

Corporate and M&A

## Telephone Briefing

### Information Disclosure in M&A Transactions

*How to avoid pitfalls in disclosing information in M&A transactions and how to ensure a safe integration planning*

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# Introduction

## Stages of M&A Transactions



## Problematic activities in the period prior to Signing

- Do not exchange the following strategic information in particular if purchaser and target/seller are competitors:
  - Prices (actual prices, planned prices, customer-specific prices, rebates etc.) and terms of sale
  - Individual costs and margins per product/product range/customer
  - Bidding and negotiations
  - Individual customers
  - Production quantity and capacity
  - Specific turnover data (by product and region/country)
  - Specific investments, investment plans, marketing plans, R&D activities

## Solutions for safe disclosure

- Information is only provided in on an aggregated basis
- Data is anonymised
- „Black Box“ with information which is only disclosed shortly before signing to final bidder
- Information is only provided to advisors which are subject to a special confidentiality undertaking , e.g. are only entitled to provide their clients with a risk analysis or summary of findings
- SPA is based on certain assumptions which are only reviewed post closing (or post signing) subject to a purchase price adjustment or rights of withdrawal

# Merger Control

- Administrative control of external growth through mergers, acquisitions, joint ventures etc.
- Over 90 countries worldwide apply merger control rules
  - Evaluation of merger control notification requirements
  - Submitting and coordinating various notifications
  - Responding to various information and documents requests
- Most jurisdictions provide suspension effect: transactions must not be consummated prior to clearance
- Suspension effect always applies, not only in critical deals
- Infringement of prohibition to close has legal and financial risks

## Prohibition to consummate

- Reflecting local rules, transaction agreements regularly provide that consummation is subject to merger control clearances by competent authorities (e.g. EU Commission, Bundeskartellamt, FTC/DOJ)
- How to behave during waiting period, *i.e.* until consummation?
  - Avoid inappropriate action vis-à-vis third parties (e.g. target, seller, customers, suppliers) which can amount to “gun jumping” with adverse consequences
  - Avoid inappropriate communiqués (external & internal), reports, studies, evaluations, presentations to senior management/board/supervisory board which can lead antitrust authorities to wrong conclusions

# Gun Jumping

- Gun jumping typically means the premature control or influence over the target's business activities prior to closing
- Examples for premature control
  - Transfer of ownership of shares or assets
  - Appointment of members of senior management/supervisory board
  - Business activities of target are put under supervision or subject to approval of purchaser
- Examples for premature influence
  - Exchange of commercially strategic information
  - Coordination between purchaser and target (pricing, bidding etc.)

# Examples for gun jumping

The screenshot shows the 'Europa Press releases RAPID' website. The top navigation bar includes links for 'Legal notice', 'What's new?', 'FAQ', 'About EUROPA', 'Index', 'Search', 'Contact', and 'Text version'. The main header features the 'Europa' logo and the text 'Press releases RAPID' with a language dropdown set to 'English (en)'. Below the header, there are navigation links for 'EUROPA > Press Room > Press Releases' and a row of icons for 'Login', 'Register', 'Documentation', and 'About'. A search bar is present with options for 'Search', 'RSS', 'Midday Express', and 'Recent Press Releases'. The main content area displays a press release titled 'Mergers: Commission fines Electrabel 20 million euros for acquiring control of Compagnie Nationale du Rhône without prior Commission approval'. The release includes a reference number 'IP/09/895', a date '10/06/2009', and links for HTML, PDF, and DOC formats in English, French, German, and Dutch. The text of the release states that the European Commission has imposed a fine of 20 million euros on Electrabel for acquiring control of Compagnie Nationale du Rhône (CNR) without prior approval, which is a violation of the EU Merger Regulation's 'standstill obligation'.

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**Mergers: Commission fines Electrabel 20 million euros for acquiring control of Compagnie Nationale du Rhône without prior Commission approval**

Reference: IP/09/895 Date: 10/06/2009

HTML: EN FR DE NL  
PDF: EN FR DE NL  
DOC: EN FR DE NL

IP/09/895  
Brussels, 10 th June 2009

**Mergers: Commission fines Electrabel 20 million euros for acquiring control of Compagnie Nationale du Rhône without prior Commission approval**

*The European Commission has decided to impose a fine of 20 million euros on Electrabel, an electricity producer and retailer belonging to the Suez Group (now GDF Suez) for acquiring control of Compagnie Nationale du Rhône (CNR), another electricity producer, without having received prior approval under the EU Merger Regulation. The Commission concluded that the infringement lasted for a significant period and that Electrabel should have been aware of its obligation to receive Commission approval before proceeding with the acquisition. The EU Merger Regulation requires concentrations of a European dimension to be notified to the Commission before their implementation so that the Commission can examine whether a concentration would significantly impede effective competition in the European Economic Area (EEA) or any substantial part of it. This is known as the 'standstill obligation'.*



## Sanctions for gun jumping

- Many jurisdictions sanction gun jumping as infringement of the prohibition to close prior to clearance
  - EU, Germany: fines up to 10 % of the worldwide turnover of the companies concerned
  - USA: USD 16.000 fine per day
- Gun jumping may amount to separate infringement of prohibition of anti-competitive agreements (Article 101 TFEU, Sect 1 Sherman Act)
  - E.g. price coordination among competitors prior to consummation
- Risk and level of sanctions are higher if purchaser and target are competitors
- Separate investigation of gun jumping costs money and resources

## Remember!

- Companies are and remain independent until consummation has occurred
- Intention to “do a deal”, analysis of potential target, management presentations, site visits, discussions and negotiations with seller and even signing of SPA/APA do not alter the fact that parties are and remain independent until consummation has occurred
- The deal may fail!

## Problematic activities

- Do not exchange strategic information
- Do not consummate transaction - transfer of ownership/beneficial ownership
- Do not integrate target
- Do not make business activities of target subject to purchaser's approval
- Do not cooperate with respect to prices, customers, output, long-term contracts, strategic planning of production and marketing
- Do not exchange strategic non-public information which is not indispensable for M&A negotiation process and signing
- Do not exchange strategic non-public information without safeguards

## Unproblematic activities

- Analysis of all publicly available information (annual and quarterly reports, SEC reports, analyst conferences, etc.)
- Analysis of information memoranda
- Disclosure of information regarding corporate and “backoffice” organization, accounting, headcount, HR, tax, IT etc.
- Target’s and seller’s obligation not to materially change business, or to continue in the ordinary course of business
- Integration planning

# Solutions

- Conduct your business in the normal and ordinary course and independent from each other
- Behave as a competitor
- Define and follow a clear and written integration plan
- Define gradual integration plan dependent on transaction status
- Agree with seller/target on agenda – meetings, site visits etc. – approved by legal, and stick to agenda
- Do not exchange confidential strategic information, in particular when you are competitors or redact confidential information
- Conclude non-disclosure agreements and joint defense agreements

## Solutions

- Set up a clean room which is open to external advisors and ideally not accessible to employees of purchase, production and in particular sales departments
- Cooling-off period
- Retaining external (financial/accounting/legal) advisors who evaluate confidential strategic information and provide aggregated results
- Ask antitrust counsel to attend meetings which may touch upon confidential strategic information
- **→ Plan integration but do not implement**

# Communication

- Staff of antitrust authorities read and listen to communications issued by the merging parties
- During a merger control investigation, antitrust authorities may require the submission of external and internal analyses, reports, studies and respective documents prepared for the board of directors and supervisory board
  - Item 4(c) HSR documents
  - Section 5.4 EUMR documents
  - Article 11 EUMR request for information
- Make sure that your communication with respect to the transaction is not misleading
- Note the different scope of Legal Privilege in US and EU

## For any questions you may have



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