



**DEAL NEGOTIATIONS:  
HOW TO EXCHANGE  
INFORMATION WITHOUT  
GETTING IN TROUBLE**



## INTRODUCTION

As it often happens, the pre-closing period of an acquisition or merger can be the most challenging for the parties. To complete a transaction successfully, different information must be exchanged but, in some cases, this could be viewed as a severe competition law breach. Several pending cases before the European courts confirm that recognising the so-called gun jumping is still a very practical problem. The exchange of strategic information may also be considered a criminal offence.

## GUN JUMPING — GOOD IN MOVIES, BAD IN MERGERS

In a competition law context, 'jumping the gun' means implementing the deals before notifying and getting approval from the relevant competition authority. Seemingly easy to remember but hard to understand in practice.

The case law of the European Court of Justice distinguishes between the concepts of 'concentration' and 'implementation of a concentration'. In mergers, a concentration is deemed to have taken place when there is a lasting transfer of control. However, the 'implementation of a concentration' may occur as soon as the parties to the concentration enter into transactions which contribute to the change of control of the undertaking. To assess whether the control was acquired before receiving the regulatory clearance, it must be determined whether the transactions contributed in whole or in part, in fact or in law, to the transfer of control of the entity before that date.

In the context of the information exchange, implementation of a concentration may occur, for example, in cases of public or internal communication, which suggests that the transaction is already being enforced or where the exchange of information leads to taking over the control of business strategies of merger undertaking. Such business strategies are, for example, decisions regarding a pricing policy, coordinating client relationships or interfering with daily procedures (e.g. concerning staff or IT systems).

In the European Union, imposed fines for gun jumping have ranged up to 130 million euros which indicates how seriously these matters are handled by the competition authorities.



## BETTER SAFE THAN CARTEL AGREEMENT

Pre-contractual information exchange must be carefully monitored to avoid prohibited concerted practices which may lead to restriction of competition. The general rule is that all agreements between competitors that reduce the company's strategic uncertainty in the market can be seen as anti-competitive.

What constitutes strategic information must be determined on a case-by-case basis. The exchange of information is likely prohibited if the exchange of information is systematic or if the information is confidential by its nature, is current rather than historic, and is detailed rather than comprehensive. The case law defining the notion of commercially sensitive information is constantly evolving. However, the most common illegal agreements are aimed at price fixing, customer allocation or product or distribution limitation.

Cartel agreements are strongly prohibited. .Agreements, decisions, and concerted practices restricting free competition are considered as the most serious competition law breaches and even as criminal offences in Estonia and can be punished by fines up to 10% of the annual net turnover or even a pecuniary punishment or imprisonment in Estonia. Submitting a leniency application can save the party to the cartel from the most severe punishments; however, the leniency exception will be applied only to the first party to submit the application. Without knowing if they are the first one to apply, the company faces the risk of self-flagellation.

## CONCLUSION

Every transaction must be handled carefully. After surviving the intense due diligence process and coming closer to finalising the deal, it is only natural for the transaction parties to start planning the future and moving forward with the new business plans. However, when it comes to the pre-closing communication, all information and data to be shared must be previously analysed to confirm that the information exchange does not violate any competition law rules.