

Staying Compliant with Competition Law for M&A

M&A transactions typically involve information exchanges between parties prior to completion including for due diligence, merger control notifications, the satisfaction of interim covenants, and integration planning. All such information exchanges must be carried out in compliance with the Competition Act, 2002.

APPLICABLE LAW

Competition law prescribes certain restrictions for pre-completion information sharing between transacting parties. However, it is generally recognized that these restrictions need to be balanced against the need for parties to assess and preserve the value of the relevant businesses prior to, and during the course of, an M&A transaction.

As a starting point, not all information exchange is prohibited. Only the exchange of competitively sensitive information (CSI) among competitors (or otherwise related businesses) raises competition concerns. In general, CSI is strategic information, the disclosure of which could reduce rivalry and uncertainty that characterizes market behaviour under normal conditions of competition. Accordingly, information that is sensitive (e.g. related to prices, discounts, costs or delivery conditions), individual (related to a particular market participant), private, and recent (or forward-looking), will generally qualify as CSI.

Information on back-end business functions such as human resources, information technology, and regulatory is less likely to be considered sensitive. However, such information may constitute CSI in certain circumstances and should be reviewed for sensitivity before being exchanged.

GUN-JUMPING

Transactions that require the approval of the Competition Commission of India (CCI) are not permitted to proceed to completion until the approval is received (the standstill obligation). The CCI has previously penalized parties for actions that potentially lead to an acquisition of operational control of the target, or reduce incentives to compete independently before the approval.

The CCI has noted that CSI exchange between the combining parties could lead to coordination of the parties' commercial activities before approval, and constitute a violation of the standstill obligation. The maximum penalty for gun-jumping is 1% of the total turnover or assets (whichever is higher) of the parties to the combination.

Accordingly, it should be ensured that any exchange of CSI between parties to a combination prior to receipt of the CCI approval does not reduce the transacting parties' incentive or ability to compete (i.e. it does not have the potential to lessen competition between the parties).

ANTI-COMPETITIVE AGREEMENTS

Even after the approval of the CCI is obtained, the parties must continue to operate as independent entities

until completion. Pre-completion CSI exchange could amount to an anti-competitive agreement under certain circumstances and lead to significant penalties. Accordingly, any exchange of CSI should not lead to the parties ceasing to operate as independent competitors prior to completion.

SAFEGUARDS AND COMPLIANCE PROTOCOLS

To mitigate the competition law risks identified above and preserve the target's competitive interests in the event the M&A transaction does not complete certain safeguards should be put in place to regulate CSI exchange.

1. Identify and separate any CSI from the information that is to be provided to the other party;
2. Agree to a protocol to prevent (and avoid the appearance of) any misuse of CSI;
3. Share the least amount of CSI necessary, and where possible, aggregate, anonymize and/or redact the CSI;
4. Share CSI only with identified "clean-team" members (ideally, external consultants only, and wherever essential, a limited number of clean employees, i.e. persons without any ongoing direct functional responsibility for commercial or market-facing aspects), who should sign non-disclosure agreements;
5. Establish an appropriate mechanism for exchanging CSI, for example, via a virtual or physical dataroom with restrictions on access, viewing, etc. The mechanism could be supervised by external lawyers.

This is only an indicative list of safeguards, which will vary with the nature of the relationship between the transacting parties (e.g. whether competitors or otherwise related), as well as the stage of the transaction.

In summary, parties in M&A transactions should operate in business-as-usual mode until all approvals are received, and the transaction is closed. Any CSI exchange before completion should comply with the Competition Act, and to this end, safeguards should be put in place and followed.

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