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Clean Teams in M&A Transactions

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Competition authorities across the globe are increasingly enforcing procedural merger control rules monitoring the exchange of competitively sensitive information. This turns the spotlight on the use of clean teams in M&A transactions. Although the clean team concept is well established and now, for the first time, mentioned in the draft revised Horizontal Guidelines of the European Commission, key questions – eg, who is allowed to be a member, what information is clean-team only – are still subject to discussion. This bulletin provides guidance on the most pressing issues.

Parties to an M&A transaction often perceive clean teams as a complexity-adding factor that slows down negotiations, due diligence or integration planning. This is, however, only one perspective. Clean teams are at the same time an enabler of M&A transactions between competitors, since they solve the conflict between the acquirer's commercial need to get a full picture of the target, including the latter's commercially sensitive information, and assess efficiencies from the transaction on the one side, and the cartel prohibition, on the other side, which requires that competitors do not exchange competitively sensitive information that could allow them to coordinate their market behaviour.

Based on recent decisions and guidelines of competition authorities on information exchange as well as market practice of antitrust counsels in the M&A context, we provide answers to key questions relating to clean teams in M&A transactions:

1. When do I need a clean team?

As a general rule, each time that an M&A transaction between competitors is being contemplated or negotiated, and which involves the disclosure of competitively sensitive information, parties should put in place a clean team. This also applies to financial investors holding a portfolio company that competes with the potential target, even if the deal team only consists of employees of the financial investor.

If there is an equally suitable but less restrictive way of exchange, such as disclosure to external M&A advisors or lawyers, the less restrictive option should take precedence.

2. What is competitively sensitive information?

There is no one-size-fits-all definition of competitively sensitive information. The scope may vary depending on the industry concerned. As a rule of thumb, information that is likely to reduce uncertainty about the future market behaviour of a competitor is to be considered as "competitively sensitive". In more detail:

- (Current) Prices, rebates, customer lists, production costs, quantities, sales, capacities, qualities, marketing plans, investments, technologies, and R&D programmes are likely to be considered competitively sensitive.
- By contrast, high-level balance sheets and other aggregated financial data, generic product or business descriptions, organisational charts and generic employee information (eg, roles, titles, headcounts), data that is sufficiently outdated, and publicly available information usually do not qualify as competitively sensitive information.

3. Is there information that cannot be disclosed even to a clean team?

Provided that the exchange of competitively sensitive information is strictly necessary for the assessment and/or the implementation of an M&A transaction and there is no less restrictive means available, in our view there is in principle no limitation as to the information to be disclosed to members of a properly staffed clean team. This means that even particularly sensitive information such as future prices could be disclosed. However, in practice it needs to be carefully assessed whether the above criteria are met.

4. Who can be part of a clean team?

Generally, the number of clean team members should be kept to the minimum required for the proper functioning of the clean team.

When it comes to the question of which persons may join a clean team, there is no aligned approach between competition authorities. This may pose additional problems in case of transactions affecting or having to be notified in several jurisdictions. Although there is no rule excluding certain business functions by definition, the following rules of thumb provide initial guidance that allows a unified approach:

- There is no issue with external advisors of the parties to the M&A transaction joining the clean team, since they are usually subject to professional confidentiality duties;
- Employees from non-operational departments, such as M&A, controlling, legal, and from non-competing (ie active in different relevant markets) operational activities or strategic decision-making qualify as clean team members; and
- Persons active in competing day-to-day operational activities or in competing strategic decision-making should only join a clean team when it is strictly necessary, as employees from non-operational departments do not possess the necessary expertise.

Whether a person holds a competing function depends on the definition of the relevant markets on which the parties to the transaction are active. Often a cautious approach (ie broad market definition) is warranted. Moreover, when it comes to the question whether it is necessary for an employee to join the clean team, parties to an M&A transaction should bear in mind that it is not their subjective view that is decisive but rather that of an abstract, reasonable third party.

5. What is the impact of the various phases of the transaction on the lawfulness of information exchange?

The stage of a transaction can affect the extent of information needed to be exchanged through a clean team:

- In the **early phases** of a transaction, eg, in the opening phase of an auction, only limited disclosure of sensitive information will normally be required;
- At **more advanced stages**, eg during due diligence, a more detailed disclosure of sensitive information will usually be necessary to allow for an efficient due diligence;
- **Post-signing**, the acquirer may need access to sensitive information in order to eg, assess seller's compliance with contractual obligations, or for integration planning; and
- In case **negotiations** fail, the acquirer has no legitimate interest for access to sensitive information anymore, so that such disclosure must cease immediately.

Outlook

The above answers provide some initial guidance for the establishment and functioning of a clean team in the context of an M&A transaction. We note that the reality of a transaction is complex and requires a closer analysis and bespoke solutions. In light of the high level of enforcement seen recently by competition authorities, parties to M&A transactions should consider the need for a clean team early in the process and should seek antitrust advice.

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