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I. INTRODUCTION

Information exchange in the framework of a merger constitutes an important issue where the demands of the course of trade need to be balanced with the limitations imposed by competition law. Companies aim at completing the merger as soon as possible. However, competition law in most European jurisdictions requires the merger to be suspended until authorization is granted. Prior to the authorization, the parties to the merger remain competitors, and exchanging information between them is a walk on very thin ice.

Competition law considers that the exchange of information renders a market artificially transparent and may restrict competition. In that sense, the exchange of information during the negotiation of a merger may fall under the scope of Article 101 of the Treaty on the Functioning of the European Union ("TFEU") or the corresponding legal provision in national law.

On the other hand, the exchange of information between merging companies is a crucial part of the merger itself. It is thus logical that, after an agreement to merge has been reached and before the authorization to execute the merger has been granted, the exchange of information might be considered in certain circumstances as a violation of the suspension obligation.

Therefore, legal concerns may arise both (I) prior to the merger agreement, when the exchange of information may be considered part of an anticompetitive practice and, (II) after a merger agreement has been reached, when the exchange of information may constitute an indication of the execution of the merger prior to its authorization, also known as gun-jumping.

II. EXCHANGE OF INFORMATION DURING THE NEGOTIATION OF A MERGER

Agreements on the exchange of information are incompatible with the rules on competition if they reduce or remove the degree of uncertainty as to the operation of the market in question, rendering it artificially transparent, resulting in a restriction of competition between undertakings.

Competition law does not impede the exchange of information if it is (i) non confidential or (ii) even if confidential, not commercially sensitive. Specifically,

1. Information accessible through public sources or that companies may obtain by their own means is considered as non-confidential.
2. As to non-commercially sensitive information, this is information that, even if not generally accessible to third parties, is not directly related to the commercial strategy of the companies.

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Areas where the exchange of information is particularly sensitive include non-aggregated turnover and financial data, information on costs, relationships with suppliers and customers, and confidential market information (such as the company's position in the markets where it operates, statements as to the strengths or weaknesses of competition in these markets, or indications as to the position of third parties as close or distant competitors). However the type of information that should be considered sensitive for a certain company depends on the type of business and the market in which it operates.

In some cases, the parties may need to evaluate the economic efficiencies resulting from the merger, which can be relevant when defending the transaction before the competition authorities. Doing so will, in most cases, require not only information publicly available on the market, but also specific data that only the target can provide to the acquirer. Therefore, to satisfy an order to include in the notification to the authorities reliable data on possible efficiencies derived from the merger, the parties may need to exchange sensitive information. The limits which are imposed on the information that can be exchanged may, however, hinder the efficiencies claims. Nevertheless some mechanisms can be put in place to deal with this issue:

1. The creation of a "clean team", as explained below.
2. Involvement of a third party: hiring, for instance, an economic consultant, not belonging to any of the parties in the transaction, with the ability to access and treat the sensitive information needed to assess post-merger efficiencies, without the threat of infringing competition law provisions.

III. EXCHANGE OF INFORMATION AFTER THE MERGER AGREEMENT BUT BEFORE THE AUTHORIZATION TO MERGE HAS BEEN GRANTED

As mentioned, in most jurisdictions competition law establishes a suspension obligation when a merger must be reported to the relevant competition authorities. The parties must suspend the implementation of the transaction until the antitrust authorities grant an authorization. The infringement of this obligation is considered in most jurisdictions a serious offense and may entail significant fines.

Therefore, before the approval of the merger has been granted, the affected companies will be considered competitors and any joint commercial actions, such as price setting, joint contract negotiation, or the exchange of sensitive information, will be considered contrary to Article 101 TFEU or the equivalent national provisions.

However, parties are allowed to undertake preparatory actions regarding the implementation of the merger. The main objective of information exchanges prior to the authorization of the merger by competition authorities may be: (a) to comply with contractual obligations (e.g. information necessary for valuation purposes); (b) to prepare and ensure the integration of the businesses; and (c) to define actions or adopt decisions concerning the company resulting from the merger which will have effects after the authorization but need to be taken previously to avoid undermining the value of the company. In that framework, exchanges of confidential and commercially sensitive information are licit under certain conditions:

1. Access to information must be limited to what is needed to know to ensure future operations once the merger has been authorized. For example, commercial information

for renegotiating suppliers' contracts in order for them to enter into force once the merger is authorized.

2. Access must be limited to a specific group of people within each organization (usually known as the "Clean Team") with the following characteristics:

   i. The employees in the Clean Team must not be part of the commercial or marketing teams.

   ii. They must sign a confidentiality agreement stating that the parties shall not share competitively sensitive information beyond what is required for legitimate purposes such as negotiation, due diligence, and integration planning. Such information should be shared only in accordance with the confidentiality agreement, limit its use to consideration of the transaction, and be disclosed only to persons who need access thereto for such purpose.

   iii. It is advisable to record the minutes of the meetings and to maintain a record of the shared information.

The members of the team will disclose the information to the relevant persons in the company, having previously removed the confidential or more sensitive information.

Such groups cannot be created with the objective or effect of coordinating the current commercial strategy of the companies, nor give an opportunity for an exchange of confidential information relating to said commercial strategy. The information exchanged should also be destroyed in case the merger does not ultimately proceed.

IV. CONCLUSION

The exchange of information in the framework of a merger is an extremely delicate matter that, if not carried out properly, can infringe competition law and result in the imposition of very high fines on the companies involved. It is important to remember that the scope of the limits imposed by competition law to exchanges of information extend beyond the agreement to merge and are not lifted until the authorization to merge is granted. Prior to that moment, safeguard measures have to be put in place.

We have outlined here some of the precautions to be taken, but a case-by-case analysis has to be carried out in order to define the type of information that can be exchanged in each case and to put in place the necessary measures to prevent any antitrust concerns. It is thus important to seek legal advice to ensure that the behavior undertaken complies with the limits imposed by the law.