Introduction

The prohibition on anti-competitive agreements under EU competition law (and the national law of EU Member States and many other jurisdictions) applies, as a general rule, to the sharing of competitively sensitive information ("CSI") between competitors or potential competitors. The prohibition can apply even:

(i) to one-way non-reciprocal disclosure and receipt of CSI; and
(ii) to the sharing of CSI on a single occasion.

The potential penalties for breaches of this prohibition are severe, with fines for infringing companies (both the information provider and information recipient) of up to 10% of worldwide group turnover. Significant fines have been imposed by the European Commission and national regulators for the illegitimate sharing of CSI in a non-transactional context.

The rules apply equally in a transactional context. For example, in 2007 the European Commission carried out dawn raids at the premises of two merging parties, Ineos and Kerling, due in part to concerns that the two companies were sharing CSI in breach of the competition law prohibition.
Ultimately in that case no infringement was found, the Commission finding that the parties were aware of their obligations and had put in safeguards to prevent the sharing of CSI prior to completion, but the case illustrates the risks and the need to ensure compliance. With this in mind, transacting parties who compete in the same markets (or have the potential to so compete) should be aware of the limitations which the law imposes on them in sharing information both in the due diligence and joint venture (“JV”) contexts.

**CSI**

As stated above, it is the exchange of CSI which may trigger a competition law infringement. So what information constitutes CSI?

In general terms, a company’s CSI is information which, if known by competitor, could reduce the strategic uncertainty faced by that competitor in the market and hence its decision-making independence.

What constitutes CSI in a specific case will depend on the industry/sector, but the concept can cover various types of information including both commercial and technical (including pricing, quantities supplied, costs, demand, customer lists, sales, capacities, marketing plans, investments, technologies and R+D programmes). It does not generally include information which is easily publicly available.

How sensitive the information is depends upon factors such as:

(i) the *type* of information (prices and quantities are the most sensitive types);
(ii) the *specificity* of the information (individualised information is more sensitive than aggregated information);
(iii) the *time* of the information (information about the future is more sensitive than historic information);
(iv) the *frequency of the exchange* of the information (frequently exchanged information is more sensitive); and
(v) the *market availability* of the information (information unknown to the market is much more sensitive than publicly available information).

Often the questions of whether information is competitively sensitive and, once demonstrated, how sensitive that information is will be industry specific. But, whatever the industry, in concrete terms it may be helpful to ask the following question: would this information be useful to a competitor, in the sense that it could affect its market behaviour?

**The Before-M&A Context (Due Diligence)**

In the pre-signing stage of an M&A transaction, the buyer may be allowed access, for the purpose of conducting due diligence, to a significant amount of the target’s confidential information. In some cases, this information sharing may be two-way, with the seller (or target) also receiving some of the buyer’s confidential information (e.g. for the purpose of a joint synergies assessment).

Normally, before due diligence commences, the parties will sign a confidentiality or non-disclosure agreement (“NDA”) which prohibits unauthorised uses, and disclosure to third parties, of the confidential information exchanged. However, while this NDA may be sufficient for the purpose of keeping confidential that information, where the parties may be considered competitors or potential competitors, the mere exchange of that information itself (where it is CSI) can result in a competition law infringement. In short, NDAs are insufficient to ensure compliance.

However, clearly in order to conduct effective due diligence, bidders will need sufficient information to evaluate the target. Safeguards therefore need to be put in place to minimise the risk of a competition law infringement.

The first step is to assess the information and determine whether this constitutes CSI. If information is CSI, they need to consider their options:
(i) refuse to exchange the information – this option poses the least risk but may be impractical in respect of some information which, in particular, a buyer may wish to have; however, an option may be "staged" disclosure, with limited information provided to the wider pool of bidders, and more detailed information only provided to a preferred bidder when it is clearer that the transaction will go ahead;

(ii) remove the sensitivity of the information – for example, in accordance with the factors set out above, by restricting the information provided to aggregated, historic and/or publicly available information; or

(iii) in cases where some level of CSI must be shared for legitimate commercial reasons, establish a process to ensure that the recipient of the information cannot use it in a way which affects its behaviour on the market.

In respect of the third option, such a process would likely include:

(i) limiting the individuals who will be exposed to the CSI (a "Clean Team");

(ii) requiring members of the Clean Team to sign a competition law-tailored individual NDA outlining the limitations of the use and disclosure of that information; and

(iii) ensuring, through written rules, that any member of the Clean Team is not, for as long as the CSI to which he/she has been exposed remains sensitive, in a position to influence the recipient party's behaviour in the market where the CSI is relevant.

The Clean Team may often include members of the recipient party, for example, individuals who are not involved in roles relating to sales, marketing or strategic decision making. The "cleanest" option, however, would be to use a third party advisor (e.g. a consultant) to receive the CSI and assess it on behalf of the receiving party, disclosing to the receiving party only the non-competitively sensitive conclusions of that assessment.

The process for both filtering the information to be shared and agreeing with the other parties how CSI will be dealt with may take time. Parties should be aware of this so that deal schedules do not pressure parties to risk non-compliance with their competition law obligations.

The During-M&A Context (Between Signing and Completion)

Between signing and completion, the parties may wish to share information in preparation for the implementation of the merger. However, prior to completion the parties remain independent competitors and therefore care must be taken not to infringe the competition law prohibition.

In addition, in transactions where a merger filing has been made, under most merger control regimes the parties may not complete or otherwise begin implementing the merger prior to the competition authority's approval. Sharing CSI may constitute early implementation (or "gun jumping") (a concern raised in the Ineos/Kerling investigation mentioned above) and so care must also be taken to avoid this.

A Clean Team may be used in this phase too to avoid infringement.

The After-M&A Context

Following completion of a transaction, in the case of straightforward acquisitions the buyer and the target will form part of the same corporate group and therefore can freely share information under the competition law rules (although of course in the case of the sale of a part the seller and the merged entity remain separate undertakings, and therefore the prohibition on the sharing of CSI applies as between them).

The position is more complex in the case of non-controlling minority stakes and joint ventures ("JVs").

In the case of non-controlling minority stakes, the acquirer and the target remain separate undertakings, and therefore to the extent they are actual or potential competitors need to comply with the competition law restrictions on information sharing. Safeguards therefore need to be put in place to ensure that no illegitimate sharing of CSI occurs (whilst allowing the investor sufficient data to monitor and protect its investment).

In the case of JVs, JV structures should clearly not be used as a vehicle through which the parents share CSI. In relation to information flows between a parent and the JV, what is permissible will depend on the context, including whether the parents compete or may compete with the JV and whether the JV has been notified to the European Commission under the EU merger control rules¹ and, if so, what if any information flows were covered by the scope of the European Commission's approval decision. Again, safeguards may need to be put in place.

¹ For example, the creation of a so-called "full function" JV requires notification if the EU and worldwide turnover of the parents meets specified thresholds.
Conclusion

The sharing of CSI can attract serious competition law infringement risks where parties exchanging that information are competitors or potential competitors. Companies should be aware of the applicable rules and structure their dealings around them, including in an M&A context.

As companies may infringe competition laws as a result of the conduct of one individual employee or officer, information sharing for transacting parties is ultimately a compliance matter, requiring companies to provide proper training to all relevant individuals and to put in place clear and strict processes for how information may (and may not) be disseminated.

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