Corporate & Commercial

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SOUTH AFRICA

Keeping it clean: Using a clean team to unlock M&A transactions and manage competitively sensitive information

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Keeping it clean: Using a clean team to unlock M&A transactions and manage competitively sensitive information

The evaluation of a potential merger or acquisition typically necessitates the sharing of confidential information, usually via a formal due diligence investigation. Naturally, the due diligence investigation is usually undertaken at the outset of the process to allow the potential bidder (or both parties, as applicable) to assess the suitability of the transaction and to inform negotiations.

In many cases, a target company and a potential bidder operate in the same sector and may even operate as direct competitors to each other.

The Competition Act 89 of 1998 (as amended) (Act) serves to, among other things, prevent anti-competitive and collusive behaviour that can be facilitated via the sharing of competitively sensitive information between competitors. For competition to operate effectively, each competitor must independently determine how it will conduct itself in a market. The exchange of competitively sensitive information between competitors may distort competition by reducing uncertainty about their future behaviour and lessening their decision-making independence.

Understanding the definitions

The Guidelines on the Exchange of Competitively Sensitive Information between Competitors published by the Competition Commission (Commission) on 24 February 2023, define:

- Competitively sensitive information (CSI) as:

  "Information that is important to rivalry between competing firms and likely to have an appreciable impact on one or more of the parameters of competition (for example, price, output, product quality, product variety or innovation).

  Competitively sensitive information could include prices, customer lists, production costs, quantities, turnovers, sales, capacities, qualities, marketing plans, risks, investments, technologies, research and development programmes and their results."

- Competitors as:

  *"Firms that are in the same line of business in a particular market. This may include firms that **actually compete** with one another or have the **potential to enter the relevant market** and compete against one another. Competitors can, but need not, be in the same geographical market."*

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In the context of a potential merger between two competitors (which, we reiterate, includes **potential** competitors, with the potential to be assessed on realistic grounds, not just as a theoretical possibility of entry), the question becomes: how does one facilitate the requisite information-sharing process without falling afoul of restricted practices in the Act?

A clean-team arrangement

In managing this risk, the establishment and utilisation of a 'clean team' arrangement is becoming a growing trend. A clean-team arrangement typically sees the establishment of a ring-fenced group of individuals (i.e. the 'clean team') designated to receive and review the relevant CSI without it being shared with the recipient's broader team. By 'quarantining' the CSI within this closed group, the risk of an inadvertent leakage is mitigated.

The composition of a clean team is crucial to its efficacy. Ideally, the clean team should comprise third parties, such as the bidder's external legal counsel, transaction advisors and financial advisors. However, in many instances this may not be practicable, from either a commercial, time or cost perspective, in which case the next best approach is to populate the clean team with only particular, selected employees or representatives of the bidder. These individuals must toe a difficult line of:

- being sufficiently distant from the strategic business operations of the information-receiving party to mitigate the risk of such employees utilising the CSI to engage in anti-competitive behaviour. In essence, clean team members should not be involved in the day-to-day operations of the bidder which include, for example: direct pricing; strategic planning; upper-level management and/or sales and marketing; yet
- being sufficiently knowledgeable of the potential transaction and the counterparty's business to properly assess the CSI for purposes of the due diligence investigation and guiding the receiving party in respect thereof.

Composition aside, there are various ways in which the clean team process can be structured to regulate the handling of CSI. The most conservative option is for the clean team to be the only recipient of **all** due diligence information, including both CSI and non-CSI information. Alternatively, the information can be categorised as CSI and non-CSI, with the clean team being the only recipient of the CSI and the non-CSI information received and handled by the broader team in the normal way, provided that in any event a non-disclosure and confidentiality agreement should regulate the sharing of information of the latter category of information.

Accurately determining what constitutes CSI

However, distinguishing between what is and isn't CSI is often not a clear-cut question. Ensuring an accurate determination of what constitutes CSI may be especially difficult as part of a time-constrained and voluminous due diligence process. The Commission's definition of CSI quoted above is wide and what comprises CSI is transaction specific. Given the very contextual nature of the definition, management of the disclosing party is key in making this determination given their intimate knowledge of the particular industry and business.

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When evaluating the harm caused by an exchange of CSI, the Commission will consider the following factors: the market characteristics; availability or accessibility of the information exchange; indispensability of the CSI given the purpose of the exchange; and whether the information is historical or relates to current or future activities. The general rule is that sharing CSI about the future is anti-competitive because it could constitute or facilitate a collusive understanding among firms.

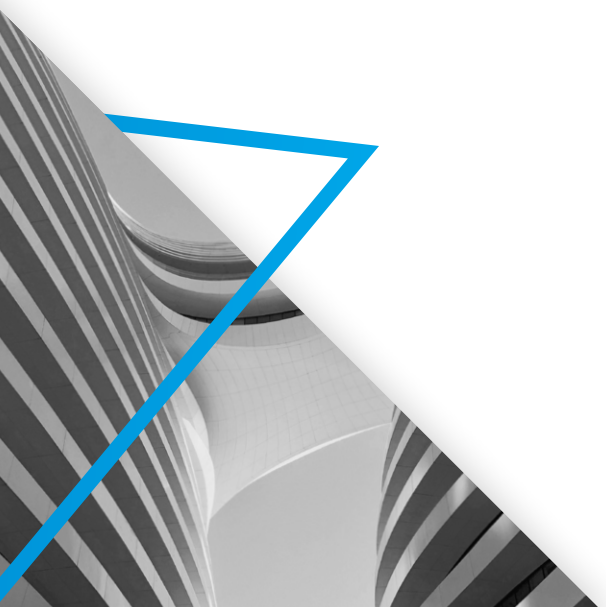
Timing of a disclosure

Timing of the disclosure is also an important factor. Disclosure at a nascent stage of a transaction is generally riskier given the uncertainty of the deal closing.

This timing issue may be exacerbated by the fact that, in the typical progression of an M&A transaction, the competition law-related considerations are often only considered in any detail at a later stage of the deal process, usually when drafting and concluding the acquisition agreements or when preparing the relevant merger filings. At this point, the due diligence investigation may already have begun or be completed, without sufficient regard to the risks of contaminating the deal by the unlawful disclosure of CSI.

Accordingly, the establishment of a clean-team protocol or agreement and ensuring that all information sharing is undertaken in accordance with it from the outset is important to prevent an unwitting contravention of the Act. The establishment of the clean team, determining which candidates are eligible for inclusion in the clean team, and the determination of which information constitutes CSI are all nuanced legal matters that need to be assessed on a transaction-specific basis.

Duran Naidoo, Caela Williams-Short and Dane Kruger



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BBBEE STATUS: LEVEL ONE CONTRIBUTOR
Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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