UNIVERSITY OF AMSTERDAM
Amsterdam Law School

Access to Competitively Sensitive Information of the Target Company: Ancillary to Corporate Transactions or a Violation of Article 101(1) TFEU?

MASTER'S THESIS
EUROPEAN COMPETITION LAW AND REGULATION

Lousine Hovhanisian
12816213
lousine.hovhanisian@student.uva.nl

Under the supervision of:
Prof. dr. mr. R. Wesseling

20 July 2020

ABSTRACT

Thirty years ago, the first Merger Regulation came into force in the European Union. Despite this long existence of a merger control regime, unfortunately not every concept in this field of EU competition law has been crystallised. One of these equivocal concepts is 'gun jumping', which can cover various forms of unlawful premerger conduct. Scholars and practitioners often distinguish between procedural gun jumping – entailing a violation of Articles 4(1) and 7(1) EUMR – and substantive gun jumping as a result of a violation of Article 101(1) TFEU. This thesis is centred around the latter form of gun jumping, which is mainly characterised by the target company giving access to its competitively sensitive information to the prospective buyer.

When corporate M&A and competition law come together in practice, legal ambiguity arises with regard to the crucial features of a quintessential corporate transaction – such as due diligence and integration planning – and the transacting parties' compliance with Article 101(1) TFEU in that context. Although it is generally held that due diligence and integration planning are essential for a successful completion of a transaction, it is not exactly clear where the boundaries of lawful premerger information exchange are set for the purpose of these preparatory acts. Absent any elucidating EU court rulings, Commission decisions or issued guidelines, this field of EU competition law has been left blank to a great extent.

In recognition of the foregoing, this thesis provides an answer to the question as to when a buyer's access to competitively sensitive information of the target company is ancillary to concluding a corporate transaction, and when access to such information leads to a violation of Article 101(1) TFEU. First, it finds that premerger information exchange for the purpose of due diligence and integration planning must be assessed under the ancillary restraints doctrine under Article 101(1) TFEU in order to unite legitimate business needs with the applicable competition rules. As such, the criteria of 'direct relation', 'objective necessity' and 'proportionality' within the framework of the ancillary restraints doctrine must be fulfilled for premerger information exchange to be considered ancillary to the core transaction. Second, this thesis finds that it is of significant importance that proportionate measures and safeguards are put in place by transacting parties in order to mitigate or avoid a violation of Article 101(1) TFEU. Analysing the existing case law and decisional practice in the EU and US, it can namely be concluded that as long as the appropriate precautionary measures have been used, premerger information exchange is less likely to run afoul of the cartel prohibition. Evidently, the lack of legitimate business justifications for the information exchange in combination with an inappropriate use of precautions will lead to a violation of Article 101(1) TFEU.

In short, this thesis confirms that the current guidance within the framework of Article 101(1) TFEU fails to provide legal certainty for businesses and practitioners involved in M&A activities in the EU. By comparison, the US guidance is much more advanced as to the concept of premerger information exchange, and it would therefore be a prudent step by the European Commission, NCAs and the parties involved in corporate transactions to consider these American underpinnings. Furthermore, it is recommended that the European Commission follows other competition authorities – such as the CADE and FTC – in adopting general guidelines concerning the measures and safeguards transacting parties ought to take to limit their exposure to competition risks. This is particularly important because the pursuance of gun jumping violations is presently high on the European Commission's enforcement agenda. Admittedly, the creation of generally applicable guidelines will be a difficult task owing to the fact-specific nature of corporate transactions and the current legal ambiguities in this area.

Table of Contents

List of Abbreviations **5**

Introduction **7**

Research question 8

Scope of this thesis 8

Methodology 9

Chapter 1. EU approach to information exchange in corporate transactions **11**

1.1 Information exchange in M&A practice **11**

1.1.1 Purpose of premerger information exchange 12
1.1.2 The interface with EU competition law 12
1.1.2.1 *Ernst & Young* 13

1.2 Legal assessment of information exchange **14**

1.2.1 Article 101(1) TFEU 14
1.2.2 Characteristics of CSI 16

1.3 EU decisional practice on premerger information exchange **17**

1.3.1 *Altice/PT Portugal* 17
1.3.1.1 The Commission's assessment of the information exchanges 17
1.3.1.2 Implications of *Altice/PT Portugal* 19
1.3.2 Approach of NCAs 20
1.3.2.1 Netherlands Authority for Consumers and Markets 20
1.3.2.1.1 *H&S Coldstores* (Koel- en vrieshuizen kartel) 21
1.3.2.2 Autorité de la concurrence 22

1.4 The notion of ancillary restraints **23**

1.4.1 Ancillary restraints doctrine under Article 101(1) TFEU and the EUMR 23
1.4.2 The ancillarity of premerger information exchange 25

1.5 Evaluation of existing EU guidance **27**

Chapter 2. US approach to information exchange in corporate transactions **30**

2.1 US antitrust laws and the 'rule of reason' **30**

2.1.1 Section 1 Sherman Act 31
2.1.2 'Rule of reason' approach in enforcement actions and case law 32
2.1.2.1 *Computer Associates* 32
2.1.2.2 *Gemstar* 32

2.2 FTC guidances and enforcement actions ... 33
2.2.1 Blumenthal Speech 2005 ... 33
2.2.2 FTC Guidance 2018 ... 34
2.2.2.1 *Insilco* ... 35
2.2.2.2 *Bosley, Inc* ... 35
2.3 Judgements in *Omnicare* and *Flakeboard* ... 36
2.3.1 *Omnicare* ... 36
2.3.2 *Flakeboard* ... 38
2.4 Lessons drawn from the US ... 39
Intermediate Conclusion ... 42
Chapter 3. Measures and safeguards to mitigate competition risks ... 43
3.1 Guidelines from competition authorities ... 43
3.1.1 FTC and CADE Guidelines ... 43
3.2 Appropriate measures and safeguards ... 44
3.2.1 Antitrust protocol ... 44
3.2.2 Confidentiality agreements and NDAs ... 44
3.2.3 Redaction of documents and information ... 45
3.2.4 Clean team ... 45
3.2.5 Data room and parlor room ... 47
3.2.6 Gradual access to CSI ... 47
3.2.7 Document destruction ... 48
3.3 Final remarks ... 49
Conclusion ... 50
Bibliography ... 52
Literature ... 52
Case law ... 56
Legislation and Guidelines ... 58
Documents and Reports ... 60
Miscellaneous sources ... 61

List of Abbreviations

ACM	Netherlands Authority for Consumers and Markets
A-G	Advocate General
CADE	Administrative Council for Economic Defense
CBb	Dutch Administrative High Court
CMLR	*Common Market Law Review*
CPI	*Competition Policy International*
CSI	Competitively sensitive information
D.D.C.	United States District Court for the District of Columbia
DOJ	United States Department of Justice
e.g.	*exempli gratia*
EC	European Commission
ECJ	European Court of Justice
EU	European Union
EUMR	European Merger Regulation No 139/2004
FCA	French Competition Authority (*Autorité de la concurrence*)
f.n.	footnote
FTC	Federal Trade Commission
FTC Act	Federal Trade Commission Act
GC	European General Court
IBA	International Bar Association
i.e.	*id est*
Ibid.	*Ibidem*
M&A	Mergers and Acquisitions
M&M	*Markt & Mededinging*
MP	*Mededingingsrecht in de Praktijk*
NCA	National Competition Authority
NDA	Non-disclosure Agreement
N.D. Cal.	United States District Court for the Northern District of California
N.D. III.	United States District Court for the Northern District of Illinois
OECD	Organisation for Economic Co-operation and Development
OJEU	Official Journal of the European Union
p.	page
para.	paragraph
paras.	paragraphs
TFEU	Treaty on the Functioning of the European Union
SPA	Sales and Purchase Agreement
U.S.C.	Code of Laws of the United States of America
US	United States of America

Introduction

Merger control has in recent years become one of the key enforcement areas of the European Commission ('Commission') and National Competition Authorities ('NCAs').[1] A much scrutinised aspect in the realm of mergers and acquisitions ('M&A') has been the unlawful premerger conduct between transacting parties, which is also known as 'gun jumping'.[2] This intensified attention of competition authorities has not gone unnoticed by companies and competition practitioners involved in business activities, as it has sparked questions concerning, *inter alia*, what constitutes (un)lawful information exchange in the context of corporate transactions.[3] Evidently, premerger information exchange remains a grey area, because on one end of the spectrum transacting parties have legitimate aims to gain access to one another's competitively sensitive information ('CSI'), but on the other end Merger Regulation 139/2004[4] ('EUMR') and Article 101(1) TFEU[5] have to be continually respected.

The concept of gun jumping, albeit not as such mentioned in European merger legislation, covers various infringements in M&A activities. First of all, gun jumping can entail the breach of prior mandatory notification of certain transactions to the Commission. By virtue of Article 4(1) EUMR, concentrations with a Community dimension namely need to be notified to the Commission. Secondly, Article 7(1) EUMR stipulates that concentrations with a Community dimension may not be implemented before notification and approval from the Commission. This is also known as the 'standstill obligation'. Thirdly, premerger coordination – particularly the exchange of CSI between competitors – can amount to a breach of the cartel prohibition as enshrined in Article 101(1) TFEU. Inherently, illicit premerger information exchange is not a violation of the EUMR and is therefore not gun jumping *sensu stricto*. Nonetheless, information exchange can be qualified as *substantive* gun jumping when it occurs in a transactional context.

---

[1] See e.g. Autorité de la concurrence, Decision 16-D-24, 8 November 2016 (*Altice/SFR &OTL*); Commission Decision of 23 July 2017, COMP/M.7184 (*Marine Harvest/Morpol*); GC 26 October 2017, T-704/14, ECLI:EU:T:2017:753 (*Marine Harvest v Commission*); Commission Decision of 24 April 2018, M.7993 (*Altice/PT Portugal*); ECJ 31 May 2018, C-633/16, ECLI:EU:C:2018:371 (*Ernst & Young*); Commission Decision of 27 June 2019, M.8179 (*Canon/Toshiba Medical Systems Corporation*); ECJ 4 March 2020, C-10/18 P, ECLI:EU:C:2020:149 (*Mowi ASA*).
[2] See e.g. Speech Vestager 2017, Ec.europa.eu.
[3] See e.g. OECD 2018, *Gun jumping Background Note by the Secretariat*, DAF/COMP(2018)11.
[4] Council Regulation (EC) No 139/2004 (*OJEU* 2004, L 24/1).
[5] Article 101(1) of the Treaty on the Functioning of the European Union (*OJEU* 2012, C 326/47).

RESEARCH QUESTION

In relation to the above-mentioned types of gun jumping, there remains legal ambiguity regarding the application of the provisions in practice. The courts of the European Union ('EU') have given guidance that is useful to a certain extent. In *Ernst & Young*, for instance, the European Court of Justice ('ECJ') for the first time defined the scope of the standstill obligation by stating that a violation of Article 7(1) EUMR will only be established if "a transaction which, in whole or in part, in fact or in law, contributes to the change in control of the target undertaking."[6] In addition, the Commission has established in its *Altice/PT Portugal* decision that a frequent exchange of CSI between the target and the buyer can constitute a violation of the standstill obligation.[7] However, this decision is at the moment pending before the General Court ('GC'). Although these cases give new guidance with regard to premerger conduct that falls under Article 7(1) EUMR, premerger conduct that is caught by Article 101(1) TFEU has not been touched upon by the EU courts or the Commission. Hence, it remains unclear when premerger information exchange – in specific terms the buyer's access to CSI of the target – leads to a violation of the cartel prohibition and, in connection therewith, when such information exchange is considered to be ancillary to corporate transactions. Against this backdrop, the research question that is at the heart of this thesis, reads as follows:

> *"Under what circumstances can a buyer's access to competitively sensitive information of the target company be considered as ancillary to concluding a corporate transaction, and when does having access to such information lead to a violation of Article 101(1) TFEU?"*

SCOPE OF THIS THESIS

Although information exchange is to some degree reciprocal in corporate transactions, this thesis will only put focus on the target's disclosure of its business information to the buyer that can amount to a violation of Article 101(1) TFEU. The procedural infringements of Articles 4(1) and 7(1) EUMR, respectively, will be disregarded in this thesis.

---

[6] ECJ, C-633/16 (*Ernst & Young*), para. 59.
[7] Commission Decision, M.7993 (*Altice/PT Portugal*), para. 448.

For the sake of brevity and in order to avoid overcomplexity as regards terminology, this thesis thus refers to 'information exchange' to describe the buyer's unilateral access to the target company's CSI. Moreover, the umbrella term of 'premerger' is used in this thesis to describe activities that occur prior to any type of transaction (e.g. mergers or acquisitions of asset and stock). Furthermore, it is noteworthy that two types of buyers exist: strategic buyers and financial buyers. Strategic buyers are companies that are (potential) competitors of the target and thus operate on the same relevant market, whereas financial buyers (e.g. private equity firms) are mainly interested in the revenues the investment in the target's business will generate. Although Article 101(1) TFEU primarily comes into play in the process of horizontal concentrations, the overall research in this thesis is certainly relevant for any type of buyer and target in a corporate transaction. Lastly, in addition to the EU approach, this thesis will also examine the American theoretical and conceptual underpinnings of premerger information exchange.

METHODOLOGY

The research question of this thesis is a legal interpretative and conceptual question that will be answered by means of a literature, legislative, and case law study. To substantiate the entire research, legal academic books, journals, documents and reports of various international organisations and authorities will be consulted. As information exchange in the context of corporate transactions does not only fall within the breadth of competition law but is also inextricably linked with M&A practice, corporate law literature will therefore also be consulted.

In order to arrive at an adequate conclusion to the central issue in this thesis, the research question is divided into three sub-questions. The first chapter of this thesis will deal with sub-question 1 with the aim of getting a clear overview of the existing guidance in the EU regarding the competitive assessment of information exchange in a transactional context. The following descriptive and legal interpretative question is central in Chapter 1:

> *"When can a buyer's access to competitively sensitive information of the target company lead to a violation of Article 101(1) TFEU, and what guidance is available in the European Union to tackle this risk?"*

Chapter 2 will analyse the second sub-question that concerns the approach in the United States ('US') to information exchange in corporate transactions. The reason why the US approach is analysed in this thesis, is because this jurisdiction has a long history in pursuing gun jumping violations. Various legal sources already exist there that could be used as a guidance in the EU, since it appears that such guidance is largely absent in the EU itself. Sub-question 2 will be answered by means of a legal interpretative and partially comparative analysis that reads as follows:

> *"To what extent can the US approach to having access to competitively sensitive information of the target company, in addition to European guidance, be used as a source of guidance for transacting parties and competition authorities in the European Union?"*

Chapter 3 will subsequently answer the third sub-question of this thesis. Based on the existing guidance in the EU and the US, an overview and critical analysis will be provided as to what measures and safeguards transacting parties should consider in order to avoid the identified competition concerns. The last sub-question is more of a descriptive and evaluative nature and is as follows:

> *"What measures and safeguards should transacting parties consider implementing in order to avoid or mitigate the identified competition law risks that may arise from having access to competitively sensitive information of the target company?"*

Chapter 1. EU approach to information exchange in corporate transactions

The EU approach to information exchange in corporate transactions is a relatively new topic in the field of EU competition law in which many legal questions have not been answered yet by the Commission or the EU courts. This subject is therefore markedly in need of further refinement and conceptualisation. In light of recent developments in EU merger control enforcement, the existing case law, decisional practice, and applicable legal framework in the EU will be discussed and evaluated. Accordingly, this chapter focuses on the fine line between the buyer's licit access to the target's CSI, and its illicit access to CSI that is subject to scrutiny under Article 101(1) TFEU.

1.1 Information exchange in M&A practice

Corporate transactions essentially comprise of two contractual parties: the seller (i.e. the target company) and the potential buyer. Various types of corporate transactions exist, such as mergers and acquisitions of asset or stock.[8] Broadly speaking, corporate transactions are a threefold process, with each stage involving plenty of communication and cooperation between the parties: i) the pre-signing phase where due diligence is conducted; ii) the phase between signing and closing where integration plans are made; and iii) the post-merger phase where actual integration takes place.[9] An indispensable preparatory activity in every transaction is doing a thorough investigation of the target's business. Information exchange predominantly occurs in the form of the target giving access to its CSI to the potential buyer(s).[10] Giving such access can be necessary in all of the above-mentioned stages, but particularly in the first two stages of a transaction, each for their own legitimate reasons.

[8] Coates 2018, p. 572.
[9] Calipha, Tarba & Brock 2010, p. 5-7.
[10] Parola & Ellis 2013, p. 33-34.

1.1.1 Purpose of premerger information exchange

The most vital purpose of premerger information exchange is that it allows potential buyers to assess the value of the target. Information exchange can also be essential to solve information asymmetry issues between transacting parties.[11] Moreover, the confirmation of facts and financial status, the determination of the price, the identification of synergies, tax implications, the preservation of the target's asset value, and further negotiations with regard to the integration planning can be considered as legitimate aims to gain access to CSI.[12] In this context, it is imperative to verify why certain strategic data is necessary for due diligence or other stages of the deal. Notwithstanding the existence of these legitimate aims, it is namely unexceptionally important that access to such strategic data is limited to what is indispensable to the core transaction in order to avoid competition risks, as will be set out below.[13]

1.1.2 The interface with EU competition law

In the first place, transactions that meet certain thresholds need to be assessed by the Commission, as they may cause distortive effects on the competition on the relevant market due to the creation or strengthening of the parties' dominant positions.[14] In this regard, the procedural gun jumping rules of Article 4(1) EUMR and Article 7(1) EUMR are therefore applicable. Secondly, Article 101(1) TFEU is applicable throughout the whole process of a transaction, as the transacting parties are considered to remain independent undertakings until the transaction has been cleared and completed. Article 101(1) TFEU thus applies irrespective of the fact whether the transaction is notifiable or not.[15] Consequently, Article 101(1) TFEU has a wider scope than the merger-specific provisions and it is, therefore, conceivable that giving access to CSI during an M&A process can easily be caught by this provision.[16] The rationale behind this thought seems rather straightforward and reasonable. However, in practice it is not perfectly clear where to draw the line between lawful and unlawful information exchange, since guidelines on the treatment of *premerger* information exchange do not exist.

[11] EC Guidelines on horizontal co-operation agreements (*OJEU* 2011, C 11/1), para. 57.
[12] Marks & Mirvis 2015, p. 4-5.
[13] Fernández, Arana & Pinilla, *Competition Law International* 2017, Vol. 13:1, p. 75.
[14] See Article 2(3) of Regulation 139/2004 that stipulates the '*SIEC*'-test.
[15] Poelman, *M&M* 2007/3, p. 71.
[16] See e.g. EC MEMO/07/573 2007, 'Mergers: Commission has carried out inspections in the S PVC sector'.

For example, neither the Commission's *Guidelines on Horizontal Mergers*[17] nor the *Guidelines on Horizontal Co-operation Agreements* shed light on this concept.

1.1.2.1 Ernst & Young

The first attempts of creating clarity as regards the application of Article 101(1) TFEU in a transactional context were the ECJ's rulings in *Austria Asphalt*[18] and *Ernst & Young*.[19] In the latter judgment, the ECJ for the first time defined the scope of the standstill obligation and ruled that Article 7(1) EUMR only applies to concentrations as enshrined in Article 3 EUMR[20] and, therefore, is only violated when a 'change of control' of the target has occurred.[21] Put differently, Article 101(1) TFEU and Regulation 1/2003[22] are applicable to corporate transactions where there is no change of control of the target but where other anticompetitive behaviour, such as unlawful information exchange, has taken place.[23] As the ECJ reasoned, the narrowing of the scope of Article 7(1) EUMR seems justified, since the application of Article 101(1) TFEU to transactions should not be hindered.[24] As such, it is submitted that Article 7(1) EUMR can be regarded as a *lex specialis* to Article 101(1) TFEU in cases where unlawful premerger conduct causes a change of control of the target.[25]

Given the above, a distinction must be drawn between procedural and substantive gun jumping and the possibility of parallel proceedings under the EUMR and Regulation 1/2003. As regards procedural gun jumping, it is held that if transacting parties infringe Article 7(1) EUMR, which does not imply that Article 4(1) EUMR has automatically been infringed as well (although contrarily that is the case), only the EUMR applies to these procedural infringements by virtue of Article 21(1) EUMR.[26] Accordingly, while in *Ernst & Young* it was only stated that the EUMR is applicable to cases where Article 7(1) EUMR has been infringed, the same rule thus also counts for infringements of Article 4(1) EUMR, since the ECJ has established in *Mowi*

[17] EC Guidelines on horizontal mergers (*OJEU* 2004, C 31/5).
[18] ECJ 7 September 2017, C-248/16, ECLI:EU:C:2017:643 (*Austria Asphalt*), paras. 32-34.
[19] ECJ, C-633/16 (*Ernst & Young*).
[20] Ibid., para. 43.
[21] Ibid., para. 59.
[22] Council Regulation (EC) No 1/2003 (*OJEU* 2003, L 1/1).
[23] ECJ, C-633/16 (*Ernst & Young*), para. 57; Fountoukakos 2020, p. 393.
[24] ECJ, C-633/16 (*Ernst & Young*), para. 58. See also A-G Wahl's Opinion in *Ernst & Young*, para. 68.
[25] OECD 2018, *Gun Jumping Note by BIAC*, DAF/COMP/WD(2018)138, para. 28, p. 8.
[26] ECJ, C-633/16 (*Ernst & Young*), para. 56.

ASA that an infringement of the notification obligation automatically results in an infringement of the standstill obligation.[27] In other words, Regulation 1/2003 cannot parallelly be applicable in the pre-clearance phase if such procedural infringements have been established. However, a parallel application of Regulation 1/2003 and the EUMR remains possible if substantive gun jumping due to an infringement of Article 101(1) TFEU has occurred in the interim period, which is the stage between merger clearance and closing.

1.2 Legal assessment of information exchange

Thus far, premerger information exchange has never been assessed outside the framework of the EUMR. It therefore remains to be seen how it will be assessed under Article 101(1) TFEU in future Commission decisions and subsequent court rulings. In any case, the legal framework of Article 101(1) TFEU does provide a perception of the Commission's possible approach to premerger information exchange.

1.2.1 Article 101(1) TFEU

Information exchange falls under the sphere of Article 101(1) TFEU if it creates or is part of an agreement, concerted practice or a decision by an association of undertakings that restricts competition, either by 'object' or 'effect'.[28] For the competitive assessment of information exchange under Article 101(1) TFEU, the Commission consults the *Guidelines on Horizontal Co-operation Agreements* that set out the general principles on the assessment. Commonly, the (il)legality of information exchange depends on a fact-specific assessment, whereby the type of information and the characteristics of the parties' markets are taken into account.[29]

The primary competition concerns of information exchange between competitors are collusion and anticompetitive foreclosure.[30] With regard to restrictions 'by object', it is held that even a unilateral or single disclosure of CSI to a competitor can result in a violation of Article 101(1) TFEU, as giving such access can lead to a reduction of the strategic uncertainty

[27] ECJ, C-10/18 P (*Mowi ASA*), paras. 101-102. See also GC, T-704/14 (*Marine Harvest v Commission*), paras. 294-297.
[28] Whish & Bailey 2018, p. 553.
[29] EC Guidelines on horizontal co-operation agreements, para. 58.
[30] Estevan De Quesada, *CMLR* 2013, Vol. 24:6, p. 840-841.

on the relevant market.[31] Moreover, the purpose and the legal and economic context of the information exchange are included in the 'by object' assessment.[32] In this regard, it has to be noted that corporate transactions have a distinctive legal and economic context, since information exchange is certainly of crucial importance in the deal process (e.g. for due diligence and integration planning).[33] This has also been acknowledged by the Commission, albeit indirectly in the context of merger remedies, by stating that:

> "[…] *commitments should foresee that potential purchasers can carry out a due diligence exercise and obtain, dependent on the stage of the procedure, sufficient information concerning the divested business to allow the purchaser to fully assess the value, scope and commercial potential of the business, and have direct access to its personnel*."[34]

It is held that information exchange that is related to an agreement, which is not anticompetitive in itself, will not constitute an object restriction.[35] The Commission will in these cases conduct a case-by-case analysis involving the economic conditions of the relevant market and specific characteristics of the exchanged information in order to determine whether the information exchange could nevertheless constitute a restriction 'by effect'.[36] In essence, exchange of CSI between competitors on markets that are "sufficiently transparent, non-complex, stable and symmetric" is expected to violate Article 101(1) TFEU, as coordination of behaviour on these markets can easily be facilitated.[37]

As indicated earlier, the mere fact that information exchange occurs in the context of a transaction does not exempt it from infringing Article 101(1) TFEU. However, in recognition of the foregoing, it can be assumed that the Commission will tend towards taking into consideration the specific context of a corporate transaction in its assessment of the premerger information exchange.[38] In this connection, the nature of the information and, not less important, the justifications for the exchange will play a significant role in the competitive assessment.

---

[31] ECJ 4 June 2009, C-8/08, ECLI:EU:C:2009:343 (*T-Mobile*), para. 43; EC Guidelines on horizontal co-operation agreements, para. 62.
[32] EC Guidelines on horizontal co-operation agreements, para. 72.
[33] Hamilton 2019, p. 151.
[34] Commission Notice on remedies (*OJEU* 2008 C 267/1), para. 116.
[35] Whish & Bailey 2018, p. 555.
[36] EC Guidelines on horizontal co-operation agreements, paras. 75-76.
[37] Ibid., para. 77.
[38] Hamilton 2019, p. 151.

1.2.2 Characteristics of CSI

What constitutes CSI can be determined on grounds of a variety of factors. First of all, the disclosure of strategic data that lowers the strategic uncertainty in the relevant market is considered to be competitively sensitive. Strategic data may relate to, *inter alia*, prices, quantities, customers, production costs, turnovers, sales, marketing plans, investments and technologies. In this regard, it has to be noted that information concerning prices and quantities is considered to be the most strategic, along with information concerning costs and demand.[39] Moreover, aggregated and non-individualised data is less likely to be considered CSI.[40] Regarding the age of the data, it is held that sharing historic data is not problematic, as it does not reveal possible future conduct of a competitor. Generally, data that is older than one year is considered to be historic,[41] though this will also depend on the characteristics of the relevant market.[42] Furthermore, the market coverage of the involved undertakings,[43] the frequency of the information exchange and whether the information is public or non-public are important factors to be included in the competitive assessment of the information exchange.[44]

Summarising the above from a transactional perspective, companies should principally keep in mind that there is no safe harbour as to what constitutes licit information exchange. However, it is clear that if the target gives access to its business information that is highly strategic and is likely to influence its competitor's behaviour on the relevant market, it will be caught by Article 101(1) TFEU either as an object or effect restriction.[45] Nevertheless, under certain circumstances, information exchange could still be justified under the ancillary restraints doctrine, as will be set out later.[46]

[39] EC Guidelines on horizontal co-operation agreements, para. 86.
[40] Ibid., para. 89.
[41] Whish & Bailey 2018, p. 557.
[42] EC Guidelines on horizontal co-operation agreements, para 90.
[43] Ibid., para. 87-88.
[44] Ibid., paras. 91-94.
[45] Bennett & Collins, *European Competition Journal* 2010, Vol. 6:2, p. 331-333. See also EC Guidelines on horizontal co-operation agreements, para. 74.
[46] OECD 2011, *Policy Roundtables on Information Exchanges*, DAF/COMP(2010)37, p. 22.

1.3 EU decisional practice on premerger information exchange

1.3.1 Altice/PT Portugal

Altice/PT Portugal is undoubtedly the only precedent from the Commission's decisional practice that provides guidance regarding the assessment of premerger information exchange, though in the context of the EUMR.[47] According to the Commission, Altice had infringed Articles 4(1) and 7(1) EUMR because of the illegal implementation of its acquisition before the mandatory notification and merger clearance. In addition, Altice had frequently received CSI from its target and direct competitor PT Portugal, which allegedly also resulted in Altice being able to exercise decisive influence.[48]

1.3.1.1 The Commission's assessment of the information exchanges

The Commission's assessment of the (un)lawfulness of the information exchange between Altice and PT Portugal can be summarised in the following steps. First of all, the Commission identified the information Altice had gained access to. The Commission found that the exchanged information was extensive, highly strategic, individualised, non-public, current and granular. In addition, PT Portugal had frequently given access to this information.[49] For example, PT Portugal gave access to data about various business aspects and detailed financial and weekly key performance indicator data during meetings and on an ad hoc basis. Most of the disclosed information was requested by Altice self and thereby acted as it was already controlling PT Portugal.[50] Secondly, the Commission looked at the time the information exchanges had taken place. The Commission noted in this regard that the detailed information exchanges took place outside the due diligence process, since PT Portugal's business had long before been evaluated by Altice and, therefore, the exchanges were not justifiable.[51] Thirdly, the Commission analysed whether safeguards and measures were applied by the parties. In this context, the Commission noted that the whole management team of Altice – including operational employees – were given access to the information, without a clean team or other

[47] Commission Decision, M.7993 (*Altice/PT Portugal*).
[48] Ibid., paras. 53-55.
[49] Ibid., paras. 411-420.
[50] Ibid., paras. 387-410.
[51] Ibid., para. 421.

appropriate safeguards having been implemented.[52] PT Portugal and Altice had not made use of any kind of safeguards, such as confidentiality agreements, non-disclosure agreements ('NDAs') or clean teams and on top of that, the recipients of the information had no limitations imposed on them as to the way the information would be used or distributed.[53] Lastly, it appears that the Commission also took the specific characteristics of the market at issue into account. The Commission namely ruled that the information exchanges on the telecoms market distorted the competition to that extent that it was impossible to restore it.[54]

Based on the above-mentioned reasons, the Commission established that Altice's access to PT Portugal's confidential information went beyond what was needed for completing the core transaction. The fact that Altice asked and received CSI, that they were direct competitors in multiple markets, that no clean team or other safeguards were put in place and the fact that the exchanges had taken place after the due diligence stage, contributed to Altice being able to exercise decisive influence over PT Portugal.[55] Remarkably, the Commission did not assess whether Article 101(1) TFEU was infringed by the involved undertakings. Reference to Article 101(1) TFEU and the *Guidelines on Horizontal Co-operation Agreements* was only made to define what constituted "strategic and commercially sensitive information".[56] In view of this, Altice had argued in its SO Response that the Commission had not taken into account the specific merger context but assessed the information exchange only on the basis of Article 101 TFEU.[57] Accordingly, the Commission responded that the exchange of CSI between a buyer and target is customary in a transaction and is not prohibited if appropriately carried out, and if the information is directly related to the buyer's need to assess the target's value. These exchanges usually take place in the due diligence stage and not in a later stage.[58] In addition, the number of individuals that have access to the target's CSI should be limited to what is necessary by means of confidentiality arrangements, clean teams or other safeguards.[59] Hence, if these criteria are met by the transacting parties, the information exchange could be considered lawful and proportionate in a transactional context. It appears from this reasoning that the

[52] Ibid., para. 422.
[53] Ibid., para. 53.
[54] Ibid., paras. 401 and 424.
[55] Ibid., para. 423.
[56] Ibid., para. 411 and f.n. 215 and 222.
[57] Ibid., para. 425.
[58] Ibid., para. 437.
[59] Ibid., para. 438-440.

Commission's approach to premerger information exchange shows many similarities with the ancillary restraints doctrine under Article 101(1) TFEU.

1.3.1.2 Implications of Altice/PT Portugal

The Commission rendered the *Altice/PT Portugal* decision right before the ECJ's ruling in *Ernst & Young*, which means that it could not have considered the ECJ's judgement. Arguably, the Commission would have come to a different conclusion in *Altice/PT Portugal* if it would have been able to take into account the ruling in *Ernst & Young*. It is namely submitted that the information exchange between Altice and PT Portugal would allegedly have fallen under Article 101(1) TFEU instead of the standstill obligation, considering the limited scope of Article 7(1) EUMR.[60] Indeed, it is somewhat incomprehensible and contradictory when requesting and obtaining access to CSI leads to the exercise of decisive influence but does not lead to a violation of Article 101(1) TFEU, even though the *Guidelines on Horizontal Co-operation Agreements* were consulted by the Commission to examine the exchanged information. How information exchange will be assessed under Article 101(1) TFEU in a transactional context thus remains a pending matter. Some practitioners expect that the Commission will open parallel procedures under the EUMR and Article 101(1) TFEU.[61] Parallel investigations under Section 7A Clayton Act and Section 1 Sherman Act are, in fact, a common practice in the US, so it is imaginable that the same might happen in the EU.[62] However, an important distinction in contrast to the US – as previously explained – is that a violation of Articles 4(1) or 7(1) EUMR and a pre-clearance violation of Article 101(1) TFEU cannot be subject to parallel proceedings.[63] This is only possible when, in addition to procedural gun jumping, the cartel prohibition has been infringed in the interim period.

Regardless of the above-explained legal uncertainty, the Commission decision in *Altice/PT Portugal* does clarify several issues. First, a prospective buyer has a legitimate justification to obtain access to the target's CSI for due diligence purposes. However, access to CSI for integration planning purposes was not touched upon by the Commission and it is therefore in

[60] Vesterdorf, Holtsø & Rosman Nielsen, *CPI* 2019, p. 10.
[61] Modrall, *The Antitrust Source* 2019, p. 6.
[62] See e.g. OECD 2018, *Gun Jumping Background Note by the Secretariat*, para. 50, p. 21.
[63] ECJ, C-248/16 (*Austria Asphalt*), paras. 32-34; ECJ, C-633/16 (*Ernst & Young*), paras. 56-58.

need of further explication. Second, the decision in *Altice/PT Portugal* illustrates that transacting parties should take due care of appropriate measures and safeguards in order to avoid competition concerns. Altice has appealed the Commission's decision before the GC, so it will be interesting to see how the GC will rule as regards information exchange in the context of transactions.[64]

1.3.2 Approach of NCAs

In the absence of clear decisional guidance on EU level regarding the assessment of premerger information exchange within the meaning of Article 101(1) TFEU, it is valuable to look at the approach of some NCAs as regards their assessment of premerger information exchange.

1.3.2.1 Netherlands Authority for Consumers and Markets

The Netherlands Authority for Consumers and Markets ('ACM') uses its updated *Guidelines for collaboration between competitors*[65] to assess premerger information exchange, which has recently been included in a newly added section.[66] According to the ACM's Guidelines, the cartel prohibition applies to every concentration until it has been closed, even if it does not have to be notified to the ACM.[67] The transacting parties can, therefore, not agree on prices, markets and customer sharing during the negotiation phase. In principle, they may neither exchange any CSI during the deal process.[68] However, the ACM acknowledges that undertakings will have to share information with one another in order to value each other's businesses. Whether the information exchange is permissible will depend on a case-by-case analysis. The ACM notes that information exchange should be strictly necessary for the completion of the proposed concentration. If this is the case, a confidentiality agreement should be signed, and use should be made of carefully constituted teams that handle the information in strict confidence and that are not (in)directly involved in the day-to-day management of the transacting companies.[69]

---

[64] Action brought on 5 July 2018, T-425/18 (*Altice Europe v Commission*) (*OJEU* 2018, C 341/20).
[65] ACM, *Leidraad Samenwerking tussen concurrenten* 2019, Acm.nl.
[66] Ibid., Section 3.9, p. 23.
[67] Ibid., para. 78.
[68] Ibid., para. 79.
[69] Ibid., para. 80.

1.3.2.1.1 H&S Coldstores (Koel- en vrieshuizen kartel)

The ACM's decision in *H&S Coldstores*[70] is illustrative with respect to an infringement of Article 101(1) TFEU in the context of a corporate transaction. The undertakings involved were competitors that were negotiating for a potential cooperation and transaction. During these negotiations, however, the parties also exchanged information for the conclusion of agreements regarding prices, customer allocations and other CSI. The exchanged information was up to date, detailed and not publicly available and therefore removed the strategic uncertainty on the relevant market.[71] The ACM ruled in this case that it made no difference that the information was exchanged in the context of a potential merger. Article 101 TFEU and its Dutch equivalent nonetheless applied to the premerger activities.[72] H&S Coldstores – one of the involved companies in the transaction – appealed the ACM's decision before the District Court of Rotterdam. Contrary to the ACM's decision, the District Court ruled that, to a large extent, the information exchange could be justified in light of the potential transaction and/or cooperation (although at issue these were eventually not realised) and was therefore not part of a single overall agreement.[73]

Very recently, the Dutch Administrative High Court ('CBb') rendered a new decision in *H&S Coldstores.* The CBb stressed that, although information exchange might occur in the context of a corporate transaction, it does not remove the anticompetitive character and objective of the information exchange itself. As such, it follows that the M&A context does not alter the fact that Article 101(1) TFEU and its Dutch equivalent remain applicable. As the CBb held, transacting competitors must remain independent undertakings until the transaction has been completed. However, the CBb also added that certain exchanges can indeed be justified in light of the potential transaction. The exchanges in question went beyond what was necessary for the transaction and were therefore not lawful. In sum, the CBb ruled in favour of the ACM in this case, as it established that the premerger information exchange did actually violate the cartel prohibition.[74]

---

[70] ACM Decision of 15 December 2016, Case 15.0710.31.1.01 (*H&S Coldstores*).
[71] Ibid., para. 65.
[72] Ibid., para. 66.
[73] District Court Rotterdam 12 April 2018, ECLI:NL:RBROT:2018:2787 (*H&S Coldstores/ACM*), para. 10.3.
[74] CBb 28 April 2020, ECLI:NL:CBB:2020:306 (*H&S Coldstores/ACM*), para. 4.1.

The above-mentioned rulings of the Dutch courts support the view that, irrespective of the application of Article 101(1) TFEU in M&A deals, justifications for the information exchange can still exist. However, it must be pointed out that information exchanges that have an anticompetitive object and go beyond the scope of what is necessary for the core transaction, will *not* be considered as lawful within the meaning of Article 101(1) TFEU. Accordingly, it follows from the updated ACM's Guidelines and the stance of the Dutch courts that the assessment of information exchange in a transactional context is in accord with the ancillary restraints doctrine.

1.3.2.2 Autorité de la concurrence

Another competition authority that has rendered decisions concerning premerger information exchange is the French Competition Authority ('FCA'). Following the FCA's decision[75] in two acquisitions by Altice that resulted in procedural gun jumping violations, the FCA's President Isabelle de Silva clarified *her* point of view on the establishment of these violations.

In *Altice/SFR & OTL*, the FCA acknowledged that corporate transactions require a relatively vast amount of information exchange between the target and the buyer, which is necessary for due diligence and post-merger integration planning.[76] In this respect, the FCA further stated that appropriate mechanisms have to be put in place in order to protect and prevent misuse of strategic information.[77] According to the FCA, the boards – excluding the operational personnel – of the transacting undertakings should be tasked with requesting and analysing CSI.[78] If it is found that the information exchange occurred in an excessive and disproportionate manner, the FCA can either analyse it under Article L.420-1 or under II of Article L. 430-8 of the French Commercial Code,[79] which are the equivalents to Article 101(1) TFEU and Article 7(1) EUMR, respectively.[80] However, similarly to the Commission's decision in *Altice/PT Portugal*, the FCA only established a procedural infringement under II of Article L. 430-8 of the French Commercial Code.[81]

---

[75] Autorité de la concurrence 8 November 2016, Decision 16-D-24 (*Altice/SFR & OTL*) (in French). See also the Press Release in English.
[76] Ibid., para. 259.
[77] Ibid, paras. 260-261.
[78] Ibid, para. 262.
[79] Book IV, *Pricing freedom and competition,* French Commercial Code (in English).
[80] Autorité de la concurrence, Decision 16-D-24 (*Altice/SFR &OTL*), para. 263.
[81] Ibid., paras. 298-299.

Particularly with regard to premerger information exchange, the FCA's President has emphasised that the exchange of CSI is indeed important for valuation and integration purposes. As indicated earlier, these exchanges need to be proportionate and exchanged in a secure manner.[82] In the FCA's *Altice/SFR & OTL* decision, for instance, CSI was exchanged routinely between members in the highest level of management and in-house counsels, without the appropriate use of clean teams or other precautions.[83] De Silva further explained that an 'ad hoc test' for premerger information exchanges is not suitable. Instead, the *Guidelines on horizontal co-operation agreements* should be consulted to assess the legality of the information exchange. Moreover, regard will be taken into the volume and type of information, and the frequency and objectives of the exchange.[84] Besides, the FCA will also look at the direct relation of the CSI to the requirements of the transaction, along with the timing in the process and the implemented safeguards.[85]

1.4 The notion of ancillary restraints

In the previous sections of this thesis, it has been demonstrated that the Commission's and NCAs' approach to premerger information exchange corresponds with the assessment under the ancillary restraints doctrine. This section will substantiate the statement as to why the application of the ancillary restraints doctrine should be endorsed in the competitive assessment of premerger information exchange under Article 101(1) TFEU.

1.4.1 Ancillary restraints doctrine under Article 101(1) TFEU and the EUMR

The ancillary restraints doctrine entails – in broad terms – the escape of certain restrictions of competition from falling under Article 101(1) TFEU.[86] Pursuant to the Commission's *Guidelines on the application of Article 101(3) TFEU*, the ancillary restraints doctrine "covers any alleged restriction of competition which is directly related and necessary to the

[82] De Silva, *Concurrences* 2018, No. 3, para. 84, p. 10.
[83] Ibid., para. 85, p. 10.
[84] Ibid., paras. 86-87, p. 10.
[85] Ibid., para. 88, p. 10.
[86] Slot & Farley 2017, p. 57-58.

implementation of a main non-restrictive transaction and proportionate to it."[87] As follows, the application of this doctrine must be carried out in the specific context of the core transaction, whereby the restriction must fulfil the criteria of 'direct relation', 'objective necessity' and 'proportionality'.[88]

The notion of (commercial) ancillarity is also applied under the EUMR with respect to concentrations.[89] The assessment of these ancillary restraints is set out in the *Commission Notice on restrictions directly related and necessary to concentrations* ('Notice on ancillary restraints').[90] The ancillary restraints doctrine under Article 101(1) TFEU and the notion of ancillarity in the context of the EUMR entail identical tests and are thus applied in a similar fashion. The Notice on ancillary restraints is, in fact, an interpretation of the merger-specific case law and Commission decisions that concerned the ancillary restraints doctrine under Article 101(1) TFEU. Since premerger information exchange has not been conceptualised yet by the Commission or EU courts as an ancillary restraint to a transaction, it is therefore not as such mentioned in the Notice on ancillary restraints. Nonetheless, this Notice is helpful in creating clarity as to how the ancillary restraints doctrine could be applied to premerger information exchange.

The Notice on ancillary restraints mentions three types of common contractual ancillary restraints: non-competition clauses, license agreements, and purchase and supply obligations. The ancillarity of these contractual restrictions must be assessed by the transacting parties themselves, and if it is established that the restrictions are directly related and necessary to the implementation of the core transaction, they are automatically covered by the Commission's clearance decision.[91] However, some cases might concern exceptional circumstances that are not covered by the Notice on ancillary restraints, but could nevertheless be justified if they entail a "novel and unresolved question giving rise to genuine uncertainty". The Commission can in such situations at the request of the parties assess whether a restriction is directly related to and necessary for the implementation of the transaction.[92] As can be deduced from the

[87] EC Guidelines on the application of Article 101(3) TFEU (*OJEU* 2004, C 101/97), para. 29.
[88] Ibid., para. 31.
[89] Nazzini, *CMLR* 2006, Vol. 43:2, p. 533.
[90] Commission Notice on ancillary restraints (*OJEU* 2005, C 56/24).
[91] Commission Notice on ancillary restraints, para. 2; Articles 6(1)(b), 8(1) and (2), and recital 21 of Regulation 139/2004.
[92] Commission Notice on ancillary restraints, paras. 5-6. See also recital 21 of Regulation 139/2004.

previous sections of this thesis, premerger information exchange could indeed be qualified as an unresolved matter that gives rise to uncertainty in relation to corporate transactions.

1.4.2 The ancillarity of premerger information exchange

In the context of a corporate transaction, a restrictive agreement must likewise fulfil the criteria of 'direct relation', 'objective necessity' and 'proportionality' for it to be deemed ancillary to the implementation of the core transaction.[93] In *Remia*, for instance, the ECJ established that non-competition clauses "must be necessary to the transfer of the undertaking concerned and their duration and scope must be strictly limited to that purpose."[94] In this respect, the GC held in *Métropole Télévision* that an ancillary restriction is considered to be necessary, if it complies with the criteria of being *objectively* necessary for the implementation of the main transaction and if it is proportionate to it.[95] Objective necessity is not established if the restriction is only essential for the commercial attainment of the prospective transaction.[96] The above-mentioned criteria are, however, fulfilled when in the absence of the underlying restrictive agreement, the core transaction could not be implemented or could only be implemented under more unsure circumstances, at considerably higher costs, over a longer period, or with a higher level of difficulty.[97] The same three criteria of the ancillary restraints doctrine count for all common or potential ancillary restrictions in corporate transactions and should, therefore, also count for premerger information exchange.[98] In addition, it is submitted that premerger information exchange for the purpose of integration planning can be deemed to be ancillary in light of the Notice on ancillary restraints, if the exchange is directly and economically related to the transaction and if it is aimed at allowing a smooth transition to the new company structure post-merger.[99]

Premerger information exchange must thus be assessed under the ancillary restraints doctrine, whether it is conducted in the context of the EUMR or Article 101(1) TFEU. In fact, if

[93] Commission Notice on ancillary restraints, paras. 11-13.
[94] ECJ 11 July 1985, 42/84, ECLI:EU:C:1985:327 (*Remia v Commission*), para. 20.
[95] GC 18 September 2001, T-112/99, ECLI:EU:T:2001:215 (*Métropole Télévision*), para. 106.
[96] Ibid., para. 109. See also ECJ 11 September 2014, C-382/12 P, ECLI:EU:C:2014:2201 (*Mastercard v Commission*), para. 91.
[97] Commission Decision of 18 December 2000, COMP/M.1863 (*Vodafone/BT/Airtel JV*), para. 20.
[98] Mäntysaari 2009, p. 439; GC, T-112/99 (*Métropole Télévision*), para. 104.
[99] Nijs, *MP* 2018/8, p. 21; Commission Notice on ancillary restraints, para. 12.

premerger information exchange is self-assessed under the notion of ancillarity under the EUMR and it is found to be ancillary to the concentration, it could automatically be covered by the clearance decision.[100] An assessment by the Commission under Article 101(1) TFEU will in that case only be conducted if the premerger information exchange is not directly related and necessary to the implementation of the core transaction.[101] It could therefore be argued that the Notice on ancillary restraints should be amended by including premerger information exchange as a potential ancillary restraint to concentrations in order for it to be possibly covered by the clearance decision and thereby avoid an investigation under Article 101(1) TFEU. By the same token, it must also be stressed that this route of self-assessment might unnecessarily attract the Commission's attention to the premerger information exchange and still open the way for a potential scrutiny under Article 101(1) TFEU.

As it currently stands, however, it can be assumed that the Commission itself will – in all probability – assess premerger information exchange under 101(1) TFEU instead of a self-assessment by transacting parties. The following observations are worthy of note regarding the assessment under Article 101(1) TFEU and the recommended application of the ancillary restraints doctrine. First of all, it is apparent that if a restriction turns out not to be ancillary and as a result infringes Article 101(1) TFEU, it must subsequently be analysed under Article 101(3) TFEU, since a rule of reason approach does not exist in EU competition law.[102] Evidently, applying the ancillary restraints doctrine to information exchange in transactions is a suitable and pragmatic approach. If this doctrine under Article 101(1) TFEU is not applied to premerger information exchange, the only alternative will thus be an assessment under Article 101(3) TFEU. This is not ideal, since Article 101(3) TFEU is a complex and strict test due to the cumulative criteria.[103] A justification for premerger information exchange would, therefore, not likely be found under Article 101(3) TFEU. Another great disadvantage of not examining premerger information exchange under the ancillary restraints doctrine is that transacting parties will not be given the flexibility they need in M&A deals, which can ultimately obstruct

[100] Commission Notice on ancillary restraints, para. 2; Articles 6(1)(b), 8(1) and (2), and recital 21 of Regulation 139/2004.
[101] Commission Notice on ancillary restraints, para. 7.
[102] GC, T-112/99 (*Métropole Télévision*), paras. 107 and 116.
[103] See e.g. EC Guidelines on horizontal co-operation agreements, paras. 95-104. Especially the criterion of 'indispensability' is a difficult one to fulfil.

the creation of efficiency enhancing transactions.[104] The ancillary restraints approach to premerger information exchange is already embraced in the US under the 'rule of reason' analysis of Section 1 of the Sherman Act and will, therefore, be discussed in further detail in Chapter 2.

1.5 Evaluation of existing EU guidance

This chapter has been centred around the question as to when a buyer's access to CSI of the target company leads to a violation of Article 101(1) TFEU, and if so, how the assessment under Article 101(1) TFEU should be carried out. As demonstrated, much around this topic in EU competition law remains unanswered due to the Commission's little decisional guidance and the EU courts' fairly minimal pertinent case law. Advising on premerger information exchange therefore remains a challenging issue for competition practitioners. Despite the legal uncertainty surrounding this matter, some aspects have, however, been clarified by the ECJ and the Commission. From *Ernst & Young* it can be derived that Article 101(1) TFEU is applicable to premerger conduct if this conduct does not contribute to a change of control of the target. In light of this ruling, a single case of giving access to CSI without the appropriate precautions will likely lead to a breach of Article 101(1) TFEU as this does not immediately lead to a change of control, whereas – according to the Commission's decision in *Altice/PT Portugal* – frequently requesting and obtaining access to CSI can also lead to an infringement of Article 7(1) EUMR. Considering the ECJ's narrow interpretation of the standstill obligation in *Ernst & Young*, it remains to be seen how the GC will rule in the appeal brought by Altice. The Commission and NCAs will inevitably have to follow the EU courts' jurisprudence in future decisions, which will expectedly be helpful in terms of distinguishing between procedural and substantive gun jumping.

It is evident that having access to a competitor's CSI can, in principle, lead to a *prima facie* infringement of Article 101(1) TFEU under regular business activities if the aim and nature of the exchange is to restrict competition. However, in a transactional context, various legitimate aims exist for giving access to CSI that have also been recognised, albeit in a broad sense

[104] OECD 2018, *Gun Jumping Note by BIAC*, para. 3, p. 2; Speech Blumenthal 2005, p. 3.

without setting clear boundaries, by the Commission and NCAs. In *Altice/PT Portugal*, for example, the Commission regarded the valuation of a business a legitimate reason to gain access to the target's CSI during the due diligence phase. The ACM and the FCA have also put similar views forward. On top of these legitimate aims, it has to be remembered that horizontal mergers can also create efficiencies. Transacting parties have to substantiate these efficiencies to the respective competition authorities on grounds of confidential information of themselves and their target.[105] In particular, transactions that go into a Phase II investigation need even more valid substantiation, which can only be given on grounds of a thorough analysis of confidential company information.[106] More clarification on this topic is also needed and will be of practical value.

It is apparent from case law that the context in which information exchange takes place does not alter the legal assessment under Article 101(1) TFEU.[107] Although it is admitted that from a competition law perspective the application of Article 101(1) TFEU to horizontal relationships should not substantially be weakened as there remains a possibility that a transaction might not consummate, it would be undesirable if the Commission and NCAs would adopt a strict approach under Article 101(1) TFEU and neglect the specific context of a corporate transaction. Hence, within the framework of Article 101(1) TFEU, competition authorities should assess premerger information exchange in the following way. A first logical step would be to determine whether the information that has been given access to constitutes CSI according to the Commission's *Guidelines on Horizontal Co-operation Agreements*. Subsequently, competition authorities should apply the ancillary restraints doctrine to evaluate whether the exchanged information was directly related and objectively necessary to the implementation of the core transaction, and whether it was disclosed within proportionate limits.[108] Certainly, companies cannot successfully complete a transaction without evaluating the target's – and to some extent each other's – business and will, therefore, continue to give access to their confidential information. Transacting parties must ascertain that their information exchange will not lead to a coordinated behaviour and will consequently have to

[105] See e.g. EC Guidelines on horizontal mergers, paras. 76-88.
[106] OECD 2018, *Gun Jumping Note by BIAC*, para. 21, p. 7.
[107] ECJ 23 November 2006, C-238/05 (*Asnef-Equifax*), para. 32.
[108] See also Bosch, *M&M* 2019/6, p. 216; De Jong, *M&M* 2018/2, p. 54; Nijs, *MP* 2018/8, p. 21. All three practitioners have brought similar views forward as to the proposed assessment of premerger information exchange in this thesis.

implement appropriate precautions in order to safeguard the confidentiality and prevent misuse. That being said, guidance on appropriate measures and safeguards that could be put in place is also relatively minimal in the EU and it is accordingly in need of further elaboration and clarification by the Commission.[109]

The current state of debate in the EU concerning merger control enforcement shows many similarities with the situation in the US roughly thirty years ago.[110] As with many aspects and developments in the field of competition law, the US is a forerunner. Therefore, it is valuable and crucial to analyse the legal discourse and guidance in the US with the objective of creating more legal certainty in the EU. The next chapter will thus go into further detail as to this subject.

[109] Chapter 3 of this thesis will further elaborate on this topic.
[110] See e.g. Blumenthal, *Antitrust Law Journal* 1994, Vol. 63:1, in which a clear overview is given of the speeches and cases that triggered the debate in the US.

Chapter 2. US approach to information exchange in corporate transactions

The theoretical and conceptual foundations concerning premerger information exchange in the US is much more developed than in the EU, with the first discussions surrounding this topic dating back to 1989.[111] However, it is worthy of note that no actual *formal* guidance has been published by the US antitrust agencies. The most guidance can be drawn from case law, informal documents and legal discourse. In this respect, the following remark needs particular attention. Although the concept of gun jumping in general is much more advanced in the US, only a small proportion of all significant gun jumping cases that have been handled by the US antitrust agencies and US courts in the past three decades concern unlawful premerger information exchange. Most gun jumping cases in the US namely concern a violation of Section 7A of the Clayton Act by the buyer obtaining beneficial ownership of the target. As these cases do not fall within the scope of this thesis, they will not be discussed in this chapter. Be that as it may, this chapter will analyse the relevant guidance that exists in the US and will explicate as to what extent it can be used as a source of guidance in the EU.

2.1 US antitrust laws and the 'rule of reason'

Merger control in the US is regulated in three federal antitrust laws: Section 7A of the Clayton Act (also known as the 'Hart-Scott-Rodino Act' or 'HSR Act')[112]; Section 1 of the Sherman Act[113]; and Section 5 of the Federal Trade Commission Act ('FTC Act').[114] The antitrust agencies in charge of enforcing these laws are the Antitrust Division of the United States Department of Justice ('DOJ') and the Federal Trade Commission ('FTC'). For the purpose of this thesis, Section 1 Sherman Act and Section 5 FTC Act are the most relevant laws to discuss in the context of premerger information exchange.[115] Although premerger information

[111] See e.g. Arquit, 37th Annual ABA Spring Meeting 1989; Denger, Reasoner, Millstein & Walbolt, *Antitrust Law Journal* 1990, Vol. 59:45; Steptoe, 38th Annual ABA Spring Meeting 1990.
[112] 15 U.S.C. § 18a.
[113] 15 U.S.C. § 1.
[114] 15 U.S.C. § 45.
[115] Vigdor 2006, p. 184.

exchange can also lead to a violation of Section 7A Clayton Act, this Act is only violated when the information exchange leads to beneficial ownership of the target, which is similar to the 'change of control' concept in EU merger control. Often, Section 7A Clayton Act and Section 1 Sherman Act are applied in parallel in gun jumping proceedings, both as separate violations for the same conduct. However, in a similar fashion to Article 101(1) TFEU, any transaction, whether notifiable or not and until completion, falls within the ambit of Section 1 Sherman Act, which evidently has a wider scope than Section 7A Clayton Act.[116]

2.1.1 Section 1 Sherman Act

Section 1 Sherman Act is the American equivalent to Article 101 TFEU as it prohibits anticompetitive agreements and other colluding practices between competitors that restrain trade. Section 5 of the FTC Act is enforced by the FTC against anticompetitive agreements and conduct that, amongst others, violate Section 1 Sherman Act.[117] Anticompetitive agreements – including impermissible information exchanges – can either be *per se* illegal or fall under the 'rule of reason' doctrine of Section 1 Sherman Act.[118] In the context of corporate transactions, coordination and information exchange between parties is usually assessed under the 'rule of reason' of Section 1 Sherman Act, which – briefly described – entails the analysis of the overall effect on competition.[119] Clearly, Section 1 will be violated if information has been exchanged for the mere reason to reduce competition. These kind of violations, such as price fixing or output agreements, are thus *per se* illegal.[120] Generally, for horizontal agreements to be justified under the rule of reason, they must be "reasonably related to, and reasonably necessary to achieve procompetitive benefits from, an efficiency-enhancing integration of economic activity."[121] Factors that are included in the rule of reason analysis are, amongst others, the nature and purpose of the agreement and the characteristics of the market in which it takes place.[122]

[116] Naughton, *ABA Section of Antitrust Law* 2006, Vol. 20:3, p. 3-4.
[117] Vigdor 2006, p. 93.
[118] Silva Morais, *Concurrences* 2015, No. 3, p. 7.
[119] Liebeskind, *ABA Annual Meeting* 2003, p. 9.
[120] OECD 2018, *Gun Jumping Note by the United States*, DAF/COMP/WD(2018)94, para. 6, p. 4.
[121] FTC & DOJ, *Antitrust Guidelines for Collaboration Among Competitors* 2000, p. 4.
[122] Ibid., p. 4.

2.1.2 'Rule of reason' approach in enforcement actions and case law

The DOJ and the FTC have both recognised that some level of coordination and information exchange is necessary and justified for negotiation ends of prospective transactions.[123] Due diligence and integration planning, for instance, require information exchanges that would ordinarily not be allowed between independent undertakings in a regular context. The common approach of the antitrust agencies and the US courts to premerger information exchange is therefore the analysis under the above-mentioned rule of reason to assess the legality of the information exchange.[124] By applying the rule of reason approach, the anticompetitive effects and procompetitive effects of the premerger information exchange are weighed against each other on grounds of a myriad of factors that give transacting parties the flexibility they need.[125]

2.1.2.1 Computer Associates

One example of the US court's rule of reason approach to premerger information exchange can be found in *Computer Associates*, where the District Court of Columbia – in line with the DOJ's stance – confirmed that transacting parties may conduct reasonable and customary due diligence before a deal is closed. However, if the parties to the transaction are competitors, the buyer may only obtain confidential information for the purpose of due diligence if: (1) the CSI is "material to the understanding of the future earnings and prospects" of the target; and (2) only by virtue of an NDA that limits the use of such information solely to due diligence purposes; and (3) the NDA must also prohibit disclosure of CSI to the buyer's personnel that is directly involved in marketing, pricing or sales activities.[126]

2.1.2.2 Gemstar

Another example where the DOJ and the District Court of Columbia applied the rule of reason approach to premerger information exchange between transacting competitors was in *Gemstar*:

---

[123] See e.g. FTC & DOJ, *Commentary on the Horizontal Merger Guidelines* 2006, p. 59.
[124] OECD 2010, *Note by the Delegation of the United States*, DAF/COMP/WD(2010)117, paras. 35-36, p. 15.
[125] Hovenkamp, *Florida Law Review* 2018, Vol. 70:81, p. 131-133.
[126] D.D.C. 20 November 2002, Final Judgement (*United States v. Computer Associates*), § V.D, p. 4; D.D.C. 23 April 2002, Competitive Impact Assessment (*United States v. Computer Associates*) p. 16-17.

> *"As a general rule, competitors should not obtain prospective customer-specific price information prior to the consummation of the transaction. Access to such information raises significant antitrust risks, as it could be used to enter into an illegal agreement that would be harmful to competition if the transaction is subsequently abandoned. Notwithstanding, there may be situations during the due diligence process in which an acquiring person may need information regarding pending contracts to value the business properly."*[127]

As specified by the court in its final judgement, requiring or giving access to CSI about current or future prices or contracts is prohibited during negotiations and the interim period, unless the information is publicly available.[128] It is, however, permitted to conduct a reasonable and customary due diligence. Even the disclosure of current or future prices can be shared if it is reasonably related and needed to analyse future earnings and if the necessary safeguards are put in place, such as an NDA that limits the use of it to the due diligence phase and prohibits dissemination to personnel in charge of marketing, pricing or sales.[129]

2.2 FTC guidances and enforcement actions

2.2.1 Blumenthal Speech 2005

Although *Computer Associates* and *Gemstar* in that time had provided useful guidance as regards the legal standards of premerger information exchange, still many misconceptions among practitioners and undertakings existed. In an acclaimed and frequently referenced speech, the then appointed FTC General Counsel William Blumenthal gave clarifying remarks from the perspective of the antitrust agencies regarding these uncertainties by resetting – in his own words – "the rhetoric that surrounds the gun-jumping issue".[130] Although this speech is not legally binding, it does give a good insight into the US approach to information exchange in corporate transactions.

[127] D.D.C. 19 March 2003, Competitive Impact Assessment (*Gemstar-TV Guide*), § B, p. 15-16.
[128] D.D.C. 11 July 2003, Final Judgement (*Gemstar-TV Guide*), §IV.B.4., p. 5.
[129] Ibid., §V.D, p. 6.
[130] Speech Blumenthal 2005, p. 4.

In the period between 1995 and 2005, the FTC and DOJ had brought six cases against undertakings that violated the US gun jumping rules. In this connection, however, Blumenthal expressed that these precedents were "easy cases that involved egregious conduct."[131] In reference to *Gemstar* and *Computer Associates*, Blumenthal emphasised in his speech that certain information exchanges are necessary and may occur in both the due diligence phase and integration planning. Moreover, if exchanged in both stages within their boundaries, the information exchanges will not pose competition risks.[132]

Regarding the assessment under Section 1 Sherman Act, Blumenthal mentioned the 'ancillary-restraints analysis' (i.e. the rule of reason) that is carried out in case a corporate transaction is a "lawful form of contract to which otherwise-suspect restraints will often be ancillary."[133] Simply put, if the information exchange is reasonably necessary for the protection of the main transaction, it will be analysed under the rule of reason. In more complex transactions – e.g. transactions between competitors on highly concentrated markets – the rule of reason analysis will be very fact-specific, whereby a balancing between the possible distortive effects and the justifications for the information exchange will be carried out. Moreover, regard will be taken into alternative ways to achieve the legitimate goals that the transacting parties want to reach.[134] As can be perceived from this explanation, what will be considered ancillary to a transaction depends on the specific circumstances in which the deal takes place. However, it must be noted that information exchanges that are *per se* illegal under Section 1 Sherman Act, such as price fixing agreements and allocations of accounts, will very unlikely be considered as ancillary to the core transaction.[135]

2.2.2 FTC Guidance 2018

The most recent – admittedly informal – guidance in the US can be found in a blog on the FTC's website.[136] Straightforwardly, this 'new' guidance does not mention many novelties as regards the assessment of information exchange in a transactional context compared to Blumenthal's 2005 speech and existing case law. However, the FTC did give a useful overview of measures

---

[131] Ibid., p. 2-3.
[132] Ibid., p. 7.
[133] Ibid., p. 7-8.
[134] Ibid., p. 8. See in this regard also Blumenthal, *Antitrust Law Journal* 1994, Vol. 63:1, p. 20-32.
[135] Speech Blumenthal 2005, p. 8.
[136] FTC 2018, Ftc.gov.

and safeguards both the buyer and target can take during due diligence and integration planning in order to mitigate the competition risks resulting from premerger information exchange. These mechanisms will be discussed in greater detail in Chapter 3. To summarise the FTC's stance, it considers current and future price information, strategic plans and costs as CSI. Two relevant FTC enforcement actions were referred to in the guidance that are useful to discuss here: *Insilco* and *Bosley, Inc.*

2.2.2.1 Insilco

A still leading FTC case that concerned information exchange in the context of a transaction is *Insilco.* In this case, Insilco had requested and received CSI from its target Lingemann prior to the actual acquisition, which according to the FTC had caused a distortive effect on the competition on the relevant market, as the transacting parties were competitors operating on highly concentrated markets (duopolies at issue).[137] The received information contained non-aggregated, customer-specific information, strategies, and current and future pricing policies that accordingly had violated Section 5 FTC Act. Arguably, it was neither clear whether the parties had used safeguards to protect the CSI.[138] In its Consent Order, the FTC settled the case and specifically forbade Insilco to obtain or disclose the following CSI in future transactions with a competitor if the appropriate safeguards (e.g. third party agents) were not put in place:

i. "Current or future non-aggregated, customer-specific information;
ii. Current or future pricing plans;
iii. Current or future strategies or policies related to competition; and
iv. Analyses or formulas used to determine costs or prices."[139]

2.2.2.2 Bosley, Inc.

In 2012, Bosley Inc. had entered into a stock purchase agreement to acquire its competitor Hair Club. Although the acquisition itself was not challenged by the FTC, it did find out that Bosley's and Hair Club's CEOs had frequently exchanged competitively sensitive and non-public

[137] FTC 30 January 1998, Complaint, Dock No. C-3783 (*Insilco*), §VII, para. 18, p. 4.
[138] Ibid., § IV, paras. 8-9, p. 2.
[139] FTC 30 January 1998, Decision and Order, Docket No. C-3783 (*Insilco*), §V, p. 11.

information with one another and thereby had violated Section 5 FTC Act.[140] The exchanged information consisted of future product offerings, product pricings and discounts, business expansion plans, and business operations and performances. The FTC concluded that these exchanges had no legitimate business objectives for the transacting parties and that it had restricted the competition on the relevant market.[141] Eventually, however, Bosley settled the FTC charges regarding that it had unlawfully obtained CSI. The FTC ordered, amongst others, that Bosley would no longer share or request CSI that is non-public from competitors, and that Bosley would have to implement an antitrust compliance program.[142] Nevertheless, the FTC noted that it is allowed to request and obtain non-public CSI if it is "reasonably related to a lawful joint venture or as part of legally supervised due diligence for a potential transaction, and reasonably necessary to achieve the procompetitive benefits of such a relationship."[143]

2.3 Judgements in *Omnicare* and *Flakeboard*

The court judgements in *Omnicare* and *Flakeboard* are the most recent examples of gun jumping violations through unlawful premerger information exchange. Both cases demonstrate how the rule of reason analysis is applied to premerger conduct and stress the need for good antitrust compliance during the entire deal process.

2.3.1 Omnicare

The judgement in *Omnicare* contains very extensive considerations of the District Court of Northern Illinois on premerger information exchange and is therefore valuable to analyse. Omnicare – a pharmacy service provider – had filed an antitrust claim against UnitedHealth and PacifiCare for infringing Section 1 Sherman Act by sharing CSI during merger negotiations for the purpose of getting lower prices from Omnicare.[144] With regard to Omnicare's allegations, the court mentioned that it had to carry out a sensitive balancing test. In particular, the court was hesitant about establishing a violation of Section 1 Sherman Act on grounds of

[140] FTC 5 June 2013, Complaint, Docket No. C-4404 (*Bosley Inc*.), para. 1, p. 1.
[141] Ibid., paras. 13-15, p. 3.
[142] FTC 5 June 2013, Decision and Order, Docket No. C-4404 (*Bosley Inc*.), § II-III, p. 4-5.
[143] Ibid. para. § II, p. 4.
[144] N.D. III. 16 January 2009, No. 06 C 6235 (*Omnicare*), p. 1.

the mere existence of premerger information exchange between transacting competitors, as this might chill business operations. On the contrary, the court also emphasised that "sham" merger negotiations and anticompetitive conduct should be prevented in the pre-consummation period.[145] At issue, the court eventually ruled that UnitedHealth and PacifiCare had not infringed Section 1 Sherman Act, as they had exchanged aggregated information on pricings late in the process (namely less than a month before signing) and the information was mainly exchanged between the highest level of management employees that were responsible for the merger negotiations and not for pricing policies. As such, the court confirmed that the information exchange was necessary for due diligence and that it was reasonably shared.[146]

The court's judgement, which includes a rule of reason analysis under Section 1 Sherman Act, can be outlined in five consecutive steps. (1) First of all, the court determined which individuals and employees were involved in the information sharing. The court mentioned in this regard that meetings should only take place between the highest level of the parties' managements, as they are not directly engaged in activities where CSI is necessary.[147] (2) Secondly, the court examined whether the exchanged information was indeed competitively sensitive.[148] (3) Thirdly, the court examined whether the information exchange was necessary to conduct due diligence for valuation purposes.[149] In this respect, the court looked in which phase of the transaction the information was exchanged and whether the information was aggregated and as general as possible.[150] (4) Fourthly, the court analysed which party was actually sharing CSI and further stated in this regard that it is unnecessary that a buyer shares its CSI with the target. However, the target can in some cases have sound reasons to obtain CSI from a potential buyer, as it might want to assure that the potential buyer is a well-run company. In this connection, the court further examined which precautionary measures were taken by the parties to limit the dissemination of CSI.[151] The transacting parties at issue had, for instance, made use of confidentiality agreements, external counsels, a clean room within the data room, and a clean team.[152] (5) As a final step, the court examined whether the integration planning that took place

[145] Ibid., § C.1, p. 33.
[146] Ibid., §C.1, p. 37.
[147] Ibid., § C.1, p. 34.
[148] Ibid., §C.1, p. 35-36.
[149] Ibid., § C.1, p. 36-37.
[150] Ibid., § C.1, p. 37.
[151] Ibid., §C.1, p. 37-38.
[152] Ibid., §II, p. 4.

after the signing of the sales and purchase agreement ('SPA') was markedly prospective and solely concerned post-merger matters.[153]

It is apparent that the court's ruling in *Omnicare* is still very relevant today and contains useful guidance for parties involved in M&A activities. Moreover, this ruling is still in line with the present approach of the US antitrust agencies. Based on the decision in *Omnicare*, the following lessons are notably pivotal to act upon:

i. Giving access to or exchanging aggregated and general company information is less problematic from a competition law perspective;
ii. Only information that is necessary and legitimate for due diligence purposes should be shared with the buyer(s). In view of this, it also makes more sense that only the target company shares CSI during the due diligence investigation. Furthermore, exchanging information for valuation purposes before signing is more reasonable than after signing and is accordingly more likely to be considered necessary for due diligence. Even so, CSI should be shared as late as possible in the deal process;
iii. A deal team that consists of senior and executive personnel that is not in charge of pricing policies in combination with other precautionary measures (e.g. confidentiality agreements and outside counsels) mitigates competition concerns;
iv. Premerger integration planning should only be focussed on post-merger matters.

2.3.2 Flakeboard

Lastly, the most recent example of a violation of Section 1 Sherman Act through premerger information exchange is the case in *Flakeboard*. The DOJ alleged that Flakeboard (the potential buyer) was given access to CSI of its target and direct competitor SierraPine, which included names, contact information, and types and volumes of purchased products of customers. Moreover, this information was disseminated to the sales personnel of Flakeboard.[154] The District Court of Northern California established that the coordination between Flakeboard and SierraPine was a *per se* violation of Section 1 Sherman Act, as the output of the target was reduced and customers were allocated. This premerger coordination between Flakeboard and

[153] Ibid., §C.2, p. 40.
[154] N.D. Cal. 7 November 2014, Competitive Impact Assessment (*Flakeboard*), §B, p. 6.

SierraPine had a "pernicious effect on competition and lack of any redeeming virtue" and was therefore regarded as unreasonable. The court concluded that no special circumstances existed that could justify the unlawful premerger conduct or exclude the information exchange from a *per se* treatment, as the exchange was not reasonably necessary to attain procompetitive effects of the transaction and as a result could not be deemed as an ancillary restraint.[155] In the final judgement, a clear set of prohibited and permitted premerger conduct was set out by the court. Flakeboard and SierrePine were not allowed to conclude an agreement during the negotiation phase and interim period of future transactions that:

i. "fixes, raises, sets, stabilizes, or establishes price or output for competing products;
ii. moves, migrates, or allocates customers for any competing product;
iii. discloses or seeks the disclosure of information about customers, prices, or output for any competing product […]."[156]

Flakeboard and SierraPine were, however, allowed to conduct or participate in a reasonable and customary due diligence investigation, if (1) the exchanged CSI is reasonably related to analysing and evaluating future earnings and prospects; and (2) the exchange occurs under an NDA that restricts the use of CSI to the due diligence stage and prohibits disclosure of the information to other personnel who are directly engaged in marketing, pricing, or sales activities.[157]

2.4 Lessons drawn from the US

In the absence of formal guidance issued by the DOJ or FTC, the case law and enforcement actions in the US are the greatest source of guidance as regards the (un)lawfulness of information exchange in corporate transactions and could, therefore, serve as a benchmark in the EU to fill the present void there. First and foremost, the previously discussed cases in this chapter have shown that reasonable information exchanges between transacting competitors is essentially not considered a *per se* violation of Section 1 Sherman Act, but is rather examined under the rule of reason analysis. The main lesson from the US that the Commission and NCAs

[155] Ibid., §C.1, p. 7.
[156] N.D. Cal. 2 February 2015, Final Judgement (*Flakeboard*), §VII, p. 5.
[157] Ibid., §VIII, p. 6.

can follow is thus the application of the ancillary restraints doctrine under Article 101(1) TFEU in like manner as the rule of reason analysis is applied to premerger information exchange. However, it should be borne in mind that the ancillary restraints doctrine and the rule of reason analysis are not entirely identical, as the latter entails a balancing of the anticompetitive and procompetitive effects of the premerger information exchange, whereas the ancillary restraints doctrine does not.[158] Nonetheless, both doctrines share the same outcome in substance, that being the permittance of restrictive arrangements in consideration of the non-restrictive core transaction.

Although it is admitted that the rule of reason analysis is quite vague as it is very fact-specific,[159] the existing literature, enforcement actions, and case law in the US suggest the following pivotal considerations that should be taken into account in the assessment of premerger information exchange under the rule of reason. First of all, it has to be examined whether the exchanged data contains CSI. Highly strategic, non-historic, non-aggregated, non-publicly available and customer-specific information will undoubtedly be qualified as CSI.[160] Secondly, the structure and specific market characteristics have to be analysed as well to determine whether the exchanged data is detrimental to competition. Oligopolistic markets with high entry barriers are, for instance, more prone to collusive behaviour if CSI has been exchanged. Besides, information that is strategic on one market, can be less strategic on another market.[161] Thirdly, as previously explained, it is maintained that a twofold justification exists under the rule of reason, namely due diligence and integration planning.[162] In this respect, it has to be noted that a two-way exchange exposes the transacting parties to more competition risks and shows less necessity for the due diligence investigation. As confirmed in *Omnicare,* CSI should only be provided by the target preferably as late as possible in the deal process. Depending on the stage of a transaction, the target should carefully decide which information is necessary for the buyer in that particular stage.[163] Moreover, it is submitted that information exchange in the due diligence phase is more justified than exchanges taking place after the valuation of the target

---

[158] The balancing of the anticompetitive and procompetitive effects of an agreement can only take place under Article 101(3) TFEU. See in this regard the EC Guidelines on the application of Article 101(3) TFEU, para. 30.
[159] U.S. Supreme Court 29 June 1978, No. 76-1560, 438 U.S. 422 (*United States v. US Gypsum Co*).
[160] Henry, *Antitrust Law Journal* 1993, Vol. 62:483, p. 496-503.
[161] DeSanti & Nagata, *Antitrust Law Journal* 1994, Vol. 63:93, p. 97.
[162] Pautler 2003, p. 21.
[163] Naughton, *ABA Section of Antitrust Law* 2006, Vol. 20:3, p. 9.

and the signing of the SPA.[164] Likewise, frequent information exchanges are more questionable from a competition law perspective than single instances of exchange.[165] Regarding the integration planning between signing and closing, there are also significant reasons to share information, such as IT-systems and human resources.[166] The judgement in *Omnicare* establishes that as long as the integration planning is focussed on prospective issues taking place after the implementation of the transaction, information exchanges in this context will not be subject to the cartel prohibition. Any form of actual integration, such as product development and joint marketing are, however, illicit with no possible excuse.[167] In addition, it is usually the target that has to give access to its CSI to plan the integration. Unnecessary disclosure from the buyer's side should in this stage therefore also be avoided.[168] Lastly, it is important to verify whether precautionary measures and safeguards have been implemented and whether they provide sufficient protection. In all of the previously discussed cases, the courts and antitrust agencies have stated that NDAs, confidentiality agreements, clean teams and outside counsels are appropriate measures to mitigate antitrust risks and to protect dissemination of CSI to other layers of the company.

Reasoned by analogy, the above-mentioned factors that are included in the rule of reason analysis could also be applied in the ancillary restraints doctrine within the framework of the criteria of 'direct relation', 'objective necessity' and 'proportionality'. Interestingly, the above-mentioned steps and considerations that are taken into account in the rule of reason analysis actually show many similarities – although broadly – with the approach of the Commission in *Altice/PT Portugal*. This implies that the assessment of premerger information exchange under the notion of ancillarity already exists in EU decisional practice, though not (yet) within the framework of Article 101(1) TFEU.

[164] Ibid., p. 10.
[165] Morse, *The Business Lawyer* 2002, Vol. 57, p. 1482.
[166] Ibid., p. 1482.
[167] Naughton, *ABA Section of Antitrust Law* 2006, Vol. 20:3, p. 13.
[168] Ibid., p. 8.

Intermediate Conclusion

The aim of the first two chapters of this thesis was to explain the legal analytical framework of the assessment of premerger information exchange in the EU and US, respectively. As can be concluded from Chapter 1, the conceptualisation of premerger information exchange as a violation of Article 101(1) TFEU is still in its infancy, as the enforcement actions, case law and other guidance in the EU is arguably minimal. As proposed and motivated in Chapter 1, premerger information exchange should be analysed under the ancillary restraints doctrine of Article 101(1) TFEU, as is in a comparable way also the common approach in the US.

Chapter 2 has accordingly set out the approach the US antitrust agencies and courts have taken as regards the assessment of premerger information exchange. Unquestionably, it would be a wise step by the Commission and NCAs to observe and apply a similar rule of reason approach to premerger information exchange in their own jurisdictions. Moreover, with only a few 'clarifying' cases in the EU, companies involved in M&A activities and – more importantly their counsels – should also explore the relevant US precedents to identify licit and illicit premerger information exchange.

Categorically, premerger information exchange is on both sides of the Atlantic considered a delicate issue, as legitimate business needs and competition laws can often clash in transactions. A reoccurring matter that has been emphasised in the previously discussed judgments, decisions and literature in both the EU and US, is the use of appropriate measures and safeguards to mitigate the competition risks. In view of this observation, Chapter 3 will further analyse the existing precautions companies can take to limit their exposure to these risks.

Chapter 3. Measures and safeguards to mitigate competition risks

To briefly recall, a corporate transaction is a gradual process, starting with negotiations and a due diligence investigation that eventually leads to an SPA, followed by the interim period between merger approval and closing where the integration planning takes place, and finally the actual post-merger integration of the two entities. As explained in the first chapter of this thesis, Article 101(1) TFEU remains applicable during all these stages of a transaction until closing. Of significant importance in the deal process are therefore the measures and safeguards transacting parties ought to put in place, because within their appropriate limits, these measures and safeguards enable the parties – mainly the buyer – to licitly gain access to the target's CSI. This final chapter will explain what measures and safeguards transacting parties should consider implementing in order to avoid or mitigate the identified competition risks.

3.1 Guidelines from competition authorities

A number of competition authorities have already issued guidelines regarding the appropriate measures and safeguards transacting parties ought to put in place, which clearly is advantageous to foster legal certainty in this grey area. Considering the fact that the Commission has not issued any form of guidance in this respect, it is useful to analyse these guidelines of other competition authorities. Moreover, the *International Bar Association* ('IBA') has published due diligence guidelines in 2018, which are also of added value for this chapter.[169]

3.1.1 FTC and CADE Guidelines

As previously discussed, the FTC has published updated guidelines in a blog on premerger information exchange.[170] These guidelines provide a clear overview regarding the measures and safeguards both the target and buyer should take in order to avoid antitrust violations. Likewise,

[169] IBA, *Legal Due Diligence Guidelines* 2018.
[170] FTC 2018, Ftc.gov.

the Brazilian Competition Authority ('CADE') has issued similar guidelines.[171] To outline, the following measures and safeguards can be identified in both guidelines: 1) The adoption of an antitrust protocol; 2) Confidentiality agreements and NDAs; 3) Redaction of documents and information; 4) The use of clean teams; 5) Data rooms and parlor rooms; 6) Giving gradual access to CSI; and 7) Document destruction. These key factors will be explained separately in the following sections.

3.2 Appropriate measures and safeguards

3.2.1 Antitrust protocol

The first preparative step in every corporate transaction on both parties' side should be the establishment of an antitrust protocol. An antitrust protocol is a document or policy adopted by the transacting parties that thoroughly plans and monitors the premerger procedures and structure of the information exchanges.[172] From the target's perspective, an antitrust protocol is especially crucial to prevent misuse or unreasonable information exchange during all stages of the transaction. Accordingly, it is imperative that the parties' counsels – more preferably outside counsels or third-party consultants – monitor the adopted protocols to ensure compliance with it.[173] In *Altice/PT Portugal*, for example, there was no antitrust protocol established, which resulted in Altice not being able to justify the information exchanges to the Commission.[174] Although the FTC, CADE and the Commission necessitate the use of antitrust protocols, what must be understood by a *satisfactory* antitrust protocol has not clearly been specified yet and is therefore still open to interpretation.

3.2.2 Confidentiality agreements and NDAs

It is self-evident that a confidentiality agreement or NDA is of great importance in the deal process, as has also repeatedly been emphasised in the previously discussed cases in this thesis. The buyer of the target company has to assure that its employees that have access to the target's

[171] CADE 2016.
[172] CADE 2016, para. 2.1, p. 10; FTC 2018, Ftc.gov.
[173] FTC 2018, Ftc.gov.
[174] Commission Decision, M.7993 (*Altice/PT Portugal*), paras. 53, 422, 438, 439 and 471.

CSI sign a confidentiality agreement or NDA before the due diligence initiates.[175] Such agreements serve to limit the group of people that have access to the target's CSI and preserves confidentiality of the information. An NDA should therefore cover *all* CSI that is going to be given access to.[176] Moreover, it should be noted that an additional confidentiality agreement or NDA should be signed with respect to integration planning and clean team agreements, since it appears from *Altice/PT Portugal* that an NDA that is concluded for the preparation of the merger notification does not suffice for other phases of a deal.[177]

3.2.3 Redaction of documents and information

One of the most crucial precautions the target company should take is the redaction, aggregation and anonymisation of its information to avoid misuse and to mitigate competition law breaches, since the exchange of information that has not been redacted has a very small chance of being justified.[178] Customer identities and other strategic data should be concealed and if possible, historic or less strategic data should be provided instead of current or future CSI.[179]

3.2.4 Clean team

A clean team, which is customary and highly suggested in (complex) transactions, is a team consisting of expert individuals that analyse the target's business in, *inter alia*, the legal and financial due diligence.[180] The competition authorities' views differ as to which individuals ought to be included in a clean team. The CADE guidelines define 'clean teams' as independent committees consisting of employees and/or independent consultants. Furthermore, the CADE notes that executive committees could be established as well, consisting of the executives of both companies that should be strictly separated from the clean team. The clean team should be in charge of sending, gathering and handling the exchanged information, whereas the executive committee should analyse the received information from the clean team.[181] The FTC is more

[175] FTC 2018, Ftc.gov; CADE 2016, para. 2.2, p. 10.
[176] IBA 2018, p. 24.
[177] Commission Decision, M.7993 (*Altice/PT Portugal*), para. 471 and f.n. 220.
[178] EC Competition merger brief 2018/1, p. 16; FTC 2018, Ftc.gov; CADE 2016, p. 7.
[179] CADE 2016, p. 7; FTC 2018, Ftc.gov; IBA 2018, p. 26.
[180] Joy 2018, p. 100.
[181] CADE 2016, para. 2.2, p. 10-11.

explicit in its wording and notes that clean teams should not be composed of employees in charge of pricing, strategy or other competitive activities in order to prevent misuse and limit access.[182] The Commission has a similar perspective on the composition of clean teams. In *Altice/PT Portugal*, the Commission noted that:

> *"The term clean team generally refers to a restricted group of individuals from the business that are not involved in the day–to-day commercial operation of the business who receive confidential information from the counter party to the transaction and are bound by strict confidentiality protocols with regard to that information."*[183]

As follows, the purpose of a clean team is to secure that information is only exchanged in case of necessity to a limited group of people and in an aggregated form.[184] The case in *Altice/PT Portugal* illustrates the importance of the use of clean teams. According to the Commission, Altice had not made use of clean teams in the due diligence process which had affected the confidentiality of the exchanged information.[185] Interestingly, the Commission ruled that Altice's executive management members (including the chief financial officer) were not allowed to take part in the clean team, since they had operational roles in the company.[186] This implies that if executive management members have no operational function within a company, they can be included in a clean team.[187] In the US court's judgement in *Omnicare*, for example, it was also stated that clean teams should be composed of the most senior personnel.[188]

In contrast to the Commission's view in *Altice/PT Portugal*, the FCA stated in its own *Altice/SFR & OTL* decision that a clean team should only consist of independent third parties (e.g. outside counsels) and that in-house counsels should be excluded from taking part in the clean team due to their position in companies.[189] Indeed, this view contradicts the Commission's later decision in *Altice/PT Portugal* and should not be encouraged, as it poses difficulties from a business perspective.[190] Clean team members should namely possess

[182] FTC 2018, Ftc.gov.
[183] Commission Decision, M.7993 (*Altice/PT Portugal*), f.n. 35.
[184] Ibid., f.n. 221.
[185] Ibid., paras. 53, 422, 423, 438, 439, 470, 471 and f.n. 220.
[186] Ibid., para. 439.
[187] Nijs, *MP* 2018/8, p. 23.
[188] N.D. III. 16 January 2009, No. 06 C 6235 (*Omnicare*), §C.1, p. 37.
[189] Autorité de la concurrence, Decision 16-D-24 (*Altice/SFR &OTL*), para. 318. See also De Silva, *Concurrences* 2018, No. 3, paras. 88-89.
[190] Bosch, *M&M* 2019/6, p. 219; De Jong, *M&M* 2018/2, p. 58.

expertise and knowledge to adequately review the target's business, and provided that they have no operational function, these individuals should be able to form a clean team.[191]

3.2.5 Data room and parlor room

The target should make its confidential information accessible to the buyer's clean team through a highly protected (virtual) 'data room'.[192] In order to prevent misuse or circulation of information, the target could consider to divide the data room into sections, whereby the downloading or e-mailing of the data should also be prohibited.[193]

With regard to discussions surrounding the post-merger integration planning, the CADE recommends the use of 'parlor rooms' where monitored discussions and information exchanges between the parties should take place.[194] With regard to these discussions, it is important to take into account possible 'spill over effects' that might be stemmed from integration planning. In order to avoid such spill over effects, aggregated data should be used; the individuals in charge of integration planning should be carefully selected; the integration planning could be outsourced to third parties; and lastly, the merging entities should wait as long as possible in the deal process to start the post-merger integration planning.[195]

3.2.6 Gradual access to CSI

A fundamental rule for the target company during premerger information exchange should be the provision of gradual access to the prospective buyer(s) in the data room, in corporate parlance commonly referred to as "peeling back the onion".[196] The target company should per stage of the deal process decide what information is necessary and appropriate to be conveyed to the prospective buyer.[197] In this regard, a distinction should be made between two forms of business sales: negotiated sales and auctions. In case of a broad or targeted auction that includes multiple prospective buyers bidding on the target company, the target is in principle not allowed

---

[191] IBA 2018, p. 24-25; Loftis & Forch, *Antitrust* 1990, Vol. 10:4, p. 11-12.
[192] Schwartzman 2019, p. 57.
[193] OECD 2018, *Gun Jumping Background Note by the Secretariat*, para. 67, p. 27; FTC 2018, Ftc.gov.
[194] CADE 2016, para. 2.6, p. 13.
[195] Speech Blumenthal 2005, p. 10-11.
[196] Boeh & Beamisch 2007, p. 105.
[197] Loftis & Forch, *Antitrust* 1990, Vol. 10:4, p. 11.

to provide asymmetric information to these separate bidders.[198] However, this does not mean that the target must automatically give a new bidder access to all the information that has been disclosed to other bidders in the auction process. The new bidder will have to request specific information it finds necessary to make a bid. By only giving access to the information that has explicitly been asked for and by not directly disclosing all information, the target can prevent a *fishing expedition.*[199] Depending on the round of the bidding process, the exchanged information will have to be adjusted to the necessity of the bidders. Normally, early stages in an M&A deal require less detailed information.[200]

The same rules naturally apply to negotiated sales, where there are only one or two prospective buyers. Certainly, due diligence is not meant to cover every aspect of the target's business and it is therefore pivotal that the target only gives access to the slightest amount of CSI to the prospective buyer(s).[201] Once the due diligence is finished and an SPA has been signed, more information might be necessary for setting up synergies and for post-merger integration purposes.[202] Although the actual integration of the merged entity must take place after the deal has been closed, transacting parties are allowed to take some premerger preparatory activities and (sometimes bilaterally) share CSI for the purpose of a successful post-merger integration planning.[203]

3.2.7 Document destruction

All documents and information that have been exchanged should be destructed or returned to the target after the due diligence investigation has finished. The FTC points out that the disclosing party should provide clear directions on how the documents should be destructed and what the consequences are if destruction does not take place. These instructions and obligations should be mentioned clearly in the confidentiality agreement or NDA.[204]

---

[198] Howson 2018, p. 6.
[199] Ibid., p. 6-7.
[200] FTC 2018, Ftc.gov; IBA 2018, p. 26.
[201] Howson 2018, p. 8.
[202] FTC 2018, Ftc.gov.
[203] Teerikangas & Joseph 2012, p. 12.
[204] FTC 2018, Ftc.gov.; CADE 2016, para. 2.5, p. 12.

3.3 Final remarks

It must be underlined that the above-mentioned measures and safeguards do not constitute a 'one-size-fits all' approach that is appropriate and suitable in all transactions, as it is common knowledge that every transaction has its own peculiarities and market characteristics. Hence, what information can be considered as 'directly related' or 'necessary' to the core transaction and what level of protection is subsequently required, is a case-specific analysis that transacting parties and their counsels must determine on the basis of the available facts and circumstances.[205] Nonetheless, the FTC and CADE Guidelines are pragmatic and helpful efforts in increasing legal certainty for transacting parties. Therefore, it is highly recommended that the Commission also publishes general guidelines pertaining to appropriate measures and safeguards in the deal process. Such guidelines are particularly crucial because current EU enforcement actions and case law do not provide much clarification regarding the question when Article 101(1) TFEU is violated in case of premerger information exchange. Moreover, not using any precautions to protect the exchanged information can especially become a major competition risk if the transaction does not go through.[206] Notwithstanding the foregoing, it is acknowledged that the adoption of generally applicable guidelines has its infeasibilities and they certainly do not give a full guarantee that Article 101(1) TFEU will not be infringed if measures and safeguards are implemented by transacting parties. This is because other important key factors, such as the nature, type, and purpose of premerger information exchange are also included in the competitive assessment carried out by the Commission or NCAs.

Ultimately, it is in the best interest of both parties to comply with Article 101(1) TFEU. Although most measures and safeguards should be taken by the target company, it does not alter the fact that the buyer can also be fined.[207] At any rate, it is namely just as much the buyer's duty to prevent a reduction of competition on the relevant market that might be caused by their premerger information exchange.

[205] Poelman, *M&M* 2007/3, p. 75-76.
[206] Morse, *The Business Lawyer* 2002, Vol. 57, p. 1482.
[207] See Article 23 of Regulation 1/2003.

Conclusion

The overarching issue in this thesis concerned the question as to when a buyer's access to the target's CSI is ancillary to concluding a corporate transaction, and when access to such information can lead to a violation of Article 101(1) TFEU. It finds as follows.

First, this thesis confirms that due diligence and integration planning are widely recognised legitimate aims for a buyer to gain access to its target's CSI. However, for premerger information exchange to be considered ancillary to the core transaction in light of these purposes, the Commission and NCAs should assess the information exchange within the framework of the *Guidelines on horizontal co-operation agreements* and the ancillary restraints doctrine under Article 101(1) TFEU. Regarding the assessment under the ancillary restraints doctrine, the buyer's access to the target's CSI has to fulfil the criteria of 'direct relation', 'objective necessity' and 'proportionality'. The outcome of this assessment will, of course, depend on the specific characteristics and circumstances of the transaction.

Second, this thesis has demonstrated that transacting parties can avoid or mitigate the identified competition concerns by putting in place the appropriate measures and safeguards. A violation of Article 101(1) TFEU is namely more likely to be established if transacting parties have not made the necessary efforts by using the appropriate tools (e.g. confidentiality agreements, NDAs and clean teams) that protect confidentiality and limit access to their CSI to what is indispensable to the transaction. In this connection, however, it must also be underscored that the use of measures and safeguards will not automatically exempt transacting parties from infringing the cartel prohibition and it consequently does not give them *carte blanche* to excessively exchange CSI in light of the prospective transaction.

To summarise, this thesis has primarily demonstrated that the current legal framework in the EU has a shortcoming in terms of providing guidance regarding compliance with Article 101(1) TFEU in corporate transactions. A welcome development would therefore be the issuance of general guidelines concerning the measures and safeguards transacting parties can put in place in order to avoid or limit a breach of EU competition law. On the other hand, it must be noted that – practically speaking – it is a difficult task to create an exhaustive list of guidelines that can apply to every transaction, since this thesis has shown that (i) there are still discrepancies and unclarities as to the composition and use of appropriate precautions, and (ii) every

transaction has its own characteristics and factual background that may require a different level of exchange and protection of CSI.

Lastly, it can be concluded that the US approach to premerger information exchange exemplifies how such exchanges could effectively be examined under the cartel prohibition and should, therefore, serve as a paradigm for the Commission and NCAs. Above all, preventing unnecessary conflicts between legitimate business needs and EU competition law is vital considering the fact that the pursuance of gun jumping violations is currently high on the Commission's enforcement agenda.

Bibliography

Literature

Arquit 1989
K.J. Arquit (FTC General Counsel), 'Remarks before the ABA Antitrust Section Federal Trade Commission Subcommittee', 37th Annual Spring Meeting, 7 April 1989.

Bennet & Collins, *European Competition Journal* 2010, Vol. 6:2
M. Bennett & P. Collins, 'The Law and Economics of Information Sharing: The Good, the Bad and the Ugly', *European Competition Journal* 2010, Vol. 6:2.

Blumenthal, *Antitrust Law Journal* 1994, Vol. 63:1
W. Blumenthal, 'The Scope of Permissible Coordination Between Merging Entities Prior to Consummation', *Antitrust Law Journal* 1994, Vol. 63:1.

Boeh & Beamisch 2007
K.K. Boeh & P.W. Beamisch, *Mergers and Acquisitions: Text and Cases*, Thousand Oaks: Sage Publications 2007.

Bosch, *M&M* 2019/6
M.K.M. Bosch, 'Informatie-uitwisseling en concentraties: standstill-verplichting en/of het kartelverbod?', *M&M* 2019/6.

Calipha, Tarba & Brock 2010
R. Calipha, S. Tarba & D.M. Brock, 'Mergers and Acquisitions: A Review of Phases, Motives, and Success Factors', in: C.L. Cooper & S. Finkelstein (eds.), *Advances in Mergers and Competition*, Bingley: Emerald Group Publishing Limited 2010, p. 1-24.

Coates 2018
J.C. Coates Jr., 'Mergers, Acquisitions and Restructuring: Types, Regulation, and Patterns of Practice', in: J.N. Gordon & W. Ringe (eds.), *The Oxford Handbook on Corporate Law and Governance*, Oxford: Oxford University Press 2018, p. 570-602.

De Jong, *M&M* 2018/2
S. de Jong, 'De retoriek van gun-jumping', *M&M* 2018/2.

De Silva, *Concurrences* 2018, No. 3
I. de Silva, 'Reflections on gun jumping in mergers', *Concurrences* 2018, No. 3.

Denger, Reasoner, Millstein & Walbolt, *Antitrust Journal* 1990, Vol. 59:1
M.L. Denger, H.M. Reasoner, I.M. Millstein & S.H. Walbolt, '60 Minutes with the Honorable James F. Rill, Assistant Attorney General, Antitrust Division, U.S. Department of Justice', *Antitrust law Journal* 1990, Vol. 59:1.

DeSanti & Nagata *Antitrust Law Journal* 1994, Vol. 63:93
S.S. DeSanti & E.A. Nagata, 'Competitor Communications: Facilitating Practices or Invitations to Collude? An Application of Theories to Proposed Horizontal Agreements Submitted for Antitrust Review', *Antitrust Law Journal* 1994, Vol. 63:93.

Estevan De Quesada, *CMLR* 2013, Vol. 24:6
C. Estevan De Quesada, 'Collusive Practices Inside a Business Network: The Case of Information Exchange', *CMLR* 2013, Vol. 24:6.

Fernández, Arana & Pinilla, *Competition Law International* 2017, Vol. 13:1
C. Fernández, J. Arana & L. Pinilla, 'Information Exchanges and the Due Diligence Process', *Competition Law International* 2017, Vol. 13:1.

Fountoukakos 2020
K. Foutoukakos, 'The Ernst & Young Judgement and Gun-Jumping in EU Merger Control: Towards a Consistent Enforcement Trend of Gun-Jumping Cases?', in: N. Charbit & S. Ahmad (eds.), *Richard Whish QC (Hon) Liber Amicorum*: *Taking Competition Law Outside the Box*, New York: Concurrences 2020, p. 385-402.

Hamilton 2019
A. Hamilton, 'European Union', in: C. Hatton, Y. Comtois & A Hamilton (eds.) *Gun jumping in Merger Control: A Jurisdictional Guide*, New York: Concurrences 2019.

Henry *Antitrust Law Journal* 1993, Vol. 62:483
B.R. Henry, 'Benchmarking and Antitrust', *Antitrust Law Journal* 1993, Vol. 62:483.

Hovenkamp, *Florida Law Review* 2018, Vol. 70:81
H. Hovenkamp, 'The Rule of Reason', *Florida Law Review* 2018, Vol. 70:81.

Howson 2018
P. Howson, *The Essentials of M&A Due Diligence*, Abingdon: Routledge Focus 2018.

Joy 2018
J. Joy, *Divestitures and Spin-Offs: Lessons Learned in the Trenches of the World's Largest M&A Deals*, New York: Springer 2018.

Liebeskind 2003
R. Liebeskind, 'Gun-jumping: Antitrust Issues Before Closing the Merger', *ABA Section of Business Law, Antitrust Committee*, 8 August 2003.

Loftis & Forch *Antitrust* 1990, Vol. 10:4
J.R. Loftis & J.M. Forch, 'Avoiding Potential FTC Challenges: Practical Guide to Premerger Exchanges of Information', *Antitrust* 1990, Vol. 10:4.

Mäntysaari 2009
P. Mäntysaari, *The Law of Corporate Finance: General Principles and EU Law. Volume III: Funding, Exit, Takeovers*, Heidelberg: Springer 2009.

Marks & Mirvis 2015
M.L. Marks & P.H. Mirvis, 'Managing the Precombination Phase of Mergers and Acquisitions', in: C.L. Cooper & S. Finkelstein (eds.), *Advances in Mergers and Acquisitions*, Bingley: Emerald Group Publishing Limited 2015, p. 1-15.

Modrall, *The Antitrust Source* 2019
J. Modrall, 'Gun Jumping: Increasing Enforcement and Drawing Lines', *The Antitrust Source*, February 2019.

Morse, *The Business Lawyer* 2002, Vol. 57
H. Morse, 'Mergers and Acquisitions: Antitrust Limitations on Conduct before Closing', *The Business Lawyer* 2002, Vol. 57.

Naughton *ABA Section of Antitrust Law* 2006, Vol. 20:3
C. Naughton, 'Gun-jumping and Premerger Information Exchange: Counseling the Harder Questions', *ABA Section of Antitrust Law* 2006, Vol. 20:3.

Nazzini, *CMLR* 2006, Vol. 43:2
R. Nazzini, 'Article 81 EC between time present and time past: A normative critique of "restriction of competition" in EU law, *CMLR* 2006, Vol. 43:2.

Nijs, *MP* 2018/8
B. Nijs, '*Gunjumping*: de *thin line* tussen bescherming van de waarde en te vroege verkrijging van zeggenschap', *MP* 2018/8.

Parola & Ellis 2013
H. Parola & K.M. Ellis, 'The M&A Negotiation Stage: A review and Future Research Directions', in: C.L. Cooper & C. Finkelstein (eds.), *Advances in Mergers and Acquisitions*, Bingley: Emerald Group Publishing Limited 2013, p. 33-57.

Pautler 2003
P.A. Pautler, 'The Effects of Mergers and Post-Merger Integration: A Review of Business Consulting Review', *Bureau of Economics – Federal Trade Commission*, 21 January 2003.

Poelman *M&M* 2007/3
E.J. Poelman, 'Gun-jumping: averij in het zicht van de haven', *M&M* 2007/3.

Schwartzman 2019
J. Schwartzman, 'The Due Diligence Process in M&A Transactions', in: H.A. Poniachek (ed), *Mergers and Acquisitions. A Practitioner's Guide to Successful Deals*, Singapore: World Scientific Publishing 2019, p. 45-64.

Silva Morais, *Concurrences* 2015, No. 3
L. Silva Morais, 'USA: Transatlantic view on information exchange in the field of competition law', *Concurrences* 2015, No. 3.

Slot & Farley 2017
P.J. Slot & M. Farley, *An Introduction to Competition Law,* London: Bloomsbury 2017.

Steptoe 1990
M.L. Steptoe, 'Remarks Before the ABA Antitrust Section Clayton Act Committee', 38th Annual Spring Meeting, 22 March 1990.

Teerikangas & Joseph 2012
S. Teerikangas & R. Joseph, 'Chapter 14: Post-M&A integration – An overview', in: D. Faulkner, S. Teerikangas & R. Joseph, *The Handbook of Mergers and Acquisitions,* Oxford: Oxford University Press 2012.

Vesterdorf, Holtsø & Rosman Nielsen, *CPI* 2019
B. Vesterdorf, G. Holtsø & A. Rosman Nielsen, 'The scope of the Standstill Obligation in the EU Merger Control Regulation', *CPI*, February 2019.

Vigdor 2006
W.R. Vigdor, *Premerger Coordination: The Emerging Law of Gun Jumping and Information Exchange*, Chicago: ABA Publishing 2006.

Whish & Bailey 2018
R. Whish & D. Bailey, *Competition Law*, Oxford: Oxford University Press 2018.

Case law

EU:

European Court of Justice:
- ECJ 11 July 1985, 42/84, ECLI:EU:C:1985:327 (*Remia v Commission*).
- ECJ 23 November 2006, C-238/05 (*Asnef-Equifax*).
- ECJ 4 June 2009, C-8/08, ECLI:EU:C:2009:343 (*T-Mobile*).
- ECJ 11 September 2014, C-382/12 P, ECLI:EU:C:2014:2201 (*Mastercard v Commission*).
- ECJ 7 September 2017, C-248/16, ECLI:EU:C:2017:643 (*Austria Asphalt*).
- ECJ 31 May 2018, C-633/16, ECLI:EU:C:2018:371 (*Ernst & Young*).
- ECJ 4 March 2020, C-10/18 P, ECLI:EU:C:2020:149 (*Mowi ASA*).

European General Court:
- GC 18 September 2001, T-112/99, ECLI:EU:T:2001:215 (*Métropole Télévision*).
- GC 26 October 2017, T-704/14, ECLI:EU:T:2017:753 (*Marine Harvest v Commission*).

Opinion of Advocate General:
- Opinion of Advocate General Wahl, 18 January 2018, C-633/16 (*Ernst & Young*).

European Commission:
- Commission Decision of 18 December 2000, COMP/M.1863 (*Vodafone/BT/Airtel JV*).
- Commission Decision of 23 July 2017, COMP/M.7184 (*Marine Harvest/Morpol*).
- Commission Decision of 24 April 2018, M.7993 (*Altice/PT Portugal*).
- Commission Decision of 27 June 2019, M.8179 (*Canon/Toshiba Medical Systems Corporation*).

NL:

District Court of Rotterdam:
- District Court Rotterdam 12 April 2018, ECLI:NL:RBROT:2018:2787 (*H&S Coldstores/ACM*).

High Administrative Court:
- CBb 28 April 2020, ECLI:NL:CBB:2020:306 (*H&S Coldstores/ACM*).

Netherlands Authority for Consumers and Markets:
- ACM Decision of 15 December 2016, Case 15.0710.31.1.01 (*H&S Coldstores*).

FR:

Autorité de la concurrence (FCA):

- Autorité de la concurrence, Decision 16-D-24, 8 November 2016 (*Altice/SFR & OTL*) (in French).

US:

U.S. Supreme Court:

- U.S. Supreme Court 29 June 1978, No. 76-1560, 438 U.S. 422. (*United States v. US Gypsum Co*).

United States District Court for the District of Columbia:

- D.D.C. 20 November 2002, Final Judgement, Civil No. 01-02062 (GK) (*United States v. Computer Associates*).
- D.D.C. 19 March 2003, Competitive Impact Assessment, Civil Action No. 03 CV 000198 (*Gemstar-TV Guide*).
- D.D.C. 11 July 2003, Final Judgement, Civil Action No. 03-0198 (JR) (*Gemstar-TV Guide*).

United States District Court for the Northern District of California:

- N.D. Cal. 7 November 2014, Competitive Impact Assessment, Case No. 3:14-cv-4949 (*Flakeboard*).
- N.D. Cal. 2 February 2015, Final Judgement, Case No. 3:14-cv-04949-VC (*Flakeboard*).

United States District Court for the Northern District of Illinois:

- N.D. Ill. 16 January 2009, No. 06 C 6235 (*Omnicare*).

Federal Trade Commission:

- FTC 30 January 1998, Complaint, Docket No. C-3783 (*Insilco*).
- FTC 30 January 1998, Decision and Order, Docket No. C-3783 (*Insilco*).
- FTC 5 June 2013, Complaint, Docket No. C-4404 (*Bosley Inc.*).
- FTC 5 June 2013, Decision and Order, Docket No. C-4404 (*Bosley Inc.*).

Legislation and Guidelines

EU:

Commission Notice on ancillary restraints
Commission Notice on restrictions directly related and necessary to concentrations (*OJEU* 2005, C 56/24).

Commission Notice on remedies
Commission Notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 824/2004 (*OJEU* 2008 C 267/1).

EC Guidelines on Article 101(3) TFEU
Communication from the Commission, Notice, Guidelines on the application of Article 81(3) [Article 101(3)] of the Treaty (*OJEU* 2004, C 101/97).

EC Guidelines on horizontal co-operation agreements
Communication from the Commission, Guidelines on the applicability of Article 101 of the Treaty of the Function of the European Union to horizontal co-operation agreements (*OJEU* 2011, C 11/1).

EC Guidelines on horizontal mergers
Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (*OJEU* 2004, C 31/5).

TFEU
The Treaty on the Functioning of the European Union (*OJEU* 2012, C 326/47).

Regulation No 1/2003
Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (*OJEU* 2003, L 1/1).

Regulation No 139/2004
Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) (*OJEU* 2004, L 24/1).

NL:

ACM 2019
Autoriteit Consument & Markt, *Leidraad Samenwerking tussen concurrenten*, February 2019, Acm.nl.

FR:

FCC
French Commercial Code (in English).

US:

15 U.S.C.
Code of Laws of the United States of America, Uscode.house.gov.

FTC & DOJ 2000
Federal Trade Commission & US Department of Justice, *Antitrust Guidelines for Collaboration Among Competitors*, April 2000, Ftc.gov.

Brazil:

CADE 2016
Administrative Council for Economic Defense, *Guidelines for the Analysis of Previous Consummation of Merger Transactions*, September 2016, Cade.gov.br.

Documents and Reports

FTC & DOJ 2006
Federal Trade Commission & US Department of Justice, *Commentary on the Horizontal Merger Guidelines* 2006, Ftc.gov.

IBA 2018
International Bar Association, *IBA Corporate and M&A Law Committee Legal Due Diligence Guidelines*, September 2018.

OECD 2010
OECD, *Roundtable on information exchanges between competitors under competition law – Note by the Delegation of the United States*, 21 October 2010, DAF/COMP/WD(2010)117.

OECD 2011
OECD, Policy Roundtables, *Information Exchanges Between Competitors under Competition Law* (2010), 11 July 2011, DAF/COMP(2010)37.

OECD 2018
OECD, *Suspensory Effects of Merger Notifications and Gun Jumping – Note by the United States*, 27 November 2018, DAF/COMP/WD(2018)94.

OECD 2018
OECD, *Suspensory Effects of Merger Notifications and Gun Jumping – Note by BIAC*, 27 November 2018, DAF/COMP/WD(2018)138.

OECD 2018
OECD, *Suspensory Effects of Merger Notifications and Gun Jumping – Background Note by the Secretariat*, 27-28 November 2018, DAF/COMP(2018)11.

Miscellaneous sources

Appeal Action Case T-425/18
Action brought on 5 July 2018, T-425/18 (*Altice Europe v Commission*) (*OJEU 2018, C* 341/20).

Autorité de la concurrence 2016
Autorité de la concurrence, Press Release, 'The Autorité de la concurrence fines the group 80 million euros for the premature completion of two mergers notified in 2014', 22 November 2016, Autoritedelaconcurrence.fr.

Blumenthal 2005
Speech W. Blumenthal, 'The rhetoric of Gun-Jumping - Remarks before the Association of Corporate Counsel', Annual Antitrust Seminar of Greater New York Chapter: Key Developments in Antitrust for Corporate Counsel, New York, 10 November 2005, Ftc.gov.

EC MEMO/07/573
European Commission Memo, 'Mergers: Commission has carried out inspections in the S PVC sector', MEMO/07/573, 13 December 2007, Ec.europa.eu.

EC Merger Brief 2018/1
European Commission, *Competition Merger Brief*, July 2018, Issue 1, Ec.europa.eu.

FTC 2018
H. Vedova, K. Clopper & C. Edwards (FTC Bureau of Competition), 'Avoiding antitrust pitfalls during pre-merger negotiations and due diligence', 20 March 2018, Ftc.gov.

Vestager 2017
Speech M. Vestager, 'Competition and the rule of law', Romanian Competition Council Anniversary Event, Bucharest, 18 May 2017, Ec.europa.eu.