WILMERHALE

# Pre-Merger Information Sharing: The FTC Weighs In

MARCH 26, 2018

A month ago, we covered recent European competition law developments on pre-merger information sharing and "gun jumping" among merging parties. In a timely reminder that the same questions also are relevant in the United States, the Federal Trade Commission (FTC) recently issued a blog post on antitrust pitfalls during pre-merger discussions and due diligence. The post provides practical guidance to merging parties and is highly recommended reading for M&A practitioners.

Key Points:

- The FTC acknowledges that merging parties "typically have a legitimate need to access detailed information about the other party's business" in merger negotiations and integration planning.
- But when the parties are competitors, they must "ensure competitive vigor in the short term and also in the event the merger does not happen." To manage information sharing risk, the FTC recommends that merging parties "set up a process and police it," and provides guidance on how disclosing and receiving parties should manage information. The guidance emphasizes, among other things:
  - Antitrust law is most concerned about competitive plans, strategies, and pricing and cost information. Customer identities also are competitively sensitive.
  - Unaggregated competitively sensitive information should not be disclosed to company personnel responsible for competitive planning, pricing, or strategy.
  - If it is reasonably necessary to share competitively sensitive information for due diligence or integration planning purposes, parties should establish clean teams (i.e., personnel that are not involved in day-to-day competitive decisions), involve third-party consultants, or implement "other safeguards that limit dissemination and use of that information within the parties' businesses."
  - Counsel should develop information sharing protocols and monitor compliance at all times.
- The FTC guidance largely reflects pre-merger information sharing advice that experienced practitioners have long provided to their clients. But it is notable for at least three reasons:

(i) the express recognition that pre-merger information sharing is generally permissible, and indeed necessary, subject to appropriate safeguards; (ii) the brevity and relative simplicity of the guidance; and (iii) the pragmatic focus on concrete steps that actually can be implemented in real-world transactions. Not every measure discussed in the guidance will be relevant for each merger, and not every measure that parties might take is discussed in the guidance, but the FTC post is a welcome effort to shed more light on the agency's approach to a notoriously murky area of antitrust law.

## *Authors*


### Hartmut Schneider

**PARTNER**

Vice Chair, Antitrust and Competition Practice

hartmut.schneider@wilmerhale.com

+1 202 663 6948

### Leon B. Greenfield

**PARTNER**

leon.greenfield@wilmerhale.com

+1 202 663 6972