



**Federal Competition and Consumer Protection Act 2018**  
**Merger Review Regulations 2020**

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**GUIDANCE NOTE TO MERGER PARTIES IN PLANNING MERGER NEGOTIATIONS  
AND EXCHANGE OF DOCUMENTS-**

**MEASURES TO REDUCE THE RISK OF GUN JUMPING**

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**Background and Overview**

1. Further to Section 95 (5), 96(4) & (5) of the Federal Competition and Consumer Protection Act 2018 (“the Act”), Regulation 13 of the Merger Review Regulations 2020 (“the Regulations”) and the relevant paragraphs of the Merger Review Guidelines 2020, the Commission publishes this Guidance as a recommendation to merging parties that are likely to undertake mergers that might raise competition concerns.
2. The Commission accepts that there might be legitimate business reasons for parties to engage in certain forms of pre-closing coordination, such as undertaking due diligence and transition planning in order for parties to organise their notification and clearance strategy and set in motion the process for a successful future implementation of the merger, but there should never be implementation before an approval is given by the Commission.
3. This Notice addresses the acceptable ways of reducing gun jumping risks. Merging parties may elect to continue to assess the feasibility of the transaction and share business-sensitive information, both while negotiation is ongoing and while the Commission is reviewing the

merger. To ensure that the information will be shared in compliance with the Act and Merger Review Regulations, merging parties should, among other measures, set specific procedures to be observed by independent committees that will handle such information ("Competition Protocol"). The aim underlying such measure is to prevent executives, employees or representatives of one merging party from having access to commercially sensitive information from the other party.

## **Competition Protocol**

4. Specific procedures to be followed by the parties, until a final decision is rendered by the Commission, may be formalised as a "Competition Protocol", which is a document adopting procedures that are consistent with the Act, the Regulations and the Guidelines.

### **A. Clean Team and Executive Committee**

5. The parties are encouraged to constitute a limited team of individuals, including members of senior management as well as an external legal counsel knowledgeable in competition law practice ("Clean Team"). The Clean Team is particularly necessary for transactions where-
  - i. there might be horizontal overlaps between the companies;
  - ii. it is necessary to exchange a vast amount of information; or
  - iii. the transaction creates potential competition risks.
6. The Clean Team is responsible for sending, receiving, gathering, analysing and handling information related to the transaction. For this reason, Clean Team members are advised to sign a confidentiality agreement and to strictly observe the Competition Protocol agreed. Clean Team members may contact employees of the merging companies, but they may not disclose information of one party to another. If some Clean Team members are employees of a particular undertaking, they should request and receive information only from that undertaking and not the other party(ies). It is recommended that such employees work exclusively in the Clean Team or have their functions and roles in the Clean Team accorded priority.
7. The Clean Team should classify the information received from the companies as: (i) public, (ii) confidential or (iii) commercially sensitive. Any confidential and commercially

sensitive information has to be treated pursuant to the Competition Protocol. Based on the information received from the undertakings' employees, the Clean Team may prepare a report on the transaction feasibility, which will be sent to the Executive Committee (formed by executives of the undertakings involved in the transaction).

### **Access to Information**

8. The information must be exclusively exchanged by the Clean Team, which is the only contact point between the undertakings. The data must be transmitted through different and independent communication channels. For example: (i) Clean Team – Undertaking A; (ii) Clean Team – Undertaking B; (iii) Clean Team - Executive Committee. The information requested by the Clean Team to the undertakings' employees has to be restricted to what is strictly necessary for the operation. That means that the Clean Team or the Executive Committee must not analyse any data on other activities performed by the companies.
9. Any change in the composition of the Clean Team or Executive Committee must be informed to the other members in writing. The new member should sign a confidentiality agreement and comply with the Competition Protocol.
10. It is recommended that the Clean Team meets and maintains all merger information in an exclusive room, ideally located outside the parties' facilities. Keeping merger information with legal counsel or other adviser with fiduciary responsibilities is a conceivable course of action. If the negotiation concludes without the consummation of the merger, the parties must demand that the Clean Team return or destroy integrally all the information sent and/or processed, so that no data is kept in files or is reused in the future. The parties may reassign the employees to their former activities, while the confidentiality obligation will remain, including in relation to the company itself.

### *Confidentiality:*

11. All Clean Team and Executive Committee members must commit to preserve confidentiality of the merger data, especially with respect to information considered confidential or commercially sensitive. This is particular view of the possibility of a departure from the committee or the undertaking. No data or information may be used, copied, transferred, published or mentioned without the undertakings' express consent. Any

information concerning the merger should be considered confidential, except for publicly available information or otherwise considered as public by the undertaking who owns it. "Information" means any data belonging to the companies, whether original or copy, printed on paper or in electronic form, in text, spreadsheet, graphic or image format.

## B. Parlour Room

12. Executive Committee members can meet to discuss plans relating to a contemplated integration between the merging companies, in specific meetings set for this purpose (Parlour Room). The Parlour Room meetings should be controlled to ensure that no commercially sensitive information that involves the competitiveness of the parties becomes the subject of discussions, for instance, pricing, distribution networks, etc. Therefore, it is recommended that all Parlour Room activities are supervised by an independent member, for instance, the external legal counsel.
13. The discussions in the Parlour Room cannot result in any kind of coordination or actual integration between the parties before the Commission approves the merger. For example, no measure or procedure should be taken that may result in transferring or sharing of employees; restrictions to the other party's activities/enterprise in the market, with its customers or with suppliers.

## Administrative Penalties

14. Further to Section 95 (5), 96(4) & (5) of the Act, the Commission may impose administrative penalties in accordance with the Administrative Penalties Regulations 2020. Generally speaking, the Commission will, among others, consider the following factors:
  - a) as to the status of the transaction, whenever the Commission suspects gun jumping, it considers, for example, if:
    - i. the transaction was not notified and was consummated without notification;
    - ii. the transaction was notified to the Commission only after consummation and after the Commission initiated investigation of the merger;
    - iii. the transaction was notified to the Commission only after consummation, but without the Commission's awareness of its existence; and

- iv. the transaction was notified to the Commission and consummated later, but before the decision was rendered;
- b) the nature of the Commission's decision (block, conditional approval and unconditional approval), as well as the existence of a horizontal overlap or vertical integration resulting from the transaction; and
- c) the time and the economic size of the violating parties.

*Nullity of acts performed*

- 15. Finally, with respect to the nullity of the acts performed, among other issues, the Commission will consider the timing of the conduct (the nullity is projected over the acts performed within the period between the transaction consummation and the Commission's decision); the proportionality of the measure and whether validating the business conduct performed is possible or not.

Forward all enquiries to:

**FEDERAL COMPETITION AND CONSUMER PROTECTION COMMISSION  
HEADQUARTERS (FCCPC)**

**C/o The Chief Executive Officer**

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