



# Webinar on procedural pitfalls in merger control

Gavin Bushell, Tom Jenkins, Sophia Real,  
Alex Stratakis

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# 1.

## Introduction

# Facebook fined £94m for 'misleading' EU over WhatsApp takeover

European commission says fine is a 'clear signal' to companies that they must comply with EU merger rules

Altice to pay EUR 80 mln competition fine for SFR takeover

Denmark: "Metro Cash & Carry Danmark A/S, Denmark, sentenced to pay a fine of DKK 50,000 for withholding information in a merger case"

US FTC info leads to merger reversal and fine in Hungary

## CMA issues first merger review fine

European Commission - Press release  
Mergers: Commission alleges Merck and Sigma-Aldrich, General Electric, and Canon breached EU merger procedural rules

EU court upholds decision to fine Marine Harvest €20m over Morpol merger

## ACM imposed fines of EUR 12.5 million on cold-storage firms

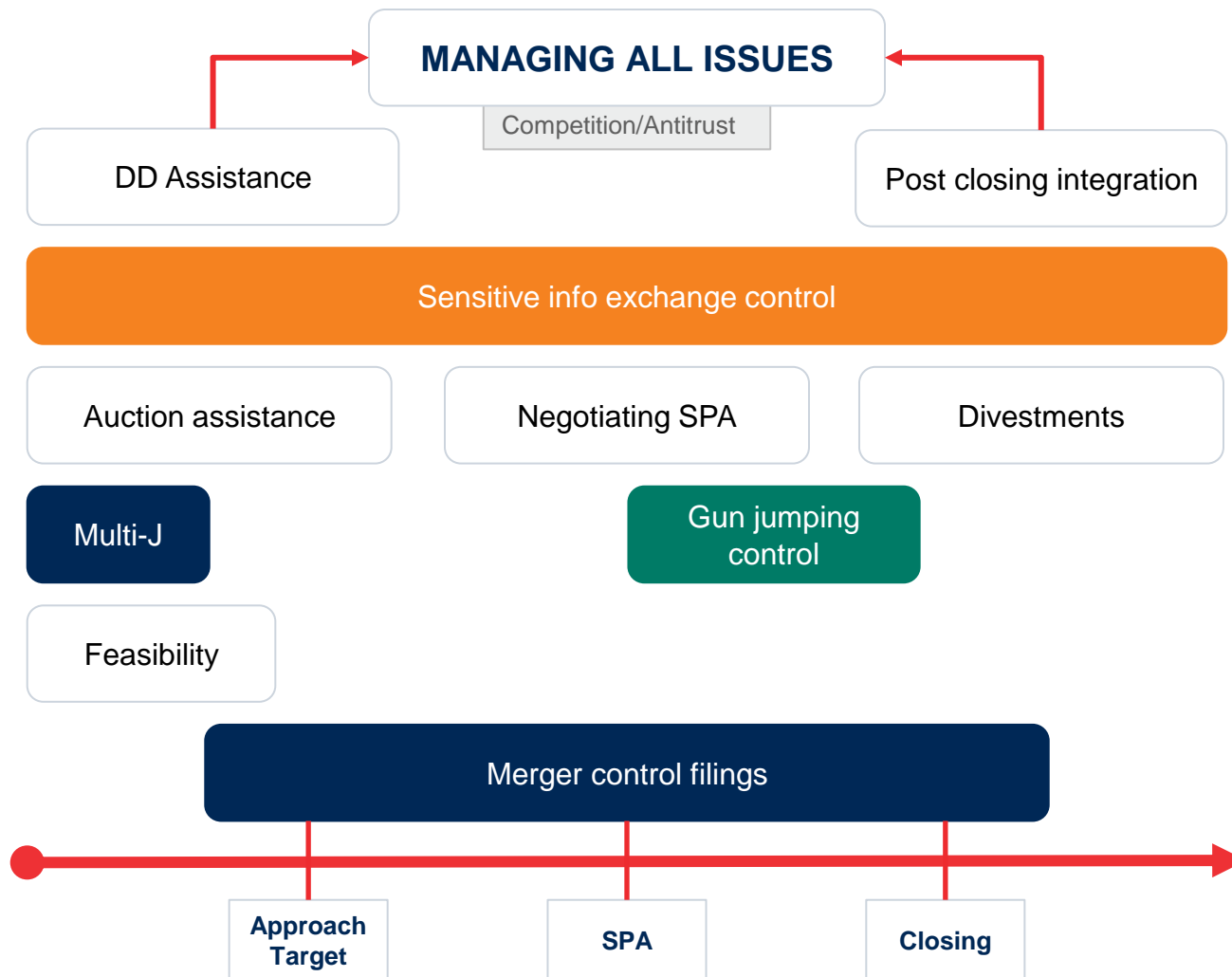
GE is in discussions with EU antitrust regulators after the latter alleged that the company provided incomplete information in its deal to takeover LM Wind.

# Procedural Pitfalls in Merger Control: Why should you care?

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- Enforcement action on the rise both at EU and national level
- Fines for procedural infringements can be significant, e.g.
  - **Facebook/Whatsapp:** fined EUR 110 million by the EC for providing incorrect or misleading information
  - **Altice:** fined EUR 80 million by the French competition authority for gun-jumping
  - **Marine Harvest/Morpol:** fined EUR 20 million by the EC for gun-jumping
- Merger control = fertile ground for procedural infringements:
  - Number of jurisdictions with active merger control regimes continues to increase
  - Trend towards broader jurisdictional tests (e.g. minority shareholding acquisitions, transaction value thresholds etc.)
  - Ever-increasing burden on companies to provide documents, data and information to regulators

# The Life of the Deal...







# 2.

## Identifying notifiable transactions

# Is the deal reportable?

The General Rule	Potential pitfalls	
<p>Acquisition of control over target business, e.g.:</p> <ul style="list-style-type: none"><li>▪ Share acquisition, merger, business assets</li><li>▪ Establishing joint venture or business</li></ul>	Minority shareholdings	Australia, Austria, Brazil, Canada, Germany, India, Israel, UK, US
	Acquisition of significant assets (IP, warehouse, website)	Must revenues be associated with asset?
	Joint control	<i>Covisint EU vs Germany</i>
	Outsourcing	Standalone business or formalistic assessment?

Transactions involved: Mergers, Acquisitions, Full Function Joint Ventures



# Where do we have to file?

The General Rule: Thresholds Based On	But Consider Carefully	
<ul style="list-style-type: none"><li>▪ Revenues (local/global)</li><li>▪ Assets (local/global)</li><li>▪ Market shares</li><li>▪ Deal value (globally and attributable to country)</li></ul>	Need for parties' presence in same market	e.g. Colombia
	Local "nexus" (effect)	e.g. Colombia, Kenya, Israel, Russia
	Local corporate entity	e.g. Israel, Bosnia Herzegovina, Croatia, Macedonia
	<i>Ex-Officio</i> Powers	e.g. Norway, Serbia, South Africa, Sweden
	Deal value	e.g. Austria and Germany (2017), EU? France? Sweden?
	Voluntary filing	e.g. Australia, Malawi, New Zealand, Venezuela



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# Key deliverables

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- GMAP provides a robust and clear view as quickly as possible containing:
  - a list of **mandatory filings**
  - a holistic and measured view of **enforcement risk**
  - a list of **notification deadlines** (e.g., Bosnia, Greece, Hungary, Iceland, Indonesia, Montenegro, Slovenia, Serbia, Tunisia, etc.)
  - a preliminary antitrust regulatory timetable flagging the potential **gating items** (e.g., China? India? Brazil?)
  - a list of **recommended counsel** outside of the Baker McKenzie global network
  - drafting suggestions and advice for **transaction structure / corporate documents**





**3.**

Integration planning: how to avoid gun-jumping

# Sensitive Info Exchange and Gun Jumping (Two Different Issues...)

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- Tension is inevitable; what do the transaction documents provide?
- Clear realistic guidance and communications; are the safeguards robust and sufficient? Central depository/management?
- Risk is particularly high:
  - at the very beginning (fishing for data; lawyers not involved) and;
  - at the very end (everyone is fatigued and eager to complete).
- Managing expectations is as important as doing a good job on substance. Beware of consultants or "special" agendas!
- Plan as much and as early as possible; but built-in flexibility needed
- Consider employing two different teams (one for the filings/substance and one for managing pre-integration issues), esp. in complex cases

Ace your integration planning before closing without breaches of competition law rules

# Pre-Acquisition Integration Expertise

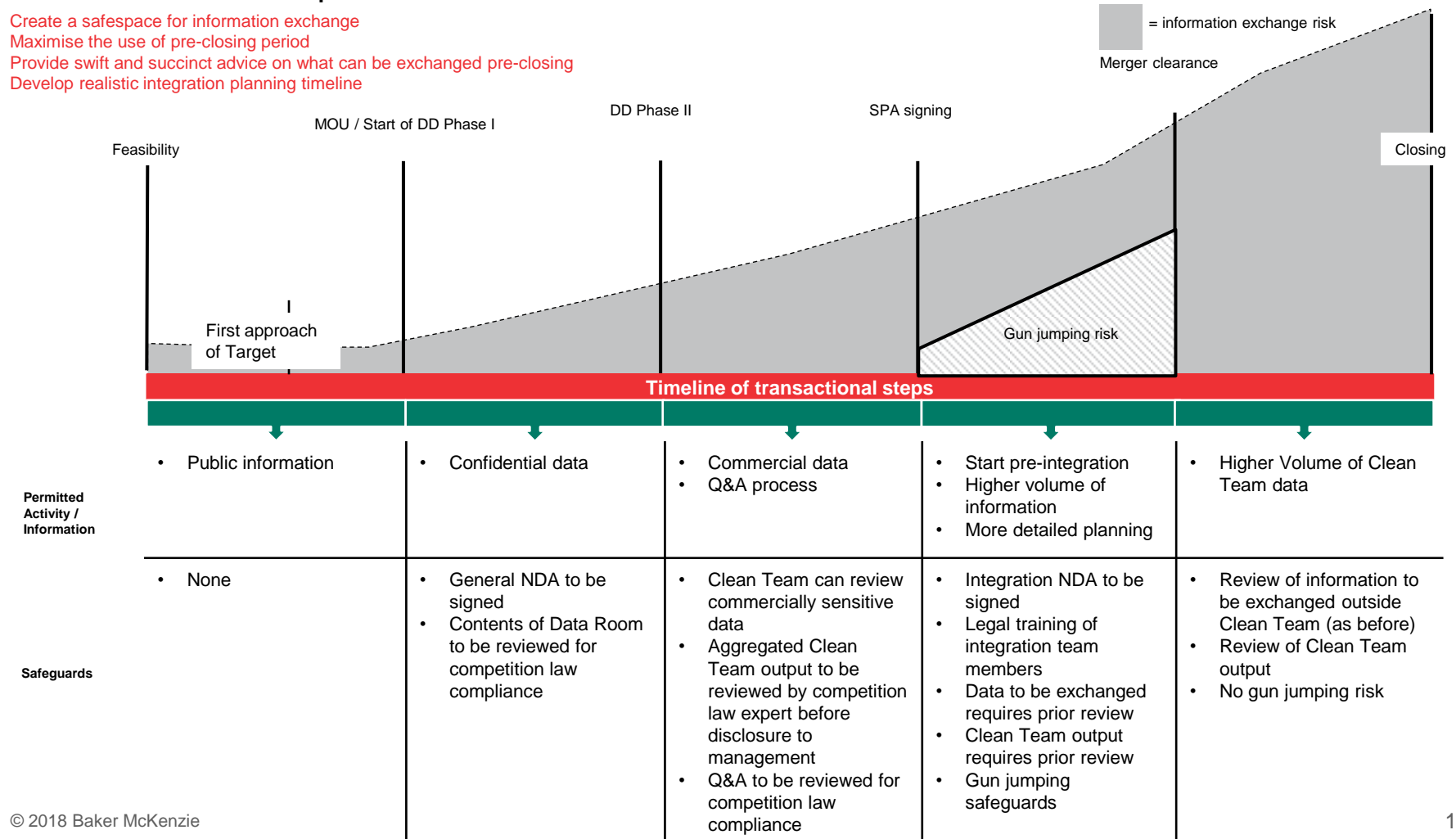
## How we can help

Create a safe space for information exchange

Maximise the use of pre-closing period

Provide swift and succinct advice on what can be exchanged pre-closing

Develop realistic integration planning timeline





# Top tips for a successful and legally sound pre-merger integration

## Pre-Acquisition Integration Expertise

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- 01 Early planning of pre-merger integration steps, considering legal restrictions and safeguards
- 02 Agree Integration NDA and terms, members and terms of Clean Team
- 03 Agree Exit process in case transaction fails (e.g. how to handle newly created integration material)
- 04 Determine clear and consistent rules regarding communication, exchange of information and meetings
- 05 Monitor enforcement of rules

### Our Services

- 1 Prepare plan - Advice on pre-acquisition planning steps and timeline
- 2 Compliance check of Due Diligence Process - Review general NDA and content of Data Room, Review aggregated output of Clean Teams
- 3 Setting up pre-acquisition structure - Draft Integration NDA and guidelines for communication, information exchange, meeting protocols, legal briefings, exit process and Gun jumping safeguards
- 4 Monitor flow of data - Review data to be exchanged in integration team; provide ad hoc advice regarding planning steps and gun jumping risk
- 5 Monitor meetings - Attend and supervise particularly sensitive meetings

A photograph of a sailboat with a large white sail, sailing on a blue sea with white-capped waves. A person in a red and yellow jacket is visible on the deck. The background shows a hilly coastline under a clear sky.

# 4.

Preparing merger control filings  
and dealing with regulators

Some thoughts on minimising risk...

## Merger Control Filings

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- Accuracy and consistency (across filings in different jurisdictions but also across different transactions that are notified to the same regulator)
- Access to (all) the right people?
  - who is knowledgeable/reliable?
  - who signs off?
  - what are the limitations of statements/data etc. (less is more/at least consider fns;)
- Early meetings with all the stakeholders; good working relationships



# Potential pitfalls

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- Lack of (reliable) data:
  - How do you construct reliable market size and market share estimates when you don't have access to reliable data and there are no 3rd party/industry reports?
- Responding to RFIs
  - How do you set up and conduct effective e-searches and respond to requests for internal documents?
  - How do you protect yourself when scope of questions is unclear or you are unable to respond in full?
  - Should you incorporate RFI responses into your filing?



**Gavin Bushell**

Baker McKenzie  
Partner, Brussels  
[gavin.bushell](mailto:gavin.bushell@bakermckenzie.com)  
[@bakermckenzie.com](https://www.bakermckenzie.com)



**Tom Jenkins**

Baker McKenzie  
Special Counsel, Hong Kong  
[tom.jenkins](mailto:tom.jenkins@bakermckenzie.com)  
[@bakermckenzie.com](https://www.bakermckenzie.com)



**Sophia Real**

Baker McKenzie  
Senior Associate, Brussels  
[sophia.real](mailto:sophia.real@bakermckenzie.com)  
[@bakermckenzie.com](https://www.bakermckenzie.com)



**Alex Stratakis**

Baker McKenzie  
Senior Associate, London  
[alex.stratakis](mailto:alex.stratakis@bakermckenzie.com)  
[@bakermckenzie.com](https://www.bakermckenzie.com)



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