

# 7 tips to close the deal

## Regulatory tools

**Merger control aims** to avoid transactions causing concentrations that significantly impede effective competition in the market. Competition regulators will review transactions that exceed certain jurisdictional thresholds, and in some cases, transactions that fall below mandatory notification thresholds.

**Foreign Direct Investment** screenings protect public order, security, or national interests, and are dealt with at a national level (with an EU framework for inter-European cooperation).

**The Foreign Subsidies Regulation** provides for the control of mergers or acquisitions where the parties have received foreign financial contributions exceeding thresholds.

In most countries, prior notification is mandatory, and parties must await clearance before proceeding with their transaction. Failure to notify, obtaining authorization by fraud, or closing without clearance may constitute **gun jumping**. A concentration is generally defined as a merger, acquisition, or creation of a full-function joint venture.



## 1.

### Think ahead

- Which countries are the parties active in?
- Is there a change of control? (Minority investments can trigger filing requirements in certain circumstances.)
- How large is the turnover of the parties? (Transaction values, asset values and/or market shares may also trigger filings.)
- Beware! Under competition law, turnover may include revenues not considered turnover under accounting rules.

## 2.

### Address regulatory filing and risks in M&A documentation

- Conditions precedent should include regulatory clearances needed for closing, responsibility allocation, and relevant timeframes.
- Buyer protections: repetition of warranties and conduct of business requirements.
- Seller protections: breakup fees or hell-or-high-water clauses.
- Prepare a closing memo and transaction checklist (plan time needed to obtain clearance).

## 3.

### Share with caution

- Assess target value and conduct due diligence without exchanging competitively sensitive information (e.g., pricing strategy, business strategy, customer information):
- Use clean teams and establish other safeguards, including non-disclosure agreements, during due diligence.

## 4.

### **Address regulatory risks as part of due diligence**

Identify financial, legal, tax, and operational risks, including:

- Agreements or concerted practices (horizontal or vertical agreements, including price fixing, production limitation, market sharing).
- Abuse of dominance (excessive or predatory pricing, loyalty rebates, bundling).
- Regulatory aspects of asset and liability warranties and price adjustment mechanisms for post-closing sanctions.
- Risk of a below-threshold merger being called in by competition authorities, especially for “killer acquisitions” (i.e., acquisitions of potential competitors at an early stage of their development).

## 6.

### **Stand still**

During review, parties must avoid premature control before approval. Do not:

- Interfere with the target’s commercial strategy or day-to-day operations.
- Exchange commercially sensitive information.
- Roll out joint marketing campaigns or issue joint customer communications.
- Appoint or remove senior management or access the target’s IT systems.

Carefully check conduct of business requirements to ensure they do not give control to the buyer. Derogations may be granted for preserving viability, distressed businesses, or buyer protection. Gun jumping may result in fines of up to 10% of global turnover, and authorities may prohibit the transaction or order remedies.

## 5.

### **Be mindful of post-completion obligations**

Post-completion non-compete clauses may risk being classified as anticompetitive market-sharing agreements. Clauses directly related to and required for implementing a transaction may be exempt from competition law prohibitions if legitimate, necessary, and proportionate.

## 7.

### **Keep out**

Horizontal cross-ownership, co-ownership, or interlocking directorates between competitors may raise antitrust risks. Ensure commercially sensitive information is protected through information sharing protocols, ethical barriers, and clean teams, and that personnel are trained to spot potential issues.