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Competition Policy**

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***International Cooperation on Merger cases as a
tool for effective enforcement of competition***

Contribution

By

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The views expressed are those of the author and do not necessarily reflect the views of
UNCTAD

Introduction

In current times the structure of world economy is rapidly changing. International cooperation plays a critical part in the process of globalization. Due to increasing competition in the global markets, it is important for competition authorities to exchange and have access to information, share expertise, cooperate in investigation of international cases. The implementation of such functions in the Russian Federation is vested in the specifically authorized federal body of executive power – the Federal Antimonopoly Service of the Russian Federation (hereinafter – the FAS Russia).

For 25 years the FAS Russia exercised the following functions: control over observing competition rules by the authorities, including control over state preferences (state aid), control over public procurement, including the sphere of defense and security, control over natural monopolies' activity (excluding tariff regulation), allocation of property, resources, rights on a competitive basis stipulated in the sectoral legislation, control over advertising law compliance, trade legislation compliance, foreign investments in strategic industries, unfair competition, compliance with competition rules in the sphere of intellectual property, specific control functions in defense industries and electricity sector. International cooperation is one of the priority areas of the FAS Russia activities.

By virtue of enhancing integration, liberalization in market access in Russia, increasing amount of infringements in cross-border markets, as well as legislative development (e.g. international agreements), the FAS Russia improves mechanisms for collaboration with competition authorities of other countries.

The authority actively cooperates with multiple international organizations and foreign colleagues to improve antitrust policy fight unfair competition and state regulation of natural monopolies. Within the scope of its competence, the FAS Russia facilitates integration of the Russian economy into world economic space; it is responsible for the implementation of international commitments of the Russian Federation.

More recently, there is an increase in the number and size of merger transactions across the world, including Russia. Integration processes affect all the more

enterprises from various industries, the number of deals with participation of foreign capital increases as well. Taking part in merger deals provides a kind of economic motivation for businessmen: expansion of sales markets, new opportunities for costs reduction, building of vertically integrated production systems, and improved capacity to access the capital market.

Mergers in Russia

Economic concentration has gained momentum in recent years. When identifying this process, it is important to mention such concepts as mergers and acquisitions.

Mergers and acquisitions are complex corporate processes of company reorganization that significantly impact certain entities, as well as whole industries. There are five forms of company reorganization in Russian legislation: merger, joining, partition, demerging and transformation.

Despite the fact that the concept of merger has a clear definition in Russian legislation and is one of company reorganization forms, and that the concept of acquisition doesn't have any legal definition, the phrase «mergers and acquisitions» has become a synonym for different actions that therefore lead to economic concentration.

Under article 27 of the Federal Law №135-FZ of July 16th, 2006 "On Protection of Competition" (Incorporation and Restructuring of Commercial Organizations Subject to the Antimonopoly Body Prior Consent) the following actions shall only be performed with the antimonopoly body's prior consent:

- 1) the merger of commercial organizations (with the exception of financial organizations), if the aggregate value of the assets thereof (assets of their group of persons) in accordance with the accounting balance sheets as at the latest reporting date preceding the date of submission of the petitions (further on referred to as the latest balance sheet, in case of submission of a notice, shall be deemed to be the accounting balance sheet as at the latest reporting date preceding the date of merging the commercial organizations) exceeds seven billion Rubles or if the aggregate revenues from sale of commodities of such organizations (their group of persons) for the calendar year preceding the merger exceed ten billion Rubles, or where one of the organizations is included into the Register of economic entities;

2) joining one or several commercial organizations (with the exception of financial organizations) with another commercial organization (with the exception of a financial organization) if the aggregate value of the assets thereof (assets of their groups of persons) in accordance with their latest balance sheets exceeds seven billion Rubles or if the aggregate revenues from the sale of commodities of such organizations (their group of persons) from the calendar year preceding the consolidation year exceed ten billion Rubles or where one of the organizations is listed in the Register.

Under article 34 of the Federal Law №135-FZ a commercial organization founded without preliminary consent of the antimonopoly body, including organization appeared as the result of merger or joining of commercial organizations in the cases stated in Article 27 of this Federal Law is liquidated or reorganized in the way of separation or detachment at law on the antimonopoly body's claim if its foundation led or can lead to restriction of competition, including such as in the result of emerging or strengthening of the dominant position.

Merger control provisions are also presented in other laws and regulations of the Russian Federation. For example, under chapter 4 of the Civil Code of the Russian Federation the reorganization of the legal entities in the form of the merger shall be effected only upon the consent of the authorized state bodies (article 57(3) of the RF Civil Code). In case of the merger of the legal entities, the rights and duties of every one of them shall pass to the newly emerged legal entity in conformity with the transfer deed. (article 58(1) of the RF Civil Code).

International cooperation of the FAS Russia in merger cases

In 2012, the Russian Federation, the Republic of Belarus and the Republic of Kazakhstan signed the Agreement on Common Principles and Rules of Competition allowing competition authorities of the member states to exchange relevant information quickly and efficiently, carry out particular joint investigation proceedings, coordinate law enforcement operations, as well as implement enforcement upon the request of either Party. In 2014, this Agreement was replaced by the Treaty of Eurasian Economic Union (hereinafter – the Treaty), within the framework of which principles and rules of competition are prescribed.

A permanent regulatory body of the Eurasian Economic Union (EEU) is the Eurasian Economic Commission (EEC). Unlike the national legislation, issues relating to financial markets and instruments and actions of state bodies that restrict competition are not a matter for the EEC. Unlike the European Union, issues of economic concentration, including merger and acquisition investigations are not within the jurisdiction of the Commission; they remain at the national level. However, under article 75(4) of the Treaty (General Competition Principles) each Party shall, in accordance with its legal system, ensure control over economic concentration to the extent necessary to protect and develop competition on the relevant territory of the Party.

Under article 75(5) of the Treaty each Party shall ensure the availability of national authority, whose competence includes the implementation of antimonopoly (competition) policy, which among other issues suggests empowering the authority to control economic concentration, to prevent and detect the infringements of antimonopoly (competition) legislation and to put in place measures to end the above-mentioned infringements (hereafter – the authorized body of the Party).

Within the framework of the Treaty, the authorized body of one Party notifies the other, in case its competition protection enforcement may affect the interests of the other Party. Nonetheless, M&A deals are an exception.

The most effective way of cooperating internationally is to request for information, which is most often used in interaction within CIS.

For example, in 2011, the FAS Russia investigated a case of antimonopoly law violation (vertical agreement) against CJSC «The Trading House «Belaz» (Russia), CJSC «Company Belazcomplect Plus» (Russia) and OJSC «Belarus Automobile Plant» (Belarus). Within the framework of the Treaty on Common Principles and Rules of Competition, the FAS Russia requested for information about the Belarusian company from the Belarusian competition authority, thus simplifying the process of decision-making.

When considering mergers, the FAS Russia also found that one of the most beneficial tools of international cooperation activities is a waiver, although the agency does not have extensive experience of application of this instrument. One

of the most successful cases was within the framework of cooperation occurred in 2009 between the FAS Russia and the European Commission. It was the first case in the FAS Russia's practice, when the confidentiality waiver mechanism was used when considering a transaction on acquiring the company "Sun Microsystems" by the company "Oracle Corporation". The applications for this transaction were filed for consideration to the competition authorities of many countries of the world, including the FAS Russia and the European Commission. Taking into account the world experience in the field of cooperation of foreign competition authorities when considering transactions, the execution of which may affect competition in the markets of several countries, the FAS Russia organized consultations.

The preliminary condition for such consultations is that the company-subject of consultations should forward an official confidentiality waiver, by which the company confirms its consent for consultations between the European Commission and the FAS with the right for confidential information exchange. The FAS Russia became a participant of the proceedings of application of the said mechanism, which is the most beneficial in case when it is not possible to receive confidential information in accordance with national legislations, when investigating cases of violating competition legislation and controlling transactions with the participation of legal entities of Russia and the EU.

While referring to the international cooperation in merger cases of the FAS Russia, application of the Aercap Ireland Limited for acquiring 100% of the voting shares in the International Lease Finance Corporation should not go unmentioned.

To make a decision FAS analyzed the market of leasing services in the segment of aircraft leasing.

Since the geographic boundaries of the aircraft leasing market are not limited to the Russian Federation, FAS applied the waiver procedure, and as a result FAS obtained information that formed the basis for making decisions on the transaction by foreign competition authorities, including: Federal competition authority of Germany, Ireland antimonopoly body, The Ministry of Commerce of the People's Republic of China, Mexico's Federal Commission on economic competition,

Korean Fair Trade Commission, US Federal Trade Commission, US Ministry of Justice, Ecuador's Market Power Inspectorate, Competition Commission of South. Analyzing the market of leasing services in the aircraft leasing segment, FAS directly took into account the information from Ireland antimonopoly body, the Federal competition authority of Germany and Portugal's competition authority. Examining the notification, FAS also had a meeting with representatives of the companies participating in the merger and held telephone negotiations with foreign competition authorities.

As a result of the analysis, FAS established that the transaction would not restrict competition on the market in question.

Therefore, FAS granted the notification.

Formerly, the FAS Russia actively cooperated with the Directorate General for Competition of the European Commission in the framework of the Memorandum of Understanding in the Sphere of Cooperation between the Federal Antimonopoly Service of the Russian Federation and the Directorate General for Competition of the European Commission (Brussels, 10.03.2011), and the Plan of Interaction for 2011-2012 is annexed to the Memorandum. The Plan identifies economic sectors with high priority in terms of interaction, and the format and methods of implementation of such interaction.

On 26 March 2012, the European Commission opened an in-depth investigation under the EU Merger Regulation into the merger transaction in the aerospace market. The case concerned the acquisition by United Technologies Corporation (UTC) of Goodrich Corporation (Goodrich). UTC intended to acquire the whole of Goodrich for a purchase price of USD 18.4 billion, in one of the largest transactions in the aerospace industry in recent years. Both parties were very significant US-based companies that play very significant roles in the aviation equipment sector.

Taking into consideration the fact "IRKUT" Corporation was a key player in the aerospace sector in the world market, DG Comp had to take into account its activity, when examining the transaction.

DG Comp asked the FAS Russia for assistance in requesting information from IRKUT. The FAS Russia fulfilled the request of DG Comp.

This is an example of a case when the FAS Russia succeeded in protecting national interests.

Mergers and acquisitions: recent trends

Every year the number of transactions subject to FAS control is decreasing. Ten years ago we received around 6000 pre-merger and 44,000 post-merger petitions. After changes to the antimonopoly law (consecutive introduction of four antimonopoly packages) the figures fell down considerably. To compare, in 2013 FAS and its regional offices considered only 2258 pre-merger petitions (400 from foreign investors) and 1913 post-merger petitions. Refusals reached 1.5%. The trend maintained in the first half of 2014: 807 pre-merger petitions (154 from foreign investors) and only 8 refusals.

When the fourth antimonopoly package, that is already approved by the Council of the Russian Federation and submitted to the State Duma, comes into force the number of economic concentration transactions subject to FAS control will go down even more considerably due to eliminating the Register of economic entities with over 35% market share.

At the same time, regulation of joint ventures – concluding agreements on joint activities is introduced. However, such regulation will take place only if competitors conclude agreements, the total asset value exceeds 7 billion RUB and the total revenue exceeds 10 billion RUB.

In 2014, the Government Commission for Control over Foreign Investments in the Russian Federation approved all transactions put for consideration: American pharmaceutical company “Abbott” buying Russian “Veropharm” OJSC - a leading producer of drugs for treating oncological diseases; German “Blitz F14-206 GmbH” acquiring “GEA Mashimpex” Ltd., which is a strategic company that produces equipment for nuclear plants; and Swiss “Holcim” Ltd., a global manufacturer of construction materials, establishing control over “Lafarge Cement” OJSC.

The FAS Russia follows a policy of openness and transparency on the issue. All petitions from legal persons as well as decisions of the antimonopoly bodies issued upon the results of their consideration are put in the single, publically-accessible FAS database, formed to execute the Road Map for developing competition and improving the antimonopoly law.