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Round Table on recent developments in merger control standards

Contribution

Federal Antimonopoly Service

The Russian Federation

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Introduction

Economic concentration assessment has always been one of the main activities of the majority of competition authorities around the world, including in Russia.

Back in 1991, the Law of March 22, 1991, No. 948-1 "On competition and restriction of monopolistic activities in commodity markets" provided for state control over the establishment, merger and consolidation of commercial organizations, as well as the acquisition of shares, units, participatory interests in the charter capital in order to prevent possible abuse of dominant position by commercial organizations or restriction of competition.

For more than 30 years, the provisions of Russian antimonopoly legislation relating to the assessment of economic concentration have been constantly evolving, and merger control standards in Russia have been modernizing and adapting to realities of economy characteristic of a particular historical period.

These evolvments were reflected in so-called "antimonopoly packages" that amended current provisions of Russian antimonopoly legislation.

Up for today, there have been five "antimonopoly packages" adopted, each of which brought something new to the system for assessing mergers and acquisitions (M&As) in Russia.

With the adoption of the Federal Law of July 26, 2006 No. 135-FZ "On Protection of Competition"¹ (also known as the first antimonopoly package) (hereinafter – the Law on Protection of Competition), clear algorithm of filing and reviewing applications for M&As was created.

The law established the quantitative thresholds of assets and turnover, achieving which companies should obligatory notify the FAS Russia about the merger, and described the procedure of determination of the content of decisions

¹ <https://wipolex-res.wipo.int/edocs/lexdocs/laws/en/ru/ru077en.pdf>

and remedies. The FAS Russia obligation to post information on the transaction on its website and invite interested parties to express their assessment of its impact on competition was introduced.

The thresholds were subsequently raised in 2009 and 2012 when the second and third antimonopoly packages² came into force.

The most important novelty of the fourth antimonopoly package of amendments adopted in 2015³ was the introduction of an obligation, as part of economic concentration control, to coordinate with the FAS Russia the conclusion of agreements on joint activities between competing entities.

Last 10 years there has been a significant trend in digitalization of markets, requiring the FAS Russia to apply unconventional and sometimes non-standard approaches to merger analysis and decision-making.

Under current conditions, economic concentration processes are shifting the focus on digital transformation as a driving force and one of the main factors in the development of the M&A market. As a result, transaction motives related to R&D cooperation and access to information, advanced technologies, know-how and specialists in this field are becoming more and more relevant⁴.

Mergers in IT markets can affect many related "traditional" markets due to the widespread adoption of digital technologies in all areas of the modern economy.

Such a trend is affecting antitrust regulation and law enforcement around the world, and the FAS Russia, considering the best global practices and trying to meet the goals of reducing the administrative burden on business and liberalizing rules in the area of transaction control, is studying the impact of the new economy for the M&A sector.

² Federal Law of July 17, 2009, No. 164-FZ "On Amending the Federal Law 'On Protection of Competition' and Certain Legislative Acts of the Russian Federation" and Federal Law of December 06, 2011, No. 401-FZ "On Amending the Federal Law 'On Protection of Competition' and Certain Legislative Acts of the Russian Federation".

³ Federal Law of October 5, 2015, No. 275-FZ "On Amending the Federal Law 'On Protection of Competition' and Certain Legislative Acts of the Russian Federation".

⁴ These include big global deals like Comcast/NBC, AT&T/Time Warner, Apple/Beats Dre, Walmart/Jet.com, Cisco/AppDynamics, Adobe/Marketo, etc.

On June 11, 2021, the Presidium of the FAS Russia published Clarification No. 19 “On the Specifics of State Antimonopoly Control over Economic Concentration”⁵ that were developed taking into account best international practices, extensive national experience and modern approaches formed within the framework of the FAS Russia's law enforcement. The guidelines provide answers to key substantive and procedural issues of M&A control in Russia.

In September 2023, the fifth antimonopoly package (also known as "digital" antimonopoly package) came into force, the aim of which was to adapt the application of competition rules to the realities of digitalization and globalization, including with regard to merger control.

The fifth antimonopoly package comprised of several laws, including the Federal Law of July 10, 2023, No. 301-FZ "On Amendments to the Law on Protection of Competition" (hereinafter – Federal Law No. 301-FZ)⁶ and Federal Law of August 4, 2023 No. 426-FZ "On Amendments to the Code of Administrative Offences of the Russian Federation" (hereinafter – Federal Law No. 426-FZ)⁷.

Referring to the data on the results of state control over economic concentration, for 2023, the number of applications and notifications considered by the FAS Russia were 992 and 156, respectively, for 2022 – 1,164 and 108, for 2021 – 1,172 and 83, for 2020 – 1,019 and 133, for 2019 – 1,052 and 144. The provided statistics indicates that over the past five years administrative pressure on the M&A sphere has been significantly reduced, but at the same time, investment activity remains at the proper level.

Merger control standards in Russia

Further, there will be presented main merger control standards applied currently in the Russian Federation in accordance with the Law on Protection of Competition and all its amendments.

Chapter 7 of the Law on Protection of Competition is devoted to state control of economic concentration and contains provisions on transactions and actions

⁵ <https://en.fas.gov.ru/documents/documentdetails.html?id=15367>

⁶ <https://en.fas.gov.ru/documents/documentdetails.html?id=15378>

⁷ <https://en.fas.gov.ru/documents/documentdetails.html?id=15377>

leading to economic concentration in the commodity market, which are subject to control by antimonopoly bodies.

Thresholds

Currently there are financial thresholds in Russia as follows:

- Transactions with shares, property of commercial organizations, rights in respect of commercial organizations are subject to prior approval by the FAS Russia if the total value of assets of the parties of the transaction, being the object of economic concentration (hereinafter – "Target") exceeds 7 billion rubles (approx. 77 million USD), or the total revenue from the sale of goods for the calendar year preceding the year of merger (accession) exceeds 10 billion rubles (approx. 110 million USD).
- Federal Law No. 301-FZ amended the Part 1 of the Article 28 of the Law on Protection of Competition, which introduced a new basis on which transactions with stocks (shares), property of commercial organizations, rights in relation to commercial organizations have to be made with the prior consent of the antimonopoly authority – if the transaction price exceeds 7 billion rubles (approx. 77 million USD).

The new development will allow to take into account the real value of a target company operating in the digital market (for example, a startup), since traditional criteria based on the amount of revenue of participants of transactions and the value of their assets may not reflect the real impact on the economic terms of the transaction.

Besides, when the thresholds are reached the following transaction shall be notified:

- Transactions for the acquisition of shares exceed 25, 50 or 75 % of the voting shares of a joint stock company (for JSC); exceed 1/3, 50 % or 2/3 of the shares of a limited liability company (for LLC).
- If a person receives ownership, use or possession of fixed production assets (except for land plots and non-industrial real estate) or intangible assets of another person, if the book value of the target exceeds 20 % of the book value of fixed production assets and intangible assets of the seller.
- If a person acquires rights that allow him to determine the conditions for an economic entity to carry out business activities or to perform the functions of its executive body. Most often, these are transactions between foreign companies abroad, leading to the establishment of indirect control over a Russian company.

Expertise

By the fifth antimonopoly package the Law on Protection of Competition is supplemented by the Article 9.2, according to which the antimonopoly authority, when considering an application for giving consent to making a transaction, other action subject to state control, a case on violation of the antimonopoly law, at the request of the applicants or on its own initiative, is given the right to appoint an examination and involve experts to carry it out.

The specified article regulates the issues of conducting an expert examination, it provides that the candidates for experts and issues on which an expert opinion is required are determined by the antimonopoly authority, while applicants have the right to propose to the antimonopoly authority candidates for experts and representatives of expert organizations, as well as matters requiring expert opinion.

The main requirements for the involved experts are determined, and it is also established that the qualification requirements for the involved expert are determined by the federal antimonopoly authority.

The rights and obligations of the expert are also determined, it is established that the expert carries out an examination on a reimbursable or non-reimbursable basis.

The order on requirements for an expert was adopted by the FAS Russia and registered by the Ministry of Justice of the Russian Federation (of August 25, 2023, No. 574/23).

It is important to note that an expert can be appointed also to supervise the execution of a remedy, i.e. to fulfill the function of a transaction trustee.

In-person review

In order to increase the objectivity of decisions taken when reviewing mergers, the fifth antimonopoly package introduces in-person consideration of applications for transactions with the participation of interested parties. The order approving the procedure for in-person consideration of applications was adopted by the FAS Russia and registered by the Ministry of Justice of the Russian Federation (of August 25, 2023, No. 576/23).

Discussing the results of the application with the parties and stake holders (commitments)

In accordance with the Federal Law No. 301-FZ, parties to a transaction have the right to declare voluntary commitments to ensure competition in the market. This innovation concerns cases where, based on the results of consideration of an application for consent to a transaction, the antimonopoly authority reaches a preliminary conclusion that the transaction may lead to a restriction of competition.

Before making a decision on the results of the review of the application, the FAS Russia sends the applicant a conclusion on the circumstances of the application for consent to the transaction with a description of the evidence supporting the preliminary conclusions of the FAS Russia, as well as a statement of the proposed conditions (remedies) that may be imposed by the FAS Russia on the applicant in order to ensure competition. The parties to the transaction may familiarize themselves with the conclusions of the FAS Russia and prepare explanations and their position on the transaction for discussion.

Extension of time limits for consideration of an application

Federal Law No. 301-FZ amended the Article 33 of the Law on Protection of Competition, according to which, if a transaction or other action is carried out in the commodity market of the Russian Federation or has an impact on it, as well as has an impact on the commodity markets of foreign countries, with the consent of the Government of the Russian Federation, the antimonopoly authority has the right to extend the term for consideration of an application for giving consent to the implementation of such a transaction or other action for a period determined by the Government of the Russian Federation, but not more than three years.

International cooperation and global mergers

Modern law enforcement practice is characterized by an increase in the number of complex and ambiguous transactions, which need the approval by the antimonopoly authority, including cross-border transactions potentially involving multiple jurisdictions.

When transactions become global and affect a large number of countries, the importance of international cooperation can not be underestimated for the most effective review.

Cooperation between competition authorities in reviewing the same merger is beneficial for the parties to the transaction, for the competition authorities themselves and for consumers. It helps to optimize the merger review procedure by saving human resources, reducing the burden on companies, speeding up the process of reviewing the transaction and making the most balanced decision, and avoiding or minimizing asymmetry of remedies.

The FAS Russia has actively cooperated with foreign colleagues when considering transactions in almost all economic sectors⁸: in the pharmaceutical sector (such mergers as Takeda/Shire, GSK/Pfizer, AbbVie/Allergan, BMS/Celgene); in the food sector (such mergers as Bayer/Monsanto, IFF/DuPont); in the industrial sector (such mergers as Siemens/Alstom, Metso/Outotec); in the digital sector (such mergers as At&T/Warner Brothers) and many others.

The legal mechanisms and collaboration tools the FAS Russia uses in evaluating global transactions are expanding. Cooperation documents (memoranda, agreements) include provisions on joint work in law enforcement.

In order to conduct the most effective and detailed consultations on the transaction and exchange of confidential information, the use of the waiver of confidentiality by the parties to the transaction is increasing in global practice. The FAS Russia applies in its activities the Recommendations of the Presidium of the FAS Russia on the application of waivers when considering economic concentration transactions⁹.

Based on this document the CIS (Commonwealth of Independent States) Competition Authorities developed Model Recommendations on the application of waivers when considering economic concentration transactions within the CIS, which were adopted in 2019 as part of the 50th meeting of the Interstate Council on Antimonopoly Policy held in Moscow (Russian Federation). In 2021, at the 7th BRICS Competition Conference in Chengdu (China), the BRICS Competition Authorities endorsed the Model Recommendations on application of the confidentiality waiver mechanism in reviewing transactions of economic concentration of the BRICS member states¹⁰. The aim of these documents

⁸https://unctad.org/system/files/non-official-document/tdrbpconf9_d25_cont_Coop_Guiding_Policies_en.pdf

⁹ <https://en.fas.gov.ru/documents/documentdetails.html?id=15356>

¹⁰ <https://en.fas.gov.ru/documents/documentdetails.html?id=15369>

is to improve enforcement and enhance consistency in the use of waivers. Such documents raise the transparency of enforcement by BRICS and CIS Competition Authorities, provides a guarantee of confidential information protection for companies sending a waiver, and creates an atmosphere of trust between regulators and parties to a transaction.

It is worth noting that the model recommendations on the application of waiver both within the CIS and BRICS are voluntary and constitute a guide and a tool for competition advocacy.

Altogether, the most effective assessment of economic concentration transactions in the period of economic transformation requires taking into account a number of important factors. These include the development of antimonopoly legislation, improvement of transaction review procedures, exchange of experience, study of best practices, and international cooperation.