

The Russian Federation
Agency decision-making in merger cases: trade-offs between prohibition
decisions and conditional clearances
OECD Working Party No 3
November 29, 2016

Summary

The number of deals falling under the control of the FAS Russia has decreased dramatically since the last amendments to the Russian antimonopoly legislation. This allows the authority to pay more its time and attention to the quality of the decisions taken on merger notifications and the necessary market analysis for that.

The **transactions falling under the FAS Russia's control** are those involving commercial and non-commercial organisations, as well as foreign persons and (or) organisations supplying goods on the territory of the Russian Federation for over one billion rubles within a year preceding the date of the transaction. Types of such transactions include mergers, acquisitions, creation of new commercial organisations, transactions with stocks/shares. The Federal Law of July 26, 2016 No. 135-FZ "On Protection of Competition" (the Law on Protection of Competition) establishes precise situations when these types of transactions should undergo the antimonopoly control. For instance, the thresholds established by law for the cases involving transactions with stocks (shares) may constitute 25%, 50%, 75% of stocks or 1/3, 2/3 of shares in the authorized capital that a purchasing company or a group of companies acquires as a result of transactions.

As a result of considering a transaction, the FAS Russia may issue **several types of decisions on merger notifications**, such as approvals, approvals with prescription ("conditional clearances"), decisions on prolongation of consideration, refusals. The major point of decision-making consists in verifying whether the anticipated deal will result or may result in restriction of competition, including as a result of creation or strengthening of a dominant position of the applicant or of the entity created as a result of the transaction.

While **taking decisions on merger notifications**, the FAS Russia is guided by the Law on Protection of Competition, according to which the antimonopoly authority should conduct analysis and assessment of the competitive environment in the relevant product markets. The analysis involves determining the market research time period; defining the market's boundaries; calculating market volume and shares of economic entities in the market; and other steps finishing with assessing the state of competition in the market and preparing the analytical report.

The **conditions** the FAS Russia imposes may be behavioural and structural. However, the latter are quite rarely used in the Russian antitrust practice.

The FAS Russia's **recent examples of decisions on merger notifications** includes the following cases: JSC «Gazprombank» willing to acquire the Moscow United Electric Grid Company (MOESK) (*prohibition*), the French enterprise «OSV Chambéry International» acquiring 99% shares of the charter capital of the Russian LLC "Alstrom Tver" (*conditional clearance*), the Polar Airlines acquiring the Airline Yakutia (*conditional clearance*), two of the largest Russian retail chains M-Video and Eldorado (*conditional clearance*).

In conclusion, it should be noted that conditional clearances are favoured by the FAS Russia more than prohibitions since they allow post-control and ensure preclusion of limiting competition, thus having an important preventative value.

Introduction

The number of deals falling under the control of the Federal Antimonopoly Service (hereinafter - FAS Russia) decreases every year. Ten years ago, the FAS Russia received about 6,000 pre-merger notifications and 44,000 post-merger notifications. However, after adoption of amendments to the antimonopoly legislation (through consistent implementation of the four so-called “antimonopoly packages”), as well as abolition of the post-merger notification control in January 2014, these figures have decreased significantly (1,793 pre-merger notifications and 165 post-merger notifications in 2015). At the same time, more attention of the antitrust authority has been paid recently to the quality of its decisions on notifications received from economic entities on mergers, as well as to the market analysis conducted for issuing these decisions.

It is suggested to consider below the provisions of the Russian antimonopoly legislation relating to mergers decisions on the territory of the Russian Federation.

1. Deals subject to control

It is important to mention first that according to the Russian antimonopoly legislation transactions subject to the state control are those concerning Russian commercial and non-commercial organisations, as well as foreign persons and (or)

organisations supplying goods to the Russian Federation for over one billion rubles within a year preceeding the date of the transaction.

The article on creation and reorganisation of commercial organisations of the Federal Law of July 26, 2016 No. 135-FZ "On Protection of Competition" (hereinafter - the Law on Protection of Competition) states that the following transactions are executed with prior consent of the antimonopoly authority:

1) mergers of commercial (except financial) organisations, if their total net asset value or balance sheet as of the last reporting date before submitting their notification exceeds seven billion rubles¹, or if their total revenue from the sale of goods over the previous calendar year exceeds ten billion rubles;

2) acquisition of one or more commercial (except financial) organisations by another commercial (except financial) organisation, if their total net asset value or balance sheet as of the last reporting date before submitting their notification exceeds seven billion rubles, or if their total revenue from the sale of goods over the previous calendar year exceeds ten billion rubles;

3) creation of one or several commercial organisations if their charter capital is paid by shares and/or assets that are the main means of production and/or intangible assets of another commercial organisation (if other specific conditions established by Article 27 of the Law on Protection of Competition are met);

4) transactions with stocks (shares), property of commercial organisations, rights in respect of commercial organisations, including joint-stock companies, limited liability companies as well as legal entities established outside the Russian Federation (if other specific conditions established by Article 28 of the Law on Protection of Competition are met).

The thresholds established by law for the cases involving transactions with stocks (shares) that are subject to the state control may constitute 25%, 50%, 75% of stocks or 1/3, 2/3 of shares in the authorized capital that a purchasing company or a group of companies acquires as a result of transactions. The thresholds' size depends on the type of companies involved in the deal and other conditions envisaged by

¹ The currency rate as of October 11, 2016 is 1 USD = 62.3884 Russian rubles

Article 28 of the Law on Protection of Competition.

Lastly, it is worth mentioning that the transactions described above do not require preliminary consent of the antimonopoly body if exercised by persons (economic entities) that are included into the same group of companies, as envisaged by one of the recent amendments to the antimonopoly legislation.

2. Types of decisions issued when merger notifications are considered

Within thirty days after receiving a notification, the competition authority is obliged to consider it and inform the applicant in the written form of the decision taken with the specification of reasoning.

Upon consideration of a notification on providing consent on the transaction, the competition authority may take the following final decisions on²:

1) approving a pre-merger notification if the transaction will not lead to the restriction of competition;

2) approving a pre-merger notification and on simultaneous issuance of a prescription to the persons participating in the transaction, or a prescription to the newly-created economic entity on performing actions aimed at ensuring competition;

3) prolongation of consideration of a pre-merger notification due to determination of the conditions after which, if these conditions are met by the applicant or other parties involved, the antimonopoly body takes a decision on approving the notification, due to determination of a time period for fulfilling these conditions (but not more than nine months);

4) refusing the notification, if the deal will result or may result in restriction of competition (including as a result of creation or strengthening of a dominant position of the applicant or of the entity created as a result of the transaction), or if the competition authority establishes that the information provided in the documents that is important for taking the decision is incorrect, or if the applicant did not provide

² In addition to these decisions, the competition authority may take decisions on extending the period of notifications' consideration in the cases established by the Law on the Protection of Competition.

available information requested by the antimonopoly authority, which was necessary to make a decision on restriction of competition;

5) refusing the notification, if it was decided so during the preliminary approval procedure in accordance with the Federal Law “On Procedures for Foreign Investments in Business Entities of Strategic Importance for Russian National Defence and State Security”.

The type of decision on approving a pre-merger notification and on simultaneous issuance of a **prescription** specified in paragraph 2) is adopted by the antimonopoly authority if the notified transaction **leads or may lead to restriction of competition**. The aim of the prescription and its conditions is to ensure the elimination or minimisation of anticompetitive effects of a horizontal, vertical or conglomerate merger.

The competition authority following an application of a person to whom a prescription was issued, as well as on its own initiative, may review the content and the procedure of its execution due to the occurrence of circumstances appeared after its adoption and which exclude the possibility and (or) appropriateness of the prescription. Such circumstances might be changes of product markets, of a state of sellers or buyers, the loss by an economic entity of its dominant position. The change in the prescription can not lead to worsening of the situation of the person who issued such an order.

The decision on prolongation of a notification’s consideration with setting the conditions for further consideration specified in the point 3) is adopted by the antimonopoly body, if a merger or creation of a new business entity will or may result in the restriction of competition, including as a result of emergence or strengthening of a dominant position of the person that is created as a result of such actions.

After fulfillment of the conditions specified in the point 3), the applicant shall submit to the antimonopoly authority the documents confirming their implementation. Within thirty days after receiving the said documents the competition authority decides on approval of the notification or its refusal.

Conditions which the solutions indicated in the points 2) and 3) may contain include:

1) procedure of accessing the production facilities, infrastructure or information of the applicant and other persons involved in the merger, acquisition or creation of a commercial organisation;

2) procedure of granting to other persons the rights on industrial property objects possessed by the applicant and other persons involved in the merger, acquisition or creation of a commercial organisation;

3) requirements for the applicant and other persons participating in the merger, acquisition or creation of a commercial organisation, concerning transfer of the applicant's property, rights and obligations to another person;

4) requirements concerning the composition of the applicant's group of entities, as well as that of other persons involved in the merger, acquisition or establishment of a commercial organisation.

3. Decision-making

The transactions may be assessed as:

1) Horizontal mergers. For this, markets on which economic agents act as competitors are established, and the analysis is carried out to define whether the transaction leads to horizontal mergers (i.e., whether there is the necessary degree of organisational and economic community). In case such a community is established, the competition authority carries out a prospective analysis of the state of competition in the market;

2) Vertical mergers. For this, the markets on which the economic entities involved in the transaction act or potentially may act as sellers or buyers are identified. It also checked whether dominant position of any of the economic entities involved in the transaction exist on any markets, and probability of exclusion of other economic entities as a result of the merger on any market is analyzed;

3) Conglomerate mergers. For this, markets on which the economic entities are in a state of potential competition are identified, and negative effects in case of elimination of potential competition resulting from the merger are determined.

A transaction's impact is assessed based on the Law on Protection of Competition, according to which while considering pre-merger/post-merger notifications and making a decision on approving/refusing the deal, the antimonopoly authority should conduct analysis and assessment of the competitive environment in the relevant product markets.

Analysis and assessment of the competitive environment on commodity markets is carried out in order to define the applicants' dominant position, that of other persons, as well as with the aim of verifying whether the actions appeared in the notification, may cause or lead to restriction of competition, including as a result of emergence or strengthening of a dominant position of the applicant or other persons.

To analyze the state of competition for defining the dominant position of economic entities and identifying other cases of preventing, restricting or eliminating competition, while making decisions in the framework of state control over mergers and acquisitions the document "Procedure for Conducting Analysis of State of Competition on Commodity Market" is used. This document was developed on the basis the Law on Protection of Competition and was subject to examination by the expert group, which includes representatives of the business community. This group was formed by the Ministry of Economic Development of the Russian Federation.

The analysis involves the following steps:

- a) determining the market research time period;
- b) defining the product market's boundaries;
- c) defining the geographic market boundaries;
- d) determining composition of economic entities operating on the market as buyers and sellers;
- e) calculating market volume and shares of economic entities in the market;
- f) determining the level of market concentration;
- g) defining the market's barriers to entry;

- h) defining a dominant position (in appropriate cases) of economic entities;
- i) assessing the state of competition in the market;
- g) preparing the analytical report.

In case if the analysis requires to take into account the conditions, which will take place in the given market in the future (for example, after a merger), a prospective analysis of the state of competition in the commodity market is carried out.

4. FAS Russia's recent experience in considering the transactions

A) prohibitions on transactions:

JSC «Gazprombank»

In 2011, the FAS did not allow to Gazprombank to buy for trust management 50.9% of equity shares of the Moscow United Electric Grid Company (MOESK), as this could have led to restricting competition in the industry.

The legislation in electricity prohibits "combining the activities of production and sale of electric energy with the activities of electricity transmission and its operational management" which provided grounds for the FAS Russia to dismiss the transaction.

It is worth noting that the overall experience of the FAS Russia in the power sector (in particular, concerning the acquisition of energy assets by the Gazprom and Inter RAO companies) often ended with a compromise between the agency and the companies - for example, in the field of electricity generation, when the competition authority issued prescriptions envisaging obligations to provide regular reports to the FAS Russia, and the company took on these obligations.

B) approvals with prescriptions ("conditional clearances"):

As it was previously noted, the aim of the FAS Russia's prescriptions is to eliminate or minimize the mergers' anti-competitive effects. In this regard, the FAS Russia may impose structural and behavioral requirements on companies.

The FAS Russia's experience in establishing **behavioral conditions** for approving notifications on transactions is as follows:

«OSV Chambéry International»

In May 2016, the FAS Russia considered the notification of "OSV Chambéry International" (location: France, main field of activity: production of glass fiber), which is included to the same group with the company «Owens Corning», on acquiring 99% shares of the charter capital of LLC "Alstrom Tver" (location: Russia, main field of activity: production and sale of glass fiber and other non-woven materials).

During consideration of this notification, the FAS Russia determined that the company "Alstrom Tver» produces fiberglass with width of 4 meters, which is the raw material for the production of linoleum of the same width and which can not be replaced by other product for producing the latter good. The discussed merger could lead to the situation where "OSV Chambéry International" took a share of 35%³ on the Russian market of glass fiber, and under certain conditions the company could have restricted competition on the said market. Based on the above, the FAS Russia issued a prescription to the company "OSV Chambéry International" with the requirement to carry out actions for ensuring competition on the Russian market of glass fiber, that is, during three years to inform on a preliminary basis the competition authority about:

- increasing export of glass fiber, if it leads to a reduction in the volume of deliveries on the territory of the Russian Federation by more than 5%;
- increasing prices by more than 15%, with the statement of the reasons for this increase;
- planning to reduce the company's capacities.

In addition, the company was obliged to inform the FAS Russia on the volume of production of glass fiber on the territory of the Russian Federation and its sales, as well as the actual average price per unit of glass fiber (taking into account the time and territorial aspects).

³ According to a regulation of the FAS Russia, the criteria for the recognition of a dominant position are envisaged by the Law on Protection of Competition; in accordance with it, the discussed threshold constitutes a 35% share of the market.

Polar Airlines and Airline Yakutia

In July 2016, the Federal Antimonopoly Service has issued its approval following the notification of the JSC Airline Yakutia to acquire 100% shares of the Polar Airlines company. The FAS Russia analyzed the state of the air travel market in 2015, which demonstrated that the JSC JSC Airline Yakutia and Polar Airlines work on 15 air routes. As a result of the transaction, the joint share of the mentioned economic entities on these destinations would be close to 100%.

As a result of the transaction's consideration, the Federal Antimonopoly Service has cleared the merger with the following conditions for the JSC Airline Yakutia:

- on a preliminary basis, to notify the Federal Antimonopoly Service of the changes of the route network of the Airline Yakutia and Polar Airlines;
- within three years, not less than 30 days before the establishment of the new tariffs, the company had to notify the Federal Antimonopoly Service on the planned tariff changes for passenger transportation on the above-mentioned routes, if the new tariff implied an increase of more than 10%. Provision of financial and economic justifications for the tariff changes was also demanded.

When it comes to the establishment **structural conditions** on companies by the FAS Russia, such decisions are rarely taken in the Russian practice. As an example of the recent relevant can be mentioned the case of a merger of the two largest Russian retail chains (M-Video and Eldorado), who submitted their pre-merger notification to the FAS and received a conditional clearance from the authority. As, according to the FAS Russia's estimations, in some regions the share of the merged company could have exceeded 50%, the authority demanded to close one of the networks' stores in 35 regions, including Moscow and the Moscow region, and to provide this shop sites to the competitors. After receiving the clearance, the companies re-assessed the planned transaction and abandoned their plans of merging.

In conclusion, it is worth noting that the intention of improving the quality of decision-making on mergers and acquisitions by the FAS Russia is stimulated among

others by the FAS Russia's policy on its openness and transparency. All the notifications received by the authority from economic entities, as well as the FAS Russia's decisions on them can be found at a single and open to the general public FAS Russia's base of decisions⁴, the creation of which was envisaged by the Roadmap on Development of Competition and Improvement of Antimonopoly Legislation, approved by the Government of the Russian Federation in 2013.

It worth adding that conditional clearances are favoured by the FAS Russia more than prohibitions due to the fact that the former type of decisions allows to execute post-control, to legally receive and analyze information and to evaluate the long-term deals' effects. The FAS Russia's prescriptions in such cases contain measures aimed at preclusion of limiting competition and thus have an important preventative value.

⁴ <http://solutions.fas.gov.ru/>