

The Russian Federation
Local Nexus and Jurisdictional Thresholds in Merger Control
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Summary

In recent times, 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.

Some deals are subject of the prior-consent of the Russian antimonopoly authority in accordance with 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).

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 of amendments) as well as abolishing notifying merger control (January 30, 2014) the figures fell down considerably. In 2015 FAS considered 1 793 pre-merger notifications and 165 post-merger notifications filed by economic entities. 1 703 pre-merger notifications were granted (noted) (of which 65 – with determinations) and 161 post-merger notifications; 46 pre-merger notifications and 4 post-merger notifications were refused.

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

database on decisions of the FAS Russia, formed to execute the Road Map for developing competition and improving the antimonopoly law that was adopted by No. 1613-r Decree of the Government of the Russian Federation of September 06, 2012

Introduction

In current times the structure of world economy is rapidly changing. International cooperation plays a critical role 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 undertakings and 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, 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.

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.

In accordance with 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 organisations (their group of persons) for the calendar year preceding the merger exceed ten billion Rubles;

- 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.

Merger control provisions are also presented in other laws and regulations of the Russian Federation. For example, in accordance with Chapter 4 of the Civil Code of the Russian Federation the reorganization of the legal entities in the form of the merger, in cases stipulated by the law, 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).

After the adoption of the “forth antimonopoly package” of amendments to the Russian antimonopoly legislation, in order to streamline the process and make information more accessible, petitions and notifications can now be filed electronically. Under the amended procedure information about the filed petitions regarding particular transactions and other actions must be published on FAS official web-site (Russian version: <http://fas.gov.ru/>; English version: <http://en.fas.gov.ru/>).

This novelty enables interested persons to promptly inform the antimonopoly body about planned transactions (actions), and the antimonopoly body - to understand possible consequences of a particular transaction (action) prior to making a decision.

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), in which there is a separate chapter on principles and rules of competition.

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 and regulated by national competition authorities.

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 widely-used way of international cooperating is 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 Russia 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, filled in 2014, 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 the FAS Russia 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, the FAS Russia applied the waiver procedure, and as a result the FAS Russia 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, the FAS Russia 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, the FAS Russia established that the transaction would not restrict competition on the market in question.

Therefore, the FAS Russia granted the notification.

Recently, 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.

Mergers and acquisitions: recent trends

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The FAS Russia maintains a downward trend on the number of considered pre-merger notifications due to abolishing notifying merger control. In 2014, for instance, 1 928 pre-merger notifications and 318 post-merger notifications were considered. In 2013 the FAS Russia and its Regional Offices considered 2258 pre-merger petitions (400 from foreign investors) and 1913 post-merger petitions.

When the forth antimonopoly package came into force the FAS Russia expects even more considerable cut in the number of economic concentration transactions that are subject to FAS Russia’s control, due to eliminating the Register of economic entities with over 35% market share.

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