The Russian Federation
Discussion on « Investigation of consummated and non-notifiable mergers»
February 25, 2014
Working Party №3

1. Are mergers that meet specific size and geographic nexus thresholds subject to mandatory notification provisions in your jurisdiction? If so, is there a mandatory period following the notification during which the parties are prohibited from consummating the merger? (Please note: detailed descriptions of merger notification provisions are not necessary for purposes of this roundtable, which focuses on the situations below).

Transactions with stocks (shares), asset-backed commercial organizations, reorganization, creation of commercial (financial) institutions which are subject to the state control by the competition authority, defined by chapter 7th of the Federal Law of 26.07.2006 № 135-FZ «On Protection of Competition» (hereinafter - the Law on Protection of Competition).

For example, in accordance with the Law on Protection of Competition an acquisition by a person (group of persons) of more than 25, 50, 75% of the voting shares of a Russian joint-stock company is subject to the state control.

With regard to transactions (reorganization) Russian antimonopoly legislation provides the pre-merger or post-merger notifications for the antimonopoly authority consideration. Post-merger notification is served within 45 days from the date of the transaction.

The need for a pre-merger notification is determined based on the value of the assets of the contracting parties (groups of persons), their total revenue from sales of goods, being in the register.

Thus, the petition is filed, if the value of the assets of the contracting parties (groups of persons) exceeds seven billion rubles. When exceeding four hundred million rubles - requires notification of the antimonopoly authority.

In the case that participants of transactions are included in the register of economics entities having a market share of certain goods in the amount of more than 35%, subject to a pre-merger notification of the transaction, regardless of the total value of assets (sales) transaction participants.

Considered a petition the antimonopoly authority takes three main solutions:

1) to grant a petition if a transaction, other action declared in the petition will not lead to a restriction of competition;

2) to dismiss a petition if the transaction, other action declared in the petition will not lead to a restriction of competition (including the result of the dominant position of the applicant);

3) to grant a petition and issue of a determination to carry out actions aimed at ensuring competition.

In reviewing a pre-merger notification, if committed transaction led or may lead to a restriction of competition, including through creation or strengthening of a dominant position of an economic entity, the antimonopoly authority may also issue a determination to carry out actions aimed at ensuring competition.

Terms of determinations can be divided into two main groups - structural and behavioral remedies.

Structural remedies are aimed at achieving a certain level of concentration of the commodity market (e.g. restrictions on certain transactions to acquire the assets of business entities and competitors).

The behavioral, for example, may include remedies on the development and presentation of the antimonopoly authority of trade and marketing policy of the company, implementation of products in accordance with the commercial and marketing policy, etc.

Pre-merger notifications are processed within thirty days from the date of receipt. This period may be extended by no more than two months. Notifications are also considered deadlines for consideration of applications (30 days).

2-3. For a merger that does not meet the notification thresholds or is otherwise exempt from the notification requirement, does your agency have authority under your merger review provisions to review the merger? If so, what remedies are available, and do they differ from remedies available in a notifiable transaction? Does your agency have authority to review such mergers under some other provision of your competition law, and if so, what remedies are available?

If your agency decides to challenge a consummated merger that was not subject to mandatory notification provisions, what remedies can your agency seek? Have you had success with remedies in these situations? Please provide examples.

As mentioned, the pre-merger notifications are submitted to the antimonopoly authority, if the value of the assets of the parties (groups of persons) exceeds seven billion rubles. When exceeding four hundred million rubles - requires notification of the antimonopoly authority.

Conduct transactions by person's whose total value of the assets do not exceed four hundred million rubles - is beyond the scope of antimonopoly control.

4. Are there differences in practice or procedure for the investigation or challenge of a consummated or non-notifiable transaction?

The Law on Protection of Competition does not provide for any special investigation procedures (excitation affairs, etc.) when there are signs of transactions made in violation of the regulations of pre-merger and post-merger notifications.

Proceedings of violation of the antimonopoly legislation are initiated when conducting investigations in relation to the agreements of economic entities (cartels), abuse of dominant position, etc.

In the event that the antimonopoly authority showed signs of the transaction without any pre-merger and post-merger notifications, the antimonopoly authority performs corresponding verification (requests necessary documents of economic entities, the registrar leading accounting of rights to securities, etc.) based the

results of which a decision on the need to appeal to the court for invalidation of the transaction (if such a transaction has resulted or may result in a restriction of competition).

Consideration of cases by courts on the recognition of economic entities committed transactions void according to the procedure established by the procedural law of the Russian Federation.

5-6. If the parties fail to notify a merger that was subject to mandatory notification provisions, are they subject to penalties? In such a case, does your agency retain the power to review the merger under merger review or other competition law provisions? Is there a time limit on when the agency can bring an enforcement action?

If an anticompetitive merger should have been notified, but was not, and it has already been consummated, what remedies can your agency seek? Have you had success with remedies in these situations? Please provide examples.

If a transaction is made with violation of pre-merger or post-merger notification regulations, the person who commits the transaction is subject to administrative liability.

Administrative fine for failure of the pre-merger notification for legal entities is from three hundred thousand to five hundred thousand rubles, for failure of the post-merger notification - up to two hundred fifty thousand.

In addition, such transactions made without any pre-merger notifications or with violation of post-merger notification regulations may be judicially invalidated on the antimonopoly authority's claim if such transactions have led or may lead to a restriction of competition, including as a result of the creation or strengthening dominant position.

The periods of limitation for bringing a person to administrative responsibility and invalidation of transactions on antimonopoly authority's claim is one year from the date of the violation.

As an example of legal persons who were brought to administrative responsibility in 2013 include the following:

1) LLC «TV3 channel» - a fine of 300,000 rubles for failure of the pre-merger notification;

2) LLC «Quadra» (generating company) - a fine of 300,000 rubles for failure of the pre-merger notification;

3) CJSC Bank «Novikombank» - a fine of 300,000 rubles for failure of the pre-merger notification;

4) OJSC «Urals Stampings» (manufacturer of pressed products of special steels and alloys) - a fine of 300,000 rubles for failure of the pre-merger notification;

5) OJSC «Nizhnekamskneftekhim» (petrochemical company) - a fine of 150,000 rubles for failure of the post-merger notification;

6) OJSC «Bank of Moscow» a fine of 150,000 rubles for failure of the post-merger notification, etc.

As an example, the recognition of arbitration courts invalidate transactions antimonopoly authority's claim can result in the acquisition of «Tatspirtprom» (production and sale of alcoholic beverages) share of 60% of the statutory capital of LLC «Alkotorg» (implementation and delivery of alcoholic beverages).

The purchaser («Tatspirtprom» which consist in the register of economic entities) having a market share of certain goods in the amount of more than 35% in 2010 has committed two transactions without the pre-merger notifications of the antimonopoly authority. These contracts for the sale of shares of LLC «Alkotorg» were considered invalid.

7. If your agency decides after investigation not to challenge a merger, or has approved a merger with remedies, but later concludes that the merger in fact was anticompetitive, can the agency still challenge the merger, either (1) under your merger review law, either by reopening the original investigation or by starting a new one, or (2) under some other provision of your competition laws? What remedies are available then? Is there a time limit on when such a post-merger review can take place? Please provide examples.

As it was mentioned above, if the antimonopoly authority showed signs of the transaction without any pre-merger and post-merger notifications corresponding verification will be performed (requests necessary documents of economic entities, the registrar leading accounting of rights to securities, etc.) on the basis of which will be made a decision about the need of an appeal to the court with the claim about recognition of the transaction invalid.

In the case considered the pre-merger or post-merger notification antimonopoly authority makes a decision on approval of the transaction (taking note of the notification) with determination to carry out actions aimed at ensuring competition, the Law on Protection of Competition does not provide for the possibility of an antimonopoly authority additional (re) review and challenge the transaction in respect of which such decision and determination were issued.

However, at the request of the person to whom a determination is issued, as well as on their own initiative the antimonopoly authority may reconsider the order of the determination's execution in connection with the emergence of the essential facts which occurred after it was imposed. Such circumstances include a significant change in product or geographic boundaries of the commodity market of buyers or sellers, the loss of the economic entity a dominant position. In this case, change orders can not worsen the situation of the person to whom it was issued.

8. Changes in the mode control to mergers.

Is necessary to note that a law was enacted eliminating the need to provide notification to the antimonopoly authority on transactions (operations) of economic concentration (the acquisition of shares, property, merger, acquisition of commercial organizations).

This law is designed to improve antimonopoly regulation and reduce the administrative burden on business participants.

Adoption of the law will significantly reduce the administrative burden on medium-sized businesses and will allow competition authorities to focus on large transactions (actions) have a significant impact on the state of competition that will enhance the effectiveness of antimonopoly regulation in the Russian Federation.