

The Russian Federation
Roundtable on «Remedies in cross-border merger cases»
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Working Party 3 on cooperation and enforcement
OECD Competition Committee

Chapter 7 of the Federal Law of 26.07.2006 No. 135-FZ "On Protection of Competition" (hereinafter – Law on protection of competition) is devoted to the state antimonopoly control over economic concentration transactions.

Under this Chapter, subject to state control are transactions, other actions with assets of Russian financial organizations and fixed production-related assets and (or) intangible assets located in the Russian Federation, or with voting stocks (shares), the rights in regard to Russian commercial and non-commercial organizations, as well as foreign persons and (or) organizations supplying goods to the Russian Federation for over one billion Rubles within a year proceeding the date of the transaction, another action subject to state control.

Foreign persons that don't own the Russian assets and don't supply goods to the territory of the Russian Federation (or supply such goods in the sum of less than one billion rubles) don't come within the Law on protection of competition even in case transactions or actions in relation to them are made by Russian legal persons or individuals.

Criteria for consideration of transactions (actions) as jural facts being subject to the state control are a size of assets of the persons participating in the transaction (action) (should exceed 7 bln. rubles), or a size of their aggregate revenues (should exceed 10 bln. rubles), as well as participation in the transaction (action) of the subject included in the Register of economic entities (except financial organizations) that has over thirty five percent share of the particular goods market.

Thus, thresholds specified by the antimonopoly legislation of the Russian Federation in the form of sizes of assets and revenues are determined totally by groups of persons, economic entities that are participants of the relevant actions and (or) transactions of economic concentration. In this regard, it should be noted that a group of foreign economic entities may include Russian legal persons with an aggregate value of the assets or

revenues reaching the thresholds specified by the Law on Protection of Competition, which will lead to necessity to get a prior approval of the relevant actions or transactions by the antimonopoly authority as these actions or transactions may affect competition in the relevant market.

State control of economic concentration is mainly exercised in the form of consideration of pre-merger notifications submitted by interested persons for getting a preliminary consent of the antimonopoly body for transactions, other actions that are subject to state control.

In considering a pre-merger notification the competition authority has the right to extend the term of its consideration if there is some need in additional information for the competition authority to make a final decision upon results of considering the application in case the competition authority establishes that the transaction declared in the application, other action may lead to restriction of competition, including as a result of emerging or strengthening of a dominant position of the person (a group of persons).

These powers allow the antimonopoly authority to carry out an analysis of statement of competition in the relevant commodity market where a transaction takes place, including a cross-border transaction. Regarding cross-border transactions, to make a decision on admissibility of approval of the transaction being made by a foreign person or in relation to a foreign person, there may be some need in interaction with antimonopoly authorities of other states.

Possibility and a procedure of interaction of the antimonopoly authorities of member-states of the Customs Union and Common Economic Space, including exchange of information among them, implementation of proceedings upon instruction are specified in special provisions of Articles 24, 25 of the Agreement on the Common Principles and Rules of Competition.

At the same time, we believe that interaction of antimonopoly authorities of different countries can be built on the basis of international treaties, as well as on the basis of the principle of reciprocity and achievement of common goals on protection of competition.

In 2009 the FAS Russia interacted with the European Commission on the merits of consideration of a transaction on acquisition of the Sun Microsystems Company by Oracle Corporation. Pre-merger notifications on conducting that transaction were submitted for consideration to competitive authorities of many countries in the world, including Russia, as well as the European Commission. Considering world experience in the field of cooperation of foreign competition authorities in consideration of transactions which may affect the competition in the markets of several countries, the FAS Russia organized the specified consultations.

According to rules of the European Commission, a preliminary condition for carrying out similar consultations is a receipt from the company that is a subject of consultation of the official letter of refusal from confidentiality (a waiver) with which the company confirms its consent to carry out consultations between the European Commission and competition authorities of other countries in regards to the transaction with possibility of exchange of confidential information presented by this company to the relevant competition authorities. Within consultations conducted between the FAS Russia and the European Commission, the European Commission carried out the specified procedure of receiving a waiver.

It should be noted that the FAS Russia for the first time became a participant of process of use of the specified mechanism that has to become the most acceptable form of the settlement of question arising when it is impossible to exchange confidential information according to the national legislation of the parties in investigation of specific cases on violation of the competition legislation and control over transactions with participation of economic entities of Russia and EU.

As for the antimonopoly control over economic concentration transactions with participation of cross-border companies, as a whole it is possible to give some examples of enforcement practice.

Example: dairy products market

Recently the most significant processes of economic concentration took place in the dairy market. As a result of merge of assets of the Danon Company and YuNIMILK JSC,

as well as acquisition by Pepsi-Cola Company the control over Wimm-Bill-Dann Foods, JSC two groups of companies were formed in the Russian dairy products market, with market power considerably exceeding the market power of other entities of the market.

High market potential of these persons, being characterized with existence of uniform infrastructure and possibility of maneuver (capital, capacities, raw materials and production streams) promotes reduction of specific expenses in production and leads to increase in sales, volumes and profit rates.

Vertical integration of enterprises entering into the specified group has competitive advantages on enterprises of specialized type as it allows increasing in efficiency of functioning of these enterprises and their survival in competitive activity. Balance of sales in maintenance of line of goods is also an advantage.

A distinctive feature in the dairy products market effecting conditions of the goods circulation and statement of the competition environment in the market of production and sale of milk and dairy products is its seasonality. Price volatility is generally caused by seasonality of supply and demand on dairy raw materials.

However, a high market potential allows the joint company ‘Danon-Yunimilk’ and ‘Wimm-Bill-Dann, JSC’ to influence the general conditions of the circulation of goods in the commodity market by reducing or raising the prices of purchase of crude milk for agricultural producers regardless of a season.

Within consideration of pre-merger notifications, a number of possible negative consequences for the market was revealed, in particular:

- *reduction in economic entities which weren't entered into one group of persons carrying out activity in the markets of milk and dairy production;*
- *emergence and strengthening of a dominant position of the joint groups of persons generally in the regional markets, probability of establishment of monopoly low prices for purchased crude milk and monopoly high prices for sold dairy products, creation of discriminatory conditions for economic entities;*
- *increasing possibility of conclusion of anti-competitive agreements between economic entities or concerted practices by economic entities in the commodity market;*

- unreasonable reduction or cessation of production of dairy products, including withdrawal cheap dairy products intended for low-income groups from the dairy product line to be sold.

Considering these possible negative consequences for the market, upon results of consideration of pre-merger notifications some instructions on actions directed at ensuring the competition were issued. Those instructions, in particular, provided control over pricing on milk and dairy products, ensuring of non-discriminatory access of suppliers of crude milk to processing services.

Example: oil market

At the end of 2012 by results of consideration of a pre-merger notification “Rosneft, JSC” on acquisition of a group of persons “TNK-BP Holding, JSC”, the Federal Antimonopoly Service made a decision to issue an instruction to “Rosneft, JSC” and persons entering into its group of persons on implementation of action directed at ensuring the competition:

- upon a receipt of offers from economic entities that don't enter into a group of persons of “Rosneft, JSC” and “TNK-BP Holding, JSC”, possibility of conclusion by them of direct contracts on wholesale of automobile gasolines and diesel fuel on non-discriminatory conditions in comparison with the economic entities entering into a group of persons of Rosneft, JSC and TNK-BP Holding, JSC should be provided.

- enterprises of oil products supply that enter into a group of persons of “Rosneft, JSC” and “TNK-BP Holding, JSC” in case of presence of offers from the third parties (owners of oil products) or persons authorized by them, and if there is a technical possibility should not allow unreasonable refusal of conclusion of contracts for rendering services of oil products storage, should sign contracts for rendering services of oil products storage on conditions not allowing the unequal position of these economic entities in comparison with organizations belonging to a group of persons of “Rosneft, JSC” and “TNK-BP Holding, JSC” in regions where enterprises of oil products supply

entering into a group of persons of “Rosneft, JSC” and “TNK-BP Holding, JSC” hold a dominant position in the markets of oil products storage.

- to provide sale at a commodity exchange at the volume not less than 10% of monthly output for domestic market of the Russian Federation of automobile gasoline, diesel fuel, fuel for jet engines and black oil of a group of persons of “Rosneft, JSC” taking into account the “Criteria¹ of a regularity and uniformity of sale of goods at the exchange for the separate commodity markets in which oil and (or) the oil products circulate”.

- Within three months from the date the transaction comes into effect to submit for getting the FAS Russia’s approval the "Procedure of pricing and the general principles of sale of automobile gasolines and diesel fuel in the wholesale markets in the territory of the Russian Federation" of “Rosneft, JSC”’s groups of persons (further – the Procedure), based on the following principles:

- primary satisfaction in oil products needs in domestic market of the Russian Federation, fairness and equal conditions of transactions for all contractors;

- a pricing procedure that is uniform for all contractors;

- publicity and availability of information on a pricing procedure;

- inadmissibility of economically and (or) technologically unreasonable refusals to conclude contracts with buyers.

- before the Procedure is approved, an application of the “Procedure of pricing and the general principles of sale of automobile gasolines in the wholesale markets in the territory of the Russian Federation” by TNK-BP Holding, JSC, approved by “TNK-BP Holding, JSC” of 07.06.2012, and the "Procedure of pricing and the general principles of sale of diesel fuel in the wholesale markets in the territory of the Russian Federation", approved by “TNK-BP Holding, JSC” should be provided (should not be interfered).

- Within 2 months from the date of the transaction of Rosneft, JSC it is necessary to contact the FAS Russia for the purpose to obtain information regarding regions of the Russian Federation in which by results of the transactions declared in the pre-merger notification the aggregate share of sales volumes of automobile gasolines and diesel fuel

¹ approved by the Resolution of the Government of the Russian Federation No. 1035 of 11.10.2012.

of a group of persons of Rosneft, JSC and a group of persons of TNK-BP Holding, JSC exceeded 50%.

Within one year from the date of obtaining the above information, auctions on sale of gas stations for the purpose of reduction in an aggregate share by sales volumes of automobile gasolines and diesel fuel to the level which doesn't exceed 50% should be held in the specified regions, thus, preservation of an aggregate share of sales volumes of automobile gasolines and diesel fuel of a group of persons of Rosneft, JSC and a group of persons of TNK-BP Holding, JSC and the size of Rosneft JSC's share which existed at the moment of the transactions declared in the pre-merger notification, irrespective of its size, is allowed.

-Not later than 6 months from the date of the transaction of "NK Rosneft, JSC", a methodology that defines the order of conduct of organizations entering in a group of persons of "NK Rosneft, JSC" and engaged in sales of petroleum products, separate accounting of costs and revenues by type of sales (wholesale and retail), and the main types of oil products (motor gasoline, diesel fuel etc.) should be developed and submitted to the FAS Russia for approval.

Not later than 6 months from the date of approval by the FAS Russia of procedures specified in the order, the implementation and use of the procedures should be ensured by economic entities entering in a group of persons of "NK" Rosneft, JSC".

- Ensure compliance with previously issued by the FAS Russia's orders in relation to "TNK-BP Holding, OJSC" and economic entities entering in its group of persons, including after implementation of activities on re-branding of "TNK-BP Holding, JSC" economic entities entering in its group of persons.

In conclusion it is necessary to pay special attention to implementation by foreign investors or a group of persons of investments in the form of acquisition of shares (stocks of shares) making authorized capitals of economic entities having strategic value for ensuring national defense and state security as well as to making other transactions as a result of which a control by foreign investors or a group of persons over such economic societies is established is subject to legal regulation according to the Federal Law of

29.04.2008 No. 57-FZ "Procedures for Foreign Investments in the Business Entities of Strategic Importance for Russian National Defense and State Security".