MERGER CONTROL: GETTING THE DEAL CLEARED IN RUSSIA

Russia's merger control regime does not differ substantially from its analogues in Western Europe and North America. Overall it is investor-friendly, and the risk of not obtaining clearance is rarely cited as the reason for not pursuing a transaction. The Russian merger control regime does, however, have its own specifics, awareness of which can be essential to get a transaction cleared smoothly and on time in Russia.

The purpose of this note is to provide an overview of the Russian merger control framework and the scope of its application, including events that trigger a filing obligation, the statutory notification thresholds and certain aspects of the treatment of joint ventures, intra-group restructurings and foreign investment restrictions.

Key issues

- Triggering events and procedure
- Treatment of joint ventures
- Local nexus for foreign-to-foreign transactions
- Foreign investment regime
- Substantive test and remedy practice
- Confidentiality aspects

1. LEGAL FRAMEWORK

Russia's merger control regime is primarily regulated by Federal Law No. 135-FZ On Protection of Competition (the "Competition Law"), which entered into force on 26 October 2006, replacing two earlier laws regulating competition in commodity and financial markets which dated to 1991 and 1999, respectively.

In 2007 and 2008, legislative amendments on turnover-pegged fines and leniency were introduced to the Russian Administrative Offences Code and Russia's Federal Antimonopoly Service (the "FAS") adopted a revised merger notification regulation.

In July 2009, a raft of legislative amendments known as the "Second Antimonopoly Package" was passed, resulting in extensive changes to the Competition Law, the Administrative Offences Code and other legislative acts. In the context of merger control, the Second Antimonopoly Package increased notification thresholds, introduced exemptions for certain types of intra-group transactions, and broadened the scope of merger control to encompass foreign-to-foreign transactions.

In January 2012, the "Third Antimonopoly Package" entered into force. This reform introduced a new local presence criterion applicable to foreign-to-foreign transactions, further increased the notification thresholds, changed

the method for calculating the target-related notification threshold and provided the FAS with additional powers to clear a transaction subject to the parties having fulfilled conditions precedent.

In January 2014, another set of amendments to the Competition Law entered into force, the most important of which was abolition of the post-closing notification requirement in almost all cases (except those described in section 2.2 below). This step was taken in order to minimize the administrative burden on the FAS, enabling it to focus on major transactions that require prior clearance.

In January 2016, the "Fourth Antimonopoly Package" introduced further amendments to the Competition Law, including (i) the introduction of a pre-completion notification regime in relation to joint venture agreements between competitors (upon certain financial thresholds being reached); and (ii) abolition of the Russian register of undertakings having a market share of more than 35% in the relevant market.

In 2018, the FAS put forward another bill, the "Fifth Antimonopoly Package". However, it is unclear whether it will be passed and, if it is passed, whether it will affect the current merger control regime or not. The latest draft of the bill envisages, among other things, changes to the review period for foreign-to-foreign transactions and establishment of compulsory licensing as a merger remedy, and it also clarifies the status of trustees / independent experts authorized by the FAS to monitor the implementation of merger remedies.

In contrast to the frequent – indeed almost annual – amendment of the Competition Law, little progress has been made in adopting secondary legislation, publishing merger guidelines and providing official guidance as to how the FAS applies the merger control regime in practice. It is widely felt that the FAS could have done more to clarify the scope and meaning of the merger control provisions. That said, significant improvements have been made by the FAS with regard to obtaining merger control clearance. Unlike just a few years ago, the procedures have generally become more predictable and transparent.

2. REGULATORY FRAMEWORK

2.1 Transactions Subject to Clearance

The merger control rules include a set of notification requirements that distinguish and apply to three broader categories of transactions:

- acquisition by way of acquiring shares, assets or other rights of control in relation to a Russian commercial organisation or financial institution, or to a non-Russian target entity that satisfies the local presence test (see sections 3.1 and 3.2 below);
- establishment, merger or accession of Russian companies under the Russian regime of corporate reorganisation (see section 3.3 below); and
- execution of a joint venture agreement between competitors (see section 3.4 below).

Cross-border M&A transactions typically fall within the first category of transactions. They tend to involve direct acquisition of shares in a Russian target or the acquisition of a non-Russian target that either controls a Russian legal entity or has substantial sales in Russia.

The practical significance of the second category is very limited.

The third category was introduced in January 2016 (under the Fourth Antimonopoly Package). To date it has not been broadly applied in practice, but nowadays we see its increasing importance.

Notification thresholds (upon exceeding which merger control clearance is required) are pegged to the assets and turnover of the parties to the transaction. All Russian thresholds are very low compared to Western merger control regimes (see section 3 below), which means that almost every cross-border acquisition requires pre-closing clearance.

As a general rule, the merger clearance regime is suspensory in nature, i.e., the transaction must not be consummated until clearance has been granted (save for certain intra-group transactions that require post-closing notification, as described in section 2.2). That said, in some cases it may be advisable to implement a prior carve-out of companies that are subject to merger clearance in Russia and transfer them at a later date (after merger clearance has been obtained).

2.2 Treatment of Intra-group Transactions

It is a peculiarity of the Russian merger control regime that it generally extends to transactions between entities that belong to the same group. However there are certain exceptions to this. Some intra-group transactions do not have to be cleared at all; for others, it is sufficient to file a post-closing notice with the FAS (instead of obtaining pre-closing clearance). These exceptions apply in the following cases:

- Clearance is not required for transactions between a controlling parent entity and its subsidiary. This also applies in cases where an entity is vertically 'shifted' along a chain of parent or subsidiary entities, subject to the requirement, however, that the entities involved are connected through shareholdings of more than 50% at each level. The statutory wording of this exception is narrow, but it has been applied by the FAS quite broadly. In particular, it is generally accepted by the FAS that this exception also applies to the transfer of sister companies within the same group, provided that the parties to the relevant transaction are indirectly connected through shareholdings of more than 50%.
- In practice, this exception has proven to be an effective tool for pre-sale restructurings and carve-outs, enabling foreign-to-foreign transactions to be implemented more expeditiously.
- A post-closing notice (to be filed within 45 days after consummation) may be required for intra-group transactions that do not fall within the scope of the first exception above if the group publicly discloses its structure in compliance with the below rules:
  - a list of all entities comprising the group is submitted to the FAS at least one month before the relevant transaction. This list is then published by the FAS on its official website; and
  - as of the date of consummation of the relevant transaction, the list must be correct and up to date, i.e., without any changes having been made to the group (including the companies' addresses and CEOs).

Generally, this pre-closing disclosure procedure can significantly ease and accelerate the implementation of transactions. In practice, however, few foreign groups are able to avail themselves of the procedure due to

the complex and broad rules defining a group and the FAS's strict approach to any minor changes within a group.

2.3 Treatment of Joint Ventures

General treatment of joint ventures

The establishment of a joint venture often involves acquisition of assets, shares or rights by the joint venture entity from its founders and/or third parties. As a consequence, the general merger control rules applicable to the acquisition of shares / assets / rights and to the establishment / merger of entities (see sections 3.1-3.3 below) will apply. The practical implication of this is that the establishment of a joint venture may require either or both (i) clearance of the joint venture agreement itself, and/or (ii) general merger clearance. In other words, the creation of a joint venture is viewed as an acquisition of shares, assets or rights by the newly created joint venture entity from its founders. Consequently, joint ventures do not normally require clearance under the general rules if (i) no legal entity is formed, or (ii) the new entity is funded solely by cash contributions.

Joint ventures between competitors

With effect from January 2016, a pre-completion notification regime applicable to joint venture agreements between competitors was introduced to the Competition Law. Notably, the FAS expressed the opinion that clearance of a notifiable joint venture agreement should be obtained prior to the signing of the agreement rather than prior to its implementation.

The Russian regime has no concept of 'full-function' joint ventures, nor does it distinguish between cooperative and concentrative joint ventures. Instead, pre-completion clearance applies to joint venture agreements that are related to Russia and entered into between competitors, subject to certain thresholds being met (see section 3.4 below).

- According to the FAS guidelines, an agreement may be qualified as a joint venture agreement if it provides that the parties (i) combine their resources or make mutual investments aimed at achieving the joint venture's goals[1], and (ii) jointly bear the risks associated with the joint venture's business. Therefore, potentially any agreement providing for cooperation between the parties in order to conduct business in Russia may be subject to clearance, including cooperation agreements and shareholders agreements. That said, shareholders agreements that regulate purely corporate matters are unlikely to be subject to clearance.[2]

  It should also be noted that joint venture agreements are subject to pre-completion notification irrespective of whether the entity in question is a full-function joint venture or not.

- The law contains no clear criteria enabling it to be determined whether a joint venture agreement is Russia-related or not. According to the FAS's clarifications, a joint venture agreement should be deemed to be related to Russia if any one of the below conditions is met:

  – the JV entity is / will be registered in Russia; or

[1] Mutual investments may be made in monetary form, in the form of securities or other assets invested in the joint venture, or in the form of production facilities owned by one of the parties or by both parties jointly.
[2] As follows from the practice, a shareholders agreement may be deemed a notifiable joint venture agreement under Russian law if it in any way relates to the parties' market activities, e.g., if it contains a non-compete clause.

- the JV entity has / will have a Russian subsidiary; or
- the JV entity is / will be established to conduct business in Russia (e.g., business involving direct supplies to Russia).

The above list is not meant to be exhaustive. However, it seems to cover the vast majority of cases when a joint venture agreement may be subject to prior clearance.

- The Competition Law does not provide a specific definition of 'competitors', e.g., it is silent as to whether joint ventures between potential (not de facto) competitors are subject to merger control clearance. The FAS, however, tends to interpret the relevant provisions of the Competition Law quite broadly. As follows from the FAS's clarifications on the Competition Law, joint ventures between potential competitors do require merger clearance. Hence the execution of a joint venture agreement between parties that have not been active in Russia prior to establishment of the joint venture might also be deemed to require prior clearance. It is therefore advisable to assume that the conclusion of any Russia-related joint venture agreement must be notified, including joint ventures that involve a new market entry.

  That said, there have been cases where the FAS has ruled that the establishment of a joint venture as an alliance between companies that are not direct competitors (i.e., that do not act on the same markets but on adjacent markets) is not subject to clearance. However, to date there have been very few such cases.

The new rules do not require that parties clear joint ventures established before 2016, i.e., joint ventures existing at the date that the new rules came into force. However, the execution of supplemental agreements or other documents may require prior clearance if such agreements / documents envisage significant amendments to the respective existing joint venture agreement, such as (i) substantial changes to the business of the joint venture, or (ii) introduction of a new non-compete clause or extension of the effective term of an existing non-compete clause, or (iii) inclusion of the territory of the Russian Federation into the scope of the agreement, or (iv) entrance of a new party to the joint venture.

Voluntary clearance of joint venture arrangements

Last but not least, joint venture agreements, shareholders agreements and other agreements concerning the creation of joint ventures which could potentially restrict competition in Russia may be voluntarily submitted to the FAS prior to their implementation in order to obtain clearance or an individual exemption. If the conclusion of a joint venture agreement does not trigger mandatory clearance (e.g., the financial thresholds are not met), the parties may still opt to follow the voluntary clearance procedure in order to exclude the antitrust risks associated with various restrictive arrangements that are often contained in joint venture agreements (e.g., non-compete clauses). The applicable procedure is comparable to the former "Form AB procedure" before the European Commission.

2.4 Treatment of Foreign-to-Foreign Transactions

Russian competition law follows the 'effects doctrine', i.e., it applies to foreign-to-foreign transactions / activities of foreign entities if such transactions / activities may potentially affect competition on the Russian market.

At present, foreign-to-foreign transactions fall within the Russian merger control regime where the target group includes (i) Russian entities, or

Strategic Investments Law:
5 things to remember

- Special notification rules and clearance procedures apply to so-called 'strategic' sectors of the Russian economy (the military sector, mass media, geological exploration, etc.). The list of "strategic activities" is provided by law and currently includes 48 types of activities.
- Specific rules and restrictions apply to foreign public investors.
- Merger control review is suspended until strategic clearance is granted; if strategic clearance is denied, the same automatically applies to the merger control review.
- Strategic investments notification's review may take more than a year if there are political dimensions to the transaction.
- Transactions consummated in breach of the strategic investment regime are void, and the investor can be deprived of its voting rights.

(ii) entities directly or indirectly controlling Russian entities, or (iii) entities owning substantial assets located in Russia, or (iv) entities having turnover exceeding RUB 1 billion (approximately EUR 13 million[3]) from operations in Russia during the year preceding the transaction.

There is no statutory guidance as to the calculation of the threshold referred to in item (iv) above. Traditionally, the common understanding has been that the threshold should be assessed for each non-Russian company individually.

However, according to unofficial clarifications of the FAS published in August 2016, the threshold is to be calculated on an aggregated basis, i.e., for all non-Russian companies within the target group.

The Competition Law does not specifically regulate foreign-to-foreign transactions; the applicable financial thresholds, procedure and timing are the same as for domestic transactions.

3. NOTIFICATION REQUIREMENTS

Within the framework described above, the Competition Law sets out the following notification requirements for specific types of transactions:

3.1 Acquisition of Shares, Controlling Rights and Assets

Transactions Subject to Merger Control

The following types of acquisitions are subject to merger control by the FAS. Special rules exist for acquisitions involving financial institutions (see section 3.2 below).

Acquisition of control over a Russian company

(a) Direct acquisition of shares in a Russian company. Clearance is required once any of the following levels of ownership is exceeded: 25%, 50% and 75% of voting shares in a Russian joint-stock company or 1/3, 50% and 2/3 of voting shares in a Russian limited liability company.

The acquisition of shares by founders in the course of establishing a company is not subject to merger control.

(b) Acquisition of rights enabling the terms on which a Russian company conducts its business to be determined[4] and/or enabling the functions of managing company of a Russian company to be carried out.

Acquisition of control over a foreign company having significant turnover in Russia (see section 2.4 above)

(c) Acquisition of more than 50% of voting shares in the foreign company.

(d) Acquisition of rights enabling the terms on which the foreign company conducts its business to be determined or enabling the functions of managing company to be carried out.

[3] Figures expressed in EUR have been converted from RUB at a convenience exchange rate of EUR 1.00 = RUB 75.00. Please bear in mind foreign exchange volatility. For each particular assessment the figures should be recalculated based on the then current official exchange rate of the Central Bank of Russia, which is available on its official website http://www.cbr.ru/eng/currency_base/daily/.

[4] The acquisition of control over a Russian company's foreign parent company generally falls within this category.

Acquisition of assets located in Russia

(e) Acquisition of production and/or intangible assets located in Russia, where the book value of the assets being transferred exceeds 20% of the book value of the transferor's total production and intangible assets.

Such acquisitions are also subject to merger control review if implemented through several interrelated transactions. There is a statutory exemption from this rule for transfers of land plots and real estate assets that are not used for industrial purposes.

Thresholds

The acquisitions referred to above are subject to pre-completion notification, and their performance must be suspended until clearance by the FAS if:

- the combined book value of the assets of the acquiring group and the target group (or of the group disposing of assets, as may be applicable) exceeds RUB 7 billion (approximately EUR 93 million) and concurrently the book value of the assets of the target group exceeds RUB 400 million (approximately EUR 5 million); or
- the combined turnover of the acquiring group and the target group (the group disposing of assets) exceeds RUB 10 billion (approximately EUR 130 million) and concurrently the book value of the assets of the target group exceeds RUB 400 million (approximately EUR 5 million).

3.2 Acquisitions Involving Financial Institutions

With respect to acquisitions relating to financial institutions, the notification requirements are almost identical to the requirements applicable to commercial organisations, described in subsections 3.1(a), 3.1(b) and 3.1(e) above, save for certain specific financial thresholds that are set by the federal government. These thresholds are subject to revision from time to time.

- The thresholds applicable to the book value of a financial institution's assets are currently set at:
  - RUB 33 billion (approximately EUR 410 million) for credit institutions;
  - RUB 3 billion (approximately EUR 40 million) for leasing companies and microfinance institutions;
  - RUB 2 billion (approximately EUR 27 million) for private pension funds;
  - RUB 1 billion (approximately EUR 13 million) for stock exchanges and currency exchanges;
  - RUB 500 million (approximately EUR 7 million) for mutual insurance companies and consumer credit cooperatives;
  - RUB 200 million (approximately EUR 3 million) for insurance companies (other than medical insurance companies); insurance brokers; professional securities market participants; clearing institutions; pawnbrokers; management companies of investment funds, unit investment funds or private pension funds; and specialised depositaries of investment funds, unit investment funds and private pension funds;
  - RUB 100 million (approximately EUR 1.5 million) for medical insurance companies.

- The threshold applicable to transfers of assets is currently 10% of the book value of the total production and intangible assets of the transferor.

3.3 Local Mergers

Pre-completion notification and suspension of the establishment, merger or accession of companies pending clearance by the FAS is required where such establishment, merger or accession is consummated under the Russian regime of corporate reorganisation (i.e. at the local level) subject to the following criteria:

- merger (accession) of Russian companies where the aggregate book value of the assets of the groups of the companies involved in the merger (accession) exceeds RUB 7 billion (approximately EUR 93 million), or their aggregate turnover exceeds RUB 10 billion (approximately EUR 130 million);
- merger (accession) involving Russian financial institutions, where the aggregate book value of the assets of the financial institutions involved in the merger (accession) exceeds the applicable threshold set by the federal government (see section 3.2 above);
- establishment of a company, where the following criteria are met:
  - the company's charter capital is paid with shares / assets of another company, and the company being established acquires shares / rights / assets with respect to that other company as described in section 3.1 above,

  and

  - the aggregate book value of the assets of the groups of the founders and of the group(s) of the entities whose shares / assets are acquired by the company being established or are contributed to its charter capital exceeds RUB 7 billion (approximately EUR 93 million),

    or

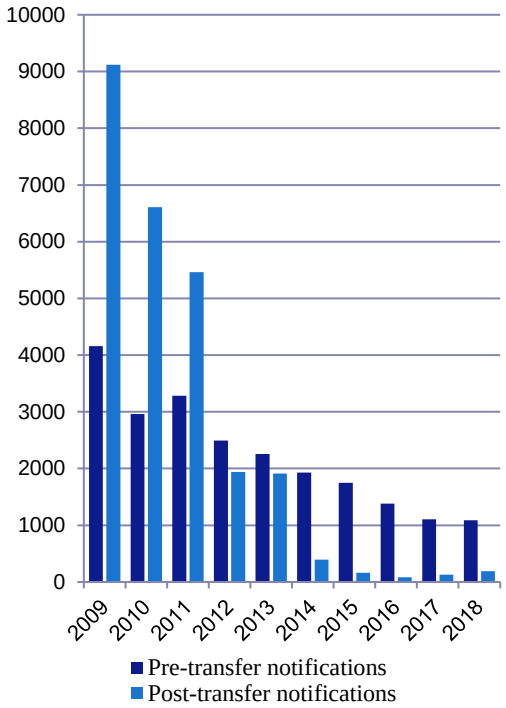
    the aggregate turnover of all these entities exceeds RUB 10 billion (approximately EUR 130 million);
- establishment of a company, where the following criteria are met:
  - the company's charter capital is paid with shares / assets of a financial institution, and the company being established acquires shares / rights / assets with respect to that financial institution as described in section 3.2 above,

  and

  - the book value of the assets of the financial institution whose shares / assets are acquired by the company being established or are contributed to its charter capital exceeds the applicable threshold set by the federal government as described in section 3.2 above;
- merger of a company with a financial institution, where the book value of the financial institution's assets exceeds the applicable threshold set by the federal government as described in section 3.2 above.

Statistics

Due to the low asset-related thresholds, the FAS used to struggle with an extensive workload of notifications. For example, in 2009, 4,160 pre-completion notifications and 9,118 post-closing notices were filed with the FAS. Following two increases of the notification thresholds (in 2009 and 2011) there was considerable progress reducing the sheer number of transactions subject to merger review. The thresholds were increased again in 2016. Consequently, the number of pre-completion notifications reviewed by the FAS has been steadily decreasing. In 2018, 1,086 pre-completion notifications were considered by the FAS, or approximately 74% fewer than in 2009.



3.4 Thresholds for Joint Ventures

As mentioned above execution of a Russia-related joint venture agreement between competitors is subject to pre-completion notification and suspension pending clearance by the FAS. The applicable thresholds are as follows:

- the aggregate book value of the assets of the parties to the joint venture agreement and their groups exceeds RUB 7 billion (approximately EUR 93 million);
- the aggregate turnover of the parties to the joint venture agreement and their groups exceeds RUB 10 billion (approximately EUR 130 million) during the last calendar year.

3.5 Calculation of Assets / Turnover

Both turnover and assets are calculated on a worldwide basis and reflect the aggregate figure for all markets (whether related to the transaction or not). As a general rule, turnover is calculated for the most recent financial period prior to the date of filing. The value of assets is calculated based on the latest available balance sheets (not necessarily audited) and should include both tangible and intangible assets located in Russia and in foreign jurisdictions.

Most of the thresholds referred to in this section 3 are to be calculated in the aggregate for the respective group. The Russian merger control rules contain a peculiar definition of a "group", which is very broad and in some respects differs substantially from the approaches usually taken in other jurisdictions. For instance, under the Russian antitrust rules a group includes the managing companies of the group companies as well as the subsidiaries and parent companies of those managing companies.

That being said, the Competition Law sets out specific rules on calculation of a target group's assets. Generally, the target group includes the group of its controlling shareholder (often acting in the capacity of seller). However, for the purposes of assessing the asset-based threshold for pre- completion notifications, the assets of the seller's group are not calculated together with the target's assets if the seller will lose its controlling rights over the target as a result of the transaction.

3.6 Voluntary Notification

If the transaction does not meet the above requirements for mandatory notification, the parties may still opt for voluntary notification before signing / implementing the relevant agreement. Voluntary notification is used to exclude potential antitrust risks, e.g., those inherent in exclusivity or non-compete clauses (in distribution agreements, shareholders' agreements, etc.), and to obtain clearance or an individual exemption for an agreement that might potentially restrict competition in Russia.

4. APPROVAL PROCESS

4.1 Procedure and Timing

Timing

The review process consists of an initial review period of 30 calendar days (comparable to a Phase I investigation in the EU). Should the FAS decide that further review of the notification and/or further assessment of the impact of the concentration on the Russian market are required, the FAS extends the initial review period by another two months (comparable to a Phase II

investigation in the EU). The FAS usually extends the review period when it decides to carry out an in- depth review of the transaction, e.g., when it issues additional information requests to the notifying party and/or circulates information requests to the target's competitors.

Having said that, extension of the review period by the FAS does not necessarily mean that the transaction in question raises any competition concerns. Such extensions can happen when the FAS wishes to review the parties' activities in more detail (to confirm that there is no overlap in their activities in Russia), to conduct a more detailed analysis of the market on which the target is active, etc.

The review period may also be extended if the FAS decides to impose conditions precedent to the closing. In that case the initial 30-day period can be extended by up to nine months. Once the FAS is provided with evidence that the conditions have been satisfied, it has 30 calendar days to decide whether to accept them and grant clearance. If the conditions are not duly satisfied by the parties by the time the extended review period expires, clearance of the transaction is denied.

Further, if the transaction is subject to both merger clearance and strategic investment clearance, the merger control review is suspended indefinitely pending the strategic investment clearance.

The FAS can return a pre-completion notification within the first 10 calendar days following its submission if it is found to be incomplete. Once the 10-day period has elapsed, the notification can (normally) be considered accepted by the FAS.

Under the Russian merger control regime there is an obligation to suspend implementation of a transaction until pre-closing clearance by the FAS has been obtained. Unlike in many other jurisdictions, in Russia transactions are not automatically cleared if the review period elapses and the FAS has not taken a decision.

Pre-notification discussions

Prior to January 2016, unlike with many Western merger control authorities, no pre-notification contacts and/or discussions with the FAS were envisaged by the legislation; they took place only on very rare occasions. Under amendments to the Competition Law which took effect from January 2016 the FAS became obliged to consider information provided by the parties prior to submission of a notification. Such information may include documents related to the transaction and/or the parties' views on potential remedies that can be granted in order to sustain competition on the relevant market (though it should be noted that potential remedies suggested by the parties are not in any way binding for the FAS).

Despite this legislative amendment, pre-notification discussions are still uncommon in Russia. To date, the FAS has not produced any guidance setting out the procedure for pre-notification discussions in detail.

4.2 Documentation and Formal Requirements

The competent authority dealing with merger control matters is the FAS, which has a central office in Moscow and 84 subdivisions in most of Russia's regions. Merger notifications are dealt with by the FAS's central office in Moscow if the value of the parties' combined worldwide assets exceeds RUB 15 billion (approximately EUR 200 million). The obligation to notify rests with:

Confidentiality

- The confidentiality of a transaction cannot be guaranteed from the date information is submitted to the FAS. While the FAS officially denies that confidential information on transactions is passed on to the media or third parties by FAS officials, there have been cases where information was leaked to third parties or published in Russian newspapers the day after it was submitted to the FAS.
- The FAS is obliged to publish announcements on its official website of merger control notifications it has received. The purpose of such announcements is to encourage market participants to express their views on the potential implications of a notified transaction on the relevant market. The Competition Law does not specify the scope of information that is to be disclosed. In practice, the information published is limited to (i) the names of the parties (i.e., of the direct acquirer, which is often an SPV, and the target(s) in relation to which clearance is requested); (ii) the size of the stake to be acquired; and (iii) a brief description of the market on which the target is active. The FAS may at its discretion redact some of the information in the announcement (e.g., the acquirer's name) if the applicant has marked the pre-completion notification "confidential" when submitting it.
- A FAS decision in respect of a notification is a public document and is usually published on the FAS website. Such decisions contain only rudimentary information about the transaction: basic details about the acquirer, the target and the affected market.

- the acquirer of shares / participatory interests / assets / control, in cases of acquisitions;
- the merging entities, in cases of mergers and accessions;
- the founder(s), in cases of notifiable establishment of a company; and
- the parties to a joint venture agreement (jointly).

As a matter of practice, the filing in Russia is usually made on behalf of the direct acquirer of the shares / assets / rights (usually a special purpose vehicle). However, filings can also be made on behalf of an entity that is to be the parent entity of such vehicle, except in cases where a stake in a Russian entity is being acquired directly (i.e., at the Russian level). In such cases the filing must be made on behalf of the direct acquirer, which must be incorporated and legally existing by the time of the filing.

As regards the content of the notification, Russian filings are highly technical and formal. A notification will normally consist of an entire lever arch binder of the parties' corporate documents, organisational charts of their groups and documents containing information on their business activities (both of which must be in a certain form prescribed by the FAS), the transaction documents (or drafts thereof), etc. The FAS is entitled to request additional documents and/or information that it considers necessary for the purposes of reviewing the notification.

Notifications do not normally contain much information on the definition of the relevant markets or the potential effects on competition. Instead, notifications tend to be accompanied by numerous schedules and annexes detailing the parties' Russian activities and aimed at assisting the FAS in carrying out its review. That said, to facilitate the review of a notification by the FAS it is advisable to proactively address in it any competition issues, especially where the parties' activities significantly overlap in Russia.

The notification and all supplemental documentation must be submitted in Russian or accompanied by a Russian translation (in most cases the translation must be certified by a Russian notary). Some foreign documents must be notarised and apostilled. Due to these formalities, preparation of a notification usually takes approximately 4 weeks.

There is no set time frame for the submission of filings. Pre-completion notifications can be made on the basis of either unsigned drafts or signed transaction documents (in the latter case obtaining merger clearance should be a condition precedent to implementation of the relevant transaction). For post-closing notices, the executed transaction documentation must be provided.

The filing fees are nominal. Currently the fee is RUB 35,000 (approximately EUR 500), and usually it is charged per pre-completion notification.

However, there have been instances where the FAS charged the filing fee for each step of a notified transaction, claiming that each step requires separate approval.

4.3 Substantive Test and Remedy Practice

Substantive test

The main ground on the basis of which the FAS is entitled to prohibit the implementation of a notified transaction is that the transaction will or might

result in restriction of competition on the relevant market, including through the creation or strengthening of a dominant market position.

When reviewing a notification, the FAS normally applies the dominance test, i.e., it checks whether a dominant position is created or strengthened.

A company (and its group) is presumed to be dominant if it has a market share of 50% or more. If the market share is less than 50% but more than 35%, dominance may be deemed to exist if the FAS proves that the company holds a dominant position given, for example, the stability of the company's market share, the relative size of its competitors' market shares and/or entry barriers to the market for new competitors. Companies that have a market share of less than 35% cannot be deemed dominant unless:

- the collective dominance rule is applied – this happens mostly in cases where the combined market share of three (or fewer) companies exceeds 50%, or of five (or fewer) companies exceeds 70%. Companies with a market share of less than 8% are disregarded for the purpose of assessing collective dominance; or
- a lower threshold for dominance is established by federal law (applicable to the telecoms industry, financial institutions, the electricity supply market, etc.).

Remedy practice

Following the review of a notification, the FAS may:

- clear the transaction unconditionally;[5] or
- where the transaction may result in restriction of competition (the most frequent example being the creation or strengthening of a dominant position):
  - impose conditions precedent to closing and set a time frame for their fulfilment (up to nine months); and/or
  - impose post-closing conditions, which are typically behavioural in nature; or
- refuse clearance, if
  - the transaction results or might result in restriction of competition, including the creation or strengthening of a dominant position; or
  - strategic investment clearance of the transaction is refused; or
  - the notification contains incorrect or misleading information.[6]

The parties may offer certain undertakings to address competition concerns raised by the FAS. It is standard practice of the FAS to grant clearance subject to certain conditions that must be fulfilled upon implementation of the transaction. Often the same type of conditions can be found in the FAS decisions, such as

- a prohibition barring any decrease in the amount of goods produced or any increase in their price; or

[5] The FAS clearance decision is valid for one year from the date of its issuance.
[6] There have only been a few decisions where merger clearance of transactions involving foreign acquirers has been refused. In 2015, for example, the FAS refused to clear approximately 5% of the transactions for which pre-completion notifications were submitted. The reason for refusal in most cases was significant restriction of competition or failure to provide the FAS with correct and comprehensive information, particularly with regard to the acquirer's beneficiaries.

- an obligation to notify the FAS of, or obtain its preliminary approval for, any change in price or production volume; or
- an obligation to notify the FAS of any purchases of assets / shares of any other Russian manufacturers or foreign manufacturers that supply goods to the Russian market; or
- an obligation to publish certain information on the applicant's website, etc.

Conditions are almost always behavioural rather than structural in nature. Only in exceptional cases does the FAS require the applicant to dispose of parts of the target business. Recent trends in remedies practice include mandatory transfer of technology to local players and measures aimed at protection of local players from the effects of sanctions.

4.4 Appeals

Decisions of the FAS may be appealed in Russian commercial (*arbitrazh*) courts by the parties or by third parties with appropriate standing, up to three months after the respective decision is rendered. Decisions of the FAS's central office can be appealed in the Moscow Commercial (*Arbitrazh*) Court, and decisions of local subdivisions of the FAS – in the respective local courts.

5. PENALTIES

A transaction consummated without clearance may be invalidated (a company established without clearance may be liquidated, merged companies may be demerged) by the Russian courts upon an application by the FAS. The FAS may bring an action for invalidation of a transaction (or liquidation / demerger of companies) only if the transaction (or establishment / merger of companies) restricts or could lead to restriction of competition in Russia. The limitation period for such actions is up to one year from the time the FAS became aware or ought to have become aware of the transaction in question.

The same approach is applied to transactions that are subject to the post-closing clearance regime when the notice was not submitted to the FAS.

Failure to obtain clearance or submission of incomplete or misleading information in a notification are an administrative offence under Russian law and are punishable with an administrative fine on the applicant of up to RUB 500,000 (approximately EUR 7,000) for each application or target, depending on the approach taken by the FAS.

In addition to that, administrative fines of up to RUB 20,000 (approximately EUR 300) can be imposed on the applicant's officers for failure to submit the relevant notification or submission of incomplete or misleading information. This penalty has rarely been levied, but we are seeing an increasing interest in it on the part of the FAS.

Failure to obtain merger control clearance may also give rise to certain reputational risks and/or pose difficulties in disposing of shares / assets that were acquired without the requisite clearance.

In cases where a transaction is cleared subject to the fulfilment of conditions, failure to comply with the FAS order imposing the conditions constitutes grounds for invalidation of the relevant transaction by the courts. It is also an administrative offence under Russian law which is punishable with a fine of up to RUB 500,000 (approximately EUR 7,000).

6. OUTLOOK

Over the last decade the Russian merger control has grown into a sophisticated regime that is similar to those in Western Europe and North America. Significant peculiarities remain, such as the risk of refusal on formal grounds and the FAS's preference for behavioural undertakings. Also, to a large extent Russian merger control continues to be focused on ownership control. Often the FAS makes additional information requests seeking the disclosure of ultimate beneficiaries, group structures and corporate affiliation rather than in response to substantive competition concerns.

However, despite the procedural challenges, the merger control process in Russia is generally predictable and investor-friendly. The maximum review period is three months and can never take longer (save in very exceptional cases of pre-closing remedies). In recent years the FAS has given the green light to numerous transactions involving very significant overlaps. FAS remedies are normally 'digestible' for the parties. There have only been few examples where transactions have been aborted due to conditions imposed by the FAS.

The FAS is generally neutral in its assessment, and Russian merger control has largely remained unaffected by the international geopolitical situation and sanctions. Last but not least, all of this stands in contrast to the Russian foreign investment regime, where the filing and review procedures are often unpredictable, burdensome and time-consuming.

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