The Merger Control Review

Eleventh Edition

Editor
Ilene Knable Gotts

The Law Reviews

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THE LAWREVIEWS

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Published in the United Kingdom
by Law Business Research Ltd, London
Meridian House, 34–35 Farringdon Street, London, EC4A 4HL, UK

www.TheLawReviews.co.uk

ISBN 978-1-83862-478-1

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following for their assistance throughout the preparation of this book:

ALTIUS

ANDERSON MŌRI & TOMOTSUNE

ASHURST

AZB & PARTNERS

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PREFACE

Pre-merger competition review has advanced significantly since its creation in 1976 in the United States. As this book evidences, today almost all competition authorities have a notification process in place – with most requiring pre-merger notification for transactions that meet certain prescribed minimum thresholds. Additional jurisdictions, such as Malaysia, are currently considering imposing mandatory pre-notification regimes, and in the meantime can assert some jurisdiction to review certain transactions under their conduct laws and for specific sectors (e.g., aviation, communications). Also, the book includes chapters devoted to such 'hot' M&A sectors as pharmaceuticals, high technology and media, as well as a chapter on merger remedies, to provide a more in-depth discussion of recent developments. The intended readership of this book comprises both in-house and outside counsel who may be involved in the competition review of cross-border transactions.

Given the ability of most competition agencies with pre-merger notification laws to delay, and even block, a transaction, it is imperative to take each jurisdiction – small or large, new or mature – seriously. For instance, in 2009, China blocked the Coca-Cola Company's proposed acquisition of China Huiyuan Juice Group Limited and imposed conditions on four mergers involving non-China-domiciled firms. In *Phonak/ReSound* (a merger between a Swiss undertaking and a Danish undertaking, each with a German subsidiary), the German Federal Cartel Office blocked the entire merger, even though less than 10 per cent of each of the undertakings was attributable to Germany. In the United Kingdom, the Competition and Markets Authority (CMA) has effectively blocked transactions in which the parties question its authority. It is, therefore, imperative that counsel develop a comprehensive plan before, or immediately upon, execution of an agreement concerning where and when to file notification with competition authorities regarding such a transaction. To this end, this book provides an overview of the process in 30 jurisdictions, as well as a discussion of recent decisions, strategic considerations and likely upcoming developments.

Some common threads in institutional design underlie most of the merger review mandates, although there are some outliers as well as nuances that necessitate careful consideration when advising a client on a particular transaction. Almost all jurisdictions vest exclusive authority to review transactions in one agency. The United States is now the major exception in this regard since China consolidated its three antitrust agencies into one agency in 2018. Most jurisdictions provide for objective monetary size thresholds (e.g., the turnover of the parties, the size of the transaction) to determine whether a filing is required. Germany has amended its law to ensure that it has the opportunity to review transactions in which the parties' turnovers do not reach the threshold, but the value of the transaction is significant (e.g., social media, new economy, internet transactions). The focus on 'killer acquisitions' (i.e., acquisitions by a dominant company of a nascent competitor), particularly involving digital or platform offerings, has been a driver in the expansion of jurisdiction and focus of investigations. Some jurisdictions have adopted a process to 'call in' transactions that fall below the thresholds, but where the transaction may be of competitive significance. For instance, the Japan Federal Trade Commission (JFTC) has the ability of reviewing and taking action in non-reportable transactions, and has developed guidelines for voluntary filings. Note that the actual monetary threshold levels can vary in specific jurisdictions over time.

There are some jurisdictions that still use 'market share' indicia (e.g., Bosnia and Herzegovina, Colombia, Lithuania, Portugal, Spain, Ukraine and the United Kingdom). Most jurisdictions require that both parties have some turnover or nexus to their jurisdiction. However, there are some jurisdictions that take a more expansive view. For instance, in Poland, a notification may be required even though only one of the parties is present and, therefore, there may not be an impact on competition in Poland. Turkey recently issued a decision finding that a joint venture (JV) that produced no effect on Turkish markets was reportable because the JV's products 'could be' imported into Turkey. In Serbia, there is similarly no 'local' effect required. Germany also takes an expansive view by adopting as one of its thresholds a transaction of 'competitively significant influence'. Although a few merger notification jurisdictions remain 'voluntary' (e.g., in Australia, Singapore, the United Kingdom and Venezuela), the vast majority impose mandatory notification requirements. Moreover, in Singapore, the transaction parties are to undertake a 'self-assessment' of whether the transaction will meet certain levels, and, if so, should notify the agency to avoid potential challenge by the agency.

Although in most jurisdictions the focus of the competition agency is on competition issues, some jurisdictions have a broader mandate. For instance, the 'public interest' approach in South Africa expressly provides for consideration of employment matters, local enterprises and procurement, and for economic empowerment of the black population and its participation in the company. Many of the remedies imposed in South Africa have been in connection with these considerations. Although a number of jurisdictions have separate regulations and processes for addressing foreign entity acquisitions when national security or specific industrial sectors are involved, in Romania, for example, competition law provides that the government can prohibit a merger if it determines that such merger could have a potential impact on national security.

Covid-19 and the current economic environment have provided new challenges to companies and enforcement agencies. Many jurisdictions have extended the review times to account for covid-19 disruptions at the agencies. At the same time, some of the transactions are distress situations, in which timing is key to avoid the exit of the operations and termination of employees. Regardless of the speed at which the economic recovery occurs, it is very likely that for the next couple of years the agencies will be faced with reviews of companies in financial distress, if not at the point of failure. Some jurisdictions exempt from notification (e.g., Ecuador) or have special rules for the timing of bankrupt firms (e.g., Brazil, Switzerland and the Netherlands where firms can implement before clearance if a waiver is obtained; Austria, India, Russia and the United States have shorter time frames). Also, in some jurisdictions, the law and precedent expressly recognise the consideration of the financial condition of the target and the failing firm doctrine (e.g., Canada, China and the United States). In Canada, for instance, the Competition Bureau explicitly permitted the *AIM/TMR* transaction to proceed on the basis of the failing company defence. Similarly, the Netherlands has recently recognised the defence in a couple of hospital mergers. In a major matter in the United Kingdom, *Amazon/Deliveroo*, the CMA provisionally allowed the transaction to proceed due to the target being a failing firm. This topic is likely to be an area to watch in other jurisdictions, particularly in some of the newer merger regimes.

The potential consequences for failing to file in jurisdictions with mandatory requirements vary. Almost all jurisdictions require that the notification process be concluded before completion (e.g., pre-merger, suspensory regimes), rather than permitting the transaction to close as long as notification is made before closing. Many of these jurisdictions can impose a significant fine for failure to notify before closing, even where the transaction raises no competition concerns (e.g., Austria, Cyprus, India, the Netherlands, Romania, Spain and Turkey). In France, for instance, the competition authority imposed a €4 million fine on Castel Frères for failure to notify its acquisition of part of the Patriache group. In Ukraine and Romania, the competition authorities have focused their efforts on discovering consummated transactions that had not been notified, and imposing fines on the parties. Chile's antitrust enforcer recommended a fine of US$3.8 million against two meat-packing companies, even though the parties had carved the Chilean business out of the closing.

Some jurisdictions impose strict time frames within which the parties must file their notification. For instance, Cyprus requires filing within one week of signing of the relevant documents and agreements; Serbia provides for 15 days after signing of the agreement; and Hungary, Ireland and Romania have a 30-calendar-day time limit for filing the notification that commences with entering into the agreement. Some jurisdictions that mandate filings within specified periods after execution of the agreement also have the authority to impose fines for 'late' notifications (e.g., Bosnia and Herzegovina, Indonesia and Serbia). Most jurisdictions also have the ability to impose significant fines for failure to notify or for closing before the end of the waiting period, or both (e.g., Austria, Canada, China, Greece, Portugal, Ukraine and the United States). In Macedonia, the failure to file can result in a misdemeanour and a monetary fine of up to 10 per cent of the worldwide turnover. In Belgium, the competition authority fined a party for late submission of information.

The United States and the European Commission (EC) both have a long history of focusing on interim conduct of the transaction parties, which is commonly referred to as 'gun-jumping', even fining companies that are found to be in violation. For example, the EC imposed the largest gun-jumping fine ever of €124.5 million against Altice. Other jurisdictions have more recently been aggressive. Brazil, for instance, issued its first gun-jumping fine in 2014 and recently issued guidelines on gun-jumping violations. Since then, Brazil has continued to be very active in investigating and imposing fines for gun-jumping activities. In addition, the sharing of competitively sensitive information before approval appears to be considered an element of gun-jumping. Also, for the first time, France imposed a fine of €20 million on the notifying party for failure to implement commitments fully within the time frame imposed by the authority.

In most jurisdictions, a transaction that does not meet the pre-merger notification thresholds is not subject to review or challenge by the competition authority. In Canada – like the United States – however, the Competition Bureau can challenge mergers that were not required to be notified under the pre-merger statute, as well as challenge notified transactions within the first year of closing. In Korea, Microsoft initially filed a notification with the Korea Fair Trade Commission (KFTC), but when it faced difficulties and delays in Korea, the parties restructured the acquisition to render the transaction non-reportable in Korea and consummated the transaction. The KFTC, however, continued its investigation as a post-consummation merger investigation and eventually obtained a consent order. In addition, the EC has fined companies on the basis that the information provided at the outset was misleading (for instance, the EC fined Facebook €110 million for providing incorrect or misleading information during the *Facebook/WhatsApp* acquisition).

In almost all jurisdictions, very few transactions undergo a full investigation, although some require that the notification provide detailed information regarding the markets, competitors, competition, suppliers, customers and entry conditions. Most jurisdictions that have filing fees specify a flat fee or state in advance a schedule of fees based upon the size of the transaction; some jurisdictions, however, determine the fee after filing or provide different fees based on the complexity of the transaction. For instance, Cyprus is now considering charging a higher fee for acquisitions that are subjected to a full Phase II investigation.

Most jurisdictions more closely resemble the EC model than the United States model. In these jurisdictions, pre-filing consultations are more common (and even encouraged); parties can offer undertakings during the initial stage to resolve competitive concerns; and there is a set period during the second phase for providing additional information and for the agency to reach a decision. In Japan, however, the JFTC announced in June 2011 that it would abolish the prior consultation procedure option. When combined with the inability to 'stop the clock' on the review periods, counsel may find it more challenging in transactions involving multiple filings to avoid the potential for the entry of conflicting remedies or even a prohibition decision at the end of a JFTC review. Some jurisdictions, such as Croatia, are still aligning their threshold criteria and processes with the EC model. Even within the EC, there remain some jurisdictions that differ procedurally from the EC model. For instance, in Austria, the obligation to file can be triggered if only one of the involved undertakings has sales in Austria, as long as both parties satisfy a minimum global turnover and have a sizeable combined turnover in Austria.

The role of third parties also varies across jurisdictions. In some jurisdictions (e.g., Japan), there is no explicit right of intervention by third parties, but the authorities can choose to allow it on a case-by-case basis. In contrast, in South Africa, registered trade unions or representatives of employees must be provided with a redacted copy of the merger notification from the outset and have the right to participate in merger hearings before the Competition Tribunal: the Tribunal will typically also permit other third parties to participate. Bulgaria has announced a process by which transaction parties even consent to disclosure of their confidential information to third parties. In some jurisdictions (e.g., Australia, the EC and Germany), third parties may file an objection to a clearance decision. In some jurisdictions (including Canada, the EC and the United States), third parties (e.g., competitors) are required to provide information and data if requested by the antitrust authority. In Israel, a third party that did not comply with such a request was recently fined by the antitrust authority.

In almost all jurisdictions, once the authority approves the transaction, it cannot later challenge the transaction's legality. The United States is one significant outlier with no bar for subsequent challenge, even decades following the closing, if the transaction is later believed to have substantially lessened competition. Canada, in contrast, provides a more limited time period of one year for challenging a notified transaction (see the recent *CSC/Complete* transaction). Norway is a bit unusual, where the authority has the ability to mandate notification of a transaction for a period of up to three months following the transaction's consummation. In 'voluntary' jurisdictions, such as Australia and Singapore, the competition agency can investigate and challenge unnotified transactions.

It is becoming the norm, in large cross-border transactions raising competition concerns, for the US, Canadian, Mexican and EC authorities to work closely together during the investigative stages, and even in determining remedies, minimising the potential of arriving at diverging outcomes. The KFTC has stated that it will engage in even greater cooperation with foreign competition authorities, particularly those of China and Japan, which are similar to Korea in their industrial structure. Regional cooperation among some of the newer agencies has also become more common; for example, the Argentinian authority has worked with Brazil's competition authority, which, in turn, has worked with the Chilean authority. Competition authorities in Bosnia and Herzegovina, Bulgaria, Croatia, Macedonia, Montenegro, Serbia, Slovenia and Turkey similarly maintain close ties and cooperate on transactions. Taiwan is part of the Asia-Pacific Economic Cooperation forum, which shares a database. In transactions not requiring filings in multiple European jurisdictions, Member States often keep each other informed during the course of an investigation. In addition, transactions not meeting the EC threshold can nevertheless be referred to the EC in appropriate circumstances. The United States has signed cooperation agreements with a number of jurisdictions, including, most recently, Peru and India. China has 'consulted' with the United States and the EC on some mergers and entered into a cooperation agreement with the United States authorities in 2011.

The impact of such multi-jurisdictional cooperation is very evident. For instance, the transaction parties in *Applied Materials/Tokyo Electron* ultimately abandoned the transaction following the combined objections of several jurisdictions, including the United States, Europe and Korea. In *Office Depot/Staples*, the FTC and the Canadian Competition Bureau cooperated and both jurisdictions brought suits to block the transaction (although the EC had also cooperated on this transaction, it ultimately accepted the undertakings offered by the parties). In the *GE/Alstom* transaction, the United States and the EC coordinated throughout, including at the remedies stage. Additionally, in the *Halliburton/Baker Hughes* transaction, the United States and the EC coordinated their investigations, with the United States suing to block the transaction while the EC's investigation continued. Also, in *Holcim/Lafarge*, the cooperation between the United States and Canada continued at the remedies stage, where both consents included assets in the other jurisdiction's territory. The United States, Canada and Mexico coordinated closely in the review of the *Continental/Veyance* transaction. In fact, coordination among the jurisdictions in multinational transactions that raise competition issues is becoming the norm.

Although some jurisdictions have recently raised the size threshold at which filings are mandated, others have broadened the scope of their legislation to include, for instance, partial ownership interests. Some jurisdictions continue to have as their threshold test for pre-merger notification whether there is an 'acquisition of control'. Many of these jurisdictions, however, will include, as a reportable situation, the creation of 'joint control', 'negative (e.g., veto) control' rights to the extent that they may give rise to *de jure* or *de facto* control (e.g., Turkey), or a change from 'joint control' to 'sole control' (e.g., the EC and Lithuania). Minority holdings and concerns over 'creeping acquisitions', in which an industry may consolidate before the agencies become fully aware, have become the focus of many jurisdictions. Some jurisdictions will consider as reviewable acquisitions in which only a 10 per cent or less interest is being acquired (e.g., Serbia for certain financial and insurance mergers), although most jurisdictions have somewhat higher thresholds (e.g., Korea sets the threshold at 15 per cent of a public company and otherwise at 20 per cent of a target; and Japan and Russia at any amount exceeding 20 per cent of the target). Others use, as the benchmark, the impact that the partial shareholding has on competition; Norway, for instance, can challenge a minority shareholding that creates or strengthens a significant restriction on competition. The United Kingdom also focuses on whether the minority shareholder has 'material influence' (i.e., the ability to make or influence commercial policy) over the entity. Several agencies during the past few years have analysed partial ownership acquisitions on a stand-alone basis as well as in connection with JVs (e.g., Canada, China, Cyprus, Finland and Switzerland). Vertical mergers were also a subject of review (and even resulted in some enforcement actions) in a number of jurisdictions (e.g., Belgium, Canada, China, Sweden and Taiwan). Portugal even viewed as an 'acquisition' subject to notification the non-binding transfer of a customer base.

For transactions that raise competition issues, the need to plan and to coordinate among counsel has become particularly acute. Multi-jurisdictional cooperation facilitates the development of cross-border remedies packages that effectively address competitive concerns while permitting the transaction to proceed. The consents adopted by the United States and Canada in the *Holcim/Lafarge* merger exemplify such a cross-border package. As discussed in the 'International Merger Remedies' chapter, it is no longer prudent to focus merely on the larger mature authorities, with the expectation that other jurisdictions will follow their lead or defer to their review. In the current enforcement environment, obtaining the approval of jurisdictions such as Brazil and China can be as important as the approval of the EC or the United States. Moreover, the need to coordinate is particularly acute, to the extent that multiple agencies decide to impose conditions on the transaction. Although most jurisdictions indicate that 'structural' remedies are preferable to 'behavioural' conditions, a number of jurisdictions in the past few years have imposed a variety of such behavioural remedies (e.g., China, the EC, France, the Netherlands, Norway, South Africa, Ukraine and the United States). For instance, some recent decisions have included as behavioural remedies pricing, sales tariffs and terms of sale conditions (e.g., Korea, Ukraine and Serbia), employee retrenchment (South Africa) and restrictions on bringing anti-dumping suits (e.g., Mexico). Many recent decisions have imposed behavioural remedies to strengthen the effectiveness of divestitures (e.g., Canada's decision in the *Loblaw/Shoppers* transaction, China's MOFCOM remedy in *Glencore/Xstrata* and France's decision in the *Numericable/SFR* transaction). This book should provide a useful starting point in navigating cross-border transactions in the current enforcement environment.

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July 2020

Part II

Jurisdictions

Chapter 26

RUSSIA

Maxim Boulba and Maria Ermolaeva[1]

I INTRODUCTION

Federal Law No. 135-FZ dated 26 July 2006 on Protection of Competition (the Competition Law), which has undergone a series of amendments, is the main statute in the area of merger control. The Russian competition authority, the Federal Anti-monopoly Service (FAS), and its regional offices remain the authority responsible for the enforcement of the merger control rules.

Decrees of the Russian government and regulations of the FAS are adopted in furtherance of the statutory provisions and deal with the technical aspects of the filing, including the contents of merger clearance notifications and other procedural issues. In addition, the competition authority has issued clarifications and guidelines; for instance, on the assessment of joint venture agreements, which shed some light on the analysis of non-compete clauses.

Apart from the Competition Law requirements (i.e., the merger control regime), transactions involving a foreign party may be caught by Federal Law No. 160-FZ dated 9 July 1999 on Foreign Investments in the Russian Federation (the Foreign Investments Law) and Federal Law No. 57-FZ dated 29 April 2008 on Procedures for Foreign Investment in Companies of Strategic Importance for National Defence and Security of the Russian Federation (the Strategic Investments Law), which were amended in 2018. The Strategic Investments Law applies to transactions associated with the participation of foreign investors in companies active in strategic sectors (e.g., nuclear power, military technology, space industry, aircraft, cryptography and the manufacturing of explosives). A specifically appointed government commission is responsible for the approval of such transactions.

The legal regime in the area of foreign investment, including its key concepts and associated prohibitions, is still evolving. While foreign and strategic investment restrictions constitute a separate set of rules (different from merger control), the FAS is involved in the administration of these filings, monitors the implementation of the requirements by foreign investors and is officially entitled to give clarifications on the application of the Strategic Investments Law.

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II YEAR IN REVIEW

i Key legislative developments

In general, 2019 was not marked by significant changes to the Competition Law: the market players and the FAS have adapted to the rules brought by the Fourth Anti-monopoly Package, the most recent set of amendments to the Competition Law, and are now awaiting further changes (the Fifth Anti-monopoly Package).

First, as part of the Fourth Anti-monopoly Package, the scope of transactions subject to merger clearance was broadened: competitors are required to obtain the prior approval of the FAS for joint venture arrangements in the Russian Federation if the turnover or asset-based thresholds are exceeded. In 2019, the FAS reviewed such notifications across different industries. Thus, if the following thresholds are met, the joint activity requires mandatory clearance:

a the aggregate worldwide value of assets of the groups involved exceeds 7 billion roubles; or

b the aggregate worldwide revenue of such groups for the past year exceeds 10 billion roubles.

Clearly, the term 'establishment of a joint venture' is correct. The term 'agreement on joint activities', however, is broad (as suggested by the FAS's clarifications published in 2013, well before the entry into force of the Fourth Anti-monopoly Package) so, in principle, it may also catch other commercial arrangements aimed at establishing cooperation. As a consequence, regardless of whether a separate legal entity is created, the merger clearance requirements of the Competition Law may potentially catch cooperation agreements even though they are not an M&A transaction.

Still, taking into account the broad definition of 'agreement on joint activities' and somewhat limited experience of the competition authority in the matter, competitors should treat all contemplated cooperation agreements with caution and assess whether the merger clearance provisions of the Competition Law are going to be triggered. If the above thresholds are not exceeded by the parties involved, formally there is no need to clear an agreement on joint activities. To avoid the risks specified above and gain certainty, the parties may still consider submitting the agreement voluntarily to the FAS, as provided for in the Competition Law.

Further, the register of economic entities with a market share exceeding 35 per cent is no longer maintained by the FAS: a specific ground for obtaining prior approval in relation to the transactions involving such companies has been abolished. By virtue of this amendment, the number of transactions previously subject to the FAS's clearance on this largely administrative ground (if the financial thresholds were not met) was reduced.

The amendments of the Fourth Anti-monopoly Package led to a number of procedural changes in the field of merger control. The FAS is required to publish the basic information on the submitted merger control filings on its website (including those relating to the joint venture agreements discussed above) so that all interested parties are able to provide their opinion on the impact of the transaction on competition.

Furthermore, the parties may submit information on the contemplated transaction, provide supporting documents and economic analysis, and propose remedies before filing a formal notification. The FAS is supposed to take this information into account when reviewing the notification for clearance. According to the FAS officials, this procedure is advisable in situations where a transaction may give rise to competition concerns. Also, it is possible to submit the merger clearance notification electronically, in the format prescribed by the FAS.

Most recently, the FAS Presidium has summarised the experience of the competition authority on the application of waivers of confidentiality in the context of merger control and issued its recommendations recognising the importance of waivers. The main idea underpinning this document is to allow for the uniform approach to waivers within the FAS in terms of communications with the parties involved in the transaction and competition authorities of other countries. By way of illustration, this mechanism was used in the review of the failed *Siemens/Alstom* deal, which included consultations with the competition authorities of the United States, Australia, Brazil, India, South Africa and the European Commission.

ii Recent practice of the competition authority

As in the past, the FAS seeks to move from a formalistic approach and concentrate on major deals that may give rise to competition concerns. The FAS focus includes the following markets: pharmaceuticals and healthcare, the chemical industry, energy and natural resources, agriculture, infrastructure, transportation, financial services and telecommunications. Currently, the FAS is starting to look into the impact of digital economy and IT businesses.

Several global M&A deals (primarily involving the acquisition of control rights over a Russian company by virtue of acquiring a foreign target (group) with a subsidiary in Russia) were reviewed by the competition authority. Examples of the significant cases in recent years include the notorious *Bayer/Monsanto* deal: eventually the FAS, among other things, prescribed Bayer to transfer certain technologies (molecular selection of specific crops) to Russian recipients and provide non-discriminatory access to digital farming platforms following the commercial launch of products in Russia. While preparing this decision, the FAS cooperated with foreign competition authorities using waivers: it consulted with the competition authorities of Brazil, India, China, South Africa and the European Commission.

According to the FAS's officials, 1,052 pre-transaction notifications (lower than in 2018, due to reduced M&A activity) and 144 post-transaction notifications were reviewed in 2019. Overall, the pattern established in the past remains in place.

III THE MERGER CONTROL REGIME

i Transactions and thresholds

Generally, the notification is to be undertaken as a pre-transaction clearance. Post-transaction filing is possible only in relation to certain intra-group transactions (instead of pre-transaction filing) where the information on the group is provided to the competition authority before the transaction is implemented.

If an intra-group transaction is implemented between legal entities or individuals that are part of the same 'group of persons' under Article 9(1)(1) of the Competition Law (a company and an individual or legal entity directly or indirectly holding more than 50 per cent of shares in that company), it is expressly exempt from the merger control requirements. If the parent company holds more than 50 per cent of the subsidiaries' shares, the transactions between the parent company and its (direct or indirect) subsidiaries, as well as between the subsidiaries controlled by the same parent company, would benefit from this exemption.

To this end, pre-transaction filing may still be necessary for certain intra-group transfers. Alternatively, Article 31 of the Competition Law provides for a specific clearance procedure for intra-group transactions that would otherwise be subject to prior approval. It is possible to make a prior disclosure of the group structure to the FAS, which is made publicly available by the competition authority, and then further notify the FAS of the transaction once completed.

The Competition Law provides the following jurisdictional thresholds for pre-transaction clearance (see Section II for the thresholds applicable to joint venture agreements):

a the aggregate worldwide value of assets of the acquirer's group and the target's group of companies exceeds 7 billion roubles and the aggregate worldwide value of assets of the target's group of companies exceeds 400 million roubles; or

b the aggregate worldwide turnover of the acquirer's group and the target's group of companies from the sale of goods, works and services during the last calendar year exceeds 10 billion roubles and the aggregate worldwide value of assets of the target's group of companies exceeds 400 million roubles.

The above thresholds apply to undertakings active in the commodity markets. Different thresholds apply to financial organisations, as established by the government together with the Central Bank of Russia.

The worldwide information is relevant for calculation purposes; the thresholds are based on the book value as reflected on the balance sheet as at the latest reporting date preceding the notification date. The value of assets (turnover) of the acquirer's group and the target's group are taken into account. The assets of the seller and its group are not relevant if the deal results in the seller and its group losing the right to determine the business activities of the target. Still, if the seller disposes of a minority stake or otherwise retains control over the target, the assets of the 'whole' group are used for the calculation.

Under the Competition Law, the following transactions require pre-transaction approval from the FAS if the thresholds are met:

a the acquisition of more than 25 per cent, 50 per cent or 75 per cent of the voting shares in a Russian joint-stock company, or more than one-third, one-half or two-thirds of the participatory interests in a Russian limited liability company;

b the acquisition of direct or indirect rights to determine the business activities of a Russian company (including those based on voting arrangements or agreements such as the shareholders' agreements providing for additional voting rights) or to act as its executive body;

c the acquisition of the fixed assets (except for land plots and non-industrial buildings or premises, such as warehouses) or intangible assets of a company if the book value of the acquired assets located in Russia exceeds 20 per cent of the total book value of the fixed and intangible assets of the transferor (for companies operating in commodity markets);

d the incorporation of a company if:
- its charter capital is paid up by the shares, participatory interests or fixed or intangible assets of another company; and
- a new company, as a result, acquires: more than 25 per cent of the voting shares in a Russian joint-stock company; more than one-third of the participatory interests in a Russian limited liability company; or fixed or intangible assets that are located in Russia and amount to more than 20 per cent of the total book value of the fixed and intangible assets of the transferor;

e the reorganisation (in the form of a merger or consolidation); and

f the execution of a joint venture agreement between competitors.

Pure foreign-to-foreign transactions need to be cleared before the Russian competition authority if they are related to the acquisition of more than 50 per cent of the voting shares in a foreign company that generated turnover on the Russian market in an amount that exceeds 1 billion roubles in the preceding year, or the acquisition of direct or indirect rights to determine the business activities or to act as the executive body of such company. A local presence is not required.

Furthermore, the acquisition of shares in a non-Russian holding company that owns shares in a Russian subsidiary may be caught by the Russian merger control rules as the acquisition of indirect control rights over the Russian subsidiary. This is one of the most common grounds for clearance, partially owing to the fact that the concept of 'control rights' is rather broad and leaves much room for interpretation. As long as the target does not have any direct sales, or own shares in Russian companies or assets located in Russia, the filing is not necessary.

ii Time frames and review procedure

The notification must be submitted before the closing to allow sufficient time for the FAS to review the notification. The clearance is valid for one year from the date of the decision. If the transaction is not completed within one year, a new filing procedure must be initiated.

The initial review period is 30 days from the date of submission of the notification with all the documents to the competition authority. Transactions that do not restrict competition are normally cleared within this statutory term, provided that the required information has been submitted in full to the FAS.

The second stage review may evolve differently. Thus, the FAS is entitled to extend this time frame by an additional two months if there are concerns that the transaction may restrict competition (in-depth analysis is necessary or further information is requested). The FAS publishes the information concerning the transaction on its website so that the interested parties can share their views on its effects with the authority.

The concept of 'restriction of competition' constitutes the main part of the substantive analysis. Generally, transactions that do not result in the restriction of competition are cleared. The percentage of rejections is rather small: in most transactions that are prohibited, their adverse impact on competition is obvious and cannot be remedied.

The FAS has a right to prescribe binding pre-closing conditions (e.g., granting access to the infrastructure or certain IP rights, or divesting) that must be complied with by the parties before the clearance will be granted. The relevant term for implementing the conditions is determined by the competition authority and will not exceed nine months. Once the required conditions are complied with, the supporting documents are submitted to the FAS, which reviews the documents within 30 days and issues a final decision either granting clearance or prohibiting the transaction. Practically speaking, extensions of this kind are very rare, since the FAS clearly prefers to issue binding orders providing for post-closing conditions.

If the transaction is subject to 'strategic' clearance under the Strategic Investments Law, the antitrust clearance can only be granted if there is an affirmative decision by the government commission. From a technical perspective, this filing is administered by the FAS that deals with the initial review and assessment. The competition authority looks at the formal aspects, communicates with other authorities (e.g., the Federal Security Service and the Ministry of Defence), and, thereafter, provides the government commission with its recommendations and assessment. The final decision rests with the commission. The review period is extended until the government commission issues a decision on the transaction. If the government commission does not grant its approval, then the antitrust clearance notification is rejected.

The review of the notification results in one of the following decisions: clearance of the transaction (conditional or unconditional) or rejection of the notification. According to the statistics, rejections are not common: except for politically impacted cases, a transaction can be prohibited only if it restricts or may restrict competition. The cases involving rejection of transactions usually relate to highly concentrated markets where the notified deals involve undertakings with significant market shares and the transaction could limit competition, including creating or strengthening a dominant position (e.g., transportation and construction). The refusal to grant clearance can also be based on formal grounds: if the data included in the notification turns out to be false, or if the applicant fails to provide the documents crucial for the FAS to complete its review. Such other grounds for rejection may be more technical: for instance, failure to provide the documents or accurate information requested by the FAS, such as information on the group structure or ultimate beneficial owners (in the absence of which the competition authority cannot reach a conclusion on the transaction's impact on competition).

In practice, the FAS typically issues its decisions in line with the deadlines specified in the Competition Law. Transactions that do not restrict competition are on average cleared within 40 to 45 days (which includes the time for obtaining the hard copy of the clearance decision). This timing usually serves as guidance for the parties in planning the closing date.

There are no official acceleration procedures or other options to expedite the review of a merger clearance notification. The most obvious recommendation is to submit the full set of documents specified in the Competition Law and the FAS regulations to avoid delays or a situation where an incomplete notification is considered as 'not presented'. In the latter case, the applicant has a right to request the authority to return the notification, proceed with the collection of the outstanding documents and file all the documents anew (the review period will begin again). The collection of the necessary documents (e.g., information on the parties, their groups, assets and turnover, business activities, transaction structure) can take some time to complete as in many instances the Russian merger control filing remains a rather technical exercise. Although this is not formally necessary, to streamline the review the parties may choose to provide economic data (evidence), such as their assessment of the market shares and main competitors.

Requests for information from the FAS are very common. Normally, after the filing is submitted the applicant's representatives communicate with the FAS case handler to pre-empt any official requests. In contrast to official written requests that are likely to lead to the extension of the review period, 'informal' requests can be addressed swiftly, which results in a more straightforward review of the notification.

iii Third-party access

The role of third parties in the FAS's review is rather limited. Their basic right is to provide their outlook on the envisaged transaction to the authority. Interested parties may provide their opinions as to the effect of the transaction on competition. In many instances, the FAS on its own initiative decides to send requests to other market players and collect their feedback. Under the Competition Law, the FAS may challenge mergers and initiate the associated proceedings. Any third parties that wish to challenge a merger would need to contact the FAS.

More importantly, no third parties can have access to the merger control files to examine the data submitted by the parties or obtained by the competition authority. Where necessary, the sensitive commercial data shall be provided to the FAS as part of the notification. The officials are specifically required to keep such information confidential and cannot disclose it to third parties. Failure to comply with these rules can result in liabilities. The review of the notifications containing such information is confidential, and from a practical perspective, the benefits of this procedure are not obvious (for example, it is not always possible to directly contact the case handler in the course of the review).

iv Competition concerns, appeals and judicial review

If the FAS has competition concerns, it may decide to grant conditional clearance. In this case the FAS issues a binding order where the necessary remedies are specified. Generally, structural remedies are uncommon: administrative barriers (practical application) constitute one of the main impediments for their development; behavioural remedies are clearly preferred by the FAS. By way of illustration, the requirement to create a commercial policy and make it publicly available (so that existing and potential distributors can have access to the document) is one of the most common remedies, particularly in the pharmaceuticals industry.

The reasoning behind the remedies can be based on political considerations in 'sensitive' transactions; nonetheless, the remedies are usually envisaged to deal with competition concerns. There is no official procedure for negotiating remedies. With the probable exception of high-profile deals, the FAS is formally free to prescribe the remedies it deems appropriate without consulting with the parties. However, the parties may propose certain alternatives to address the competition concerns. According to the FAS's officials, the introduction of these negotiations into the FAS practice is possible in the future.

The decisions and binding orders of the FAS establishing the remedies (e.g., if the parties involved find the remedies excessive) can be challenged in full or in part in the Russian commercial courts. The binding order is to be suspended until the court decides on the matter. The number of appeals in the area of merger clearance is insignificant. The applicants mainly appeal the FAS decisions on rejection of the notification on formal grounds. The court practice is controversial but there are examples of successful appeals.

v Effect of regulatory review

If the transaction requires prior approval of the competition authority, it must be suspended until clearance and can be implemented after approval has been granted. There are no exceptions to the suspensory effect; no waivers or derogations are available. In this regard, there are no provisions in the Competition Law that would allow the rollout of the global transaction without obtaining a clearance in Russia. The carve-out scenario may be acceptable in certain situations. However, its implementation would be subject to a number of conditions to be complied with to avoid any contravention with the Competition Law requirements.

Gun-jumping practices are prohibited and may result in the same sanctions as failure to submit the notification: administrative fines of up to 500,000 roubles imposed on an acquirer (or the founders of a new company) required to notify the authority (fines of up to 20,000 roubles may also be imposed on the company officials), and in the most extreme cases invalidation by the court upon the FAS claim. The main risk is the potential rejection of the notification by the FAS. The transaction may be scrutinised by the competition authority as, most likely, it will be reluctant to grant clearance based on various grounds (e.g., purely technical and formalistic). Naturally, broader commercial reputational risks are also to be considered.

The FAS is the authority that controls compliance with the merger control rules. The government commission is in charge of the approval of transactions caught by the Strategic Investments Law: only the Commission can grant 'strategic' clearance. By way of background, other laws may contain industry-specific merger approval requirements (for instance, in banking and insurance where the Central Bank of Russia is the regulator), which are separate from the Competition Law provisions, and restrictions or prohibitions as to foreign participation (media, air transportation).

IV OTHER STRATEGIC CONSIDERATIONS

The key issues associated with coordinating the clearance of a global transaction with a Russia-related component are the strict suspensory regime of the Competition Law with a limited number of carve-out options and the arbitrary approach often exercised by the FAS in relation to more complex transactions, which makes it difficult to predict the exact scenario of the review. In this regard, the basic recommendation would be to start preparation of the filing in advance and structure the relevant undertaking with due consideration of the Russian filing and its time frame. Particular attention should be paid to proposed transactions with 'strategic' companies: the importance of initial analysis, planning and compliance with the formal requirements cannot be overestimated.

Considering that not all matters in the area of merger control are expressly dealt with in the Competition Law, the FAS's practice is evolving, as is the Competition Law. Still, a lot of concepts and rules existing in other jurisdictions or used in the course of global deals are provided for in the Competition Law and may not be applicable or are highly problematic in Russia.

There are no special rules applicable to situations where the Russian target is in financial distress or undergoing insolvency. Thus, if the financial thresholds are met by the companies and groups involved, transactions with the companies under insolvency proceedings (most notably, the asset deals) are subject to the same treatment as those with 'active' companies. Essentially the same requirements for obtaining the clearance will apply.

V OUTLOOK AND CONCLUSIONS

The FAS considers the best global practices and tries to be consistent with the objective of reducing the administrative burden for businesses and liberalising the rules in the area of merger control. In the past, some of its initiatives were widely discussed by practitioners but eventually were not included in the Fourth Anti-monopoly Package. The FAS has prepared a draft law (also known as the Fifth Anti-monopoly Package) introducing amendments to the Competition Law with a view to streamlining the application of antitrust rules to digital economy and IT companies.

As suggested by various comments made by FAS officials and the available draft law, the additional amendments to the Competition Law relating to merger control can be reasonably expected and should introduce an additional ground subjecting a transaction to merger clearance (i.e., transaction value, considering that traditional criteria do not always reflect the real impact of transactions in the digital world), as well as more detailed rules on the review of merger clearance notifications (the role of external experts taking part in the review of merger clearance notifications, as well as the requirement for the FAS to issue statements of objections and hold hearings when reviewing complex transactions) and extension of the review term. Still, for the time being, it is unclear when, and to what extent, these initiatives will be enacted.

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ISBN 978-1-83862-478-1