

Merger Control in Russia: New Trends and Developments

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Liberalization of Russia's competition law, the Law on Protection of Competition, is ongoing and aimed at aligning it with international best practices. The number of merger control notifications submitted to the Federal Antimonopoly Service of Russia (FAS) has decreased dramatically. Ten years ago, some 6,000 prior notifications and 44,000 post-closing notifications were submitted to the FAS. In comparison, the FAS and its regional offices reviewed only 2,258 prior notifications (including 400 from foreign investors) and 1,913 post-closing notifications in 2013.¹ The decrease was caused by continuous modification of the competition law initiated by the FAS, starting with reduction in thresholds amounts. This trend continued in the first half of 2014: only 807 prior notifications and 322 post-closing notifications were reviewed.²

The most recent amendments to the merger control rules became effective January 30, 2014.³ Under the amendments, contained in Federal Law No. 423-Z, submission of post-closing notification after completion of smaller transactions is no longer required. From the effective date of the amendments through June of 2014, the number of post-closing notifications has fallen by one-third compared to the same period last year. The scope of paper work for both prior and post-closing notifications is similar, so the number of notifications to be reviewed by the FAS will decrease significantly.

The number of notifications will be further reduced as a result of recent amendments proposed by the FAS and introduced into the Russian Parliament (known as the Fourth Antimonopoly Package).⁴ These amendments, if enacted, will be an important step in further liberalizing the competition law framework. With regard to merger control, the draft law would eliminate the Register of dominant firms and those with over 35% market share maintained by the FAS. During the almost two decades in which the Register has been in existence, there has been continuing debate about whether it should be abolished. Currently, merger notification is required if a buyer or target is listed in the Register, regardless of actual assets or turnover figures. In recent years, many foreign companies or their subsidiaries have been listed in the Register, including Novo Nordisk, Roche, Hoffmann-La Roche, Baxter Healthcare, Eli Lilly, Fresenius, Edwards Lifesciences and others. Under the Fourth Antimonopoly Package, the Register will be cancelled, and a filing requirement for any firm on the Register will no longer exist. This change will reduce the administrative burden on business and decrease the number of notifications to be submitted, especially in the Russian regions.

The Package proposes, also, to bring joint venture agreements under the merger control procedures. If the Package is adopted, joint venture agreements between competitors will be

subject to prior notification if asset or turnover thresholds are met. Currently, companies seeking legal certainty can submit to the FAS for review of an agreement potentially restricting competition. The amendments will make notification mandatory. When foreign companies are planning to establish a joint venture related to Russia with foreign or Russian partners, a preliminary assessment should be undertaken to determine whether the joint venture would be subject to the notification obligation.

Work on improving the strategic investments legislation is also advancing. Amendments aimed at clarification of the strategic investments legislation are planned. Despite the current political environment, the Government Commission on Monitoring Foreign Investments, which is similar to CFIUS in the United States, continues to approve transactions of foreign investors in Russian companies. In recent meetings, the Commission has approved deals of such investors as Abbott Laboratories, Blitz F14-206, Fresenius, Holcim, Palfinger, Liebherr and others.⁵

Certain matters are still not regulated in the merger review process. There is no official procedure for dialogue between the FAS and the applicant during the waiting period. The steps are brief and simple—a buyer submits a notification, and the agency grants either conditional or unconditional clearance after review. The FAS's departments vary in how they handle communication with an applicant. Some departments appear to be reluctant to communicate. The outcome of notification review can depend to a certain extent on the effectiveness of communications, in particular communication from counsel.

Remedies that may be imposed on an applicant are also not formalized. The procedure for arriving at an appropriate remedy lacks transparency, and competitors or other interested parties may take advantage of the lack of transparency to attempt to influence the FAS. The FAS is not under a duty to inform an applicant about potential remedies. The applicant may, as a result, first learn of proposed remedies at the last day of the waiting period or shortly before receiving a conditional clearance. In practice, this means that an applicant must be prepared to make important business decisions within a tight time frame. As a rule, for large deals, the FAS tends to negotiate remedies to ensure compliance and increase the acquirer's performance level. This is solely out of goodwill on the part of the FAS, however, and not because of any statutory obligation. For foreign companies relying upon counsel and the quality of negotiations held with the FAS, the current procedures entail considerable uncertainty.

A significant trend is the increasing the importance of economic analysis in merger review. Determining market boundaries, calculating a level of concentration and identifying barriers

to entry have become important steps in the merger review process. The law does not formally require the parties to undertake market analysis, but, in practice, the FAS takes into account market analysis reports, particularly those prepared by independent economists. It has become prudent to complete detailed market analyses before submitting a merger notification, because some of the FAS's offices or departments may not otherwise correctly define the market. In one of our recent transactions, the FAS agreed with the market definition suggested by the parties' counsel and granted unconditional clearance, owing in large part to a market analysis prepared in advance of filing the notification. In another case, the market analysis submitted to the FAS had a significant impact on the scope of remedies imposed.

Merger control in Russia, thus, continues to develop. The major trend is liberalization of the competition law and reduction in the administrative burden on business. Concurrently, merger review is becoming more sophisticated, especially as markets become more concentrated. All of this contributes to an enhanced role for counsel in the merger review process.

¹ Press Release, Fed. Antimonopoly Serv., Mergers and Acquisitions: Trends in 2014 (Sept. 19, 2014), available at http://en.fas.gov.ru/news/news_33938.html.

² Press Release, Fed. Antimonopoly Serv., Igor Artemiev: Our Main Objective Remains Unchanged – Transform Relations in Industries to Pro-Competitive Through Antimonopoly Cases (Sept. 9, 2014), available at http://en.fas.gov.ru/news/news_33911.html.

³ Press Release, Fed. Antimonopoly Serv., The Law on Introducing Amendments to the Federal Law “On Protection of Competition” Shall Come into Force at the End of January (Dec. 31, 2013), available at http://en.fas.gov.ru/news/news_33460.html.

⁴ The main provisions of the draft law are listed in Press Release, Fed. Antimonopoly Serv., The 4th Antimonopoly Package Is Approved by the Government of the Russian Federation (Sept. 4, 2014), available at http://en.fas.gov.ru/news/news_33896.html.

⁵ See, e.g., Press Release, Gov't of the Russ. Fed'n, Government Commission on Monitoring Foreign Investment (June 26, 2014), available at <http://government.ru/en/news/13359> (approving requests from Abbott Laboratories and Fresenius).