Merger Control

Jurisdictional comparisons **First edition 2011**

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LEGISLATION AND JURISDICTION

1. What is the relevant merger control legislation? Is there any pending legislation that would affect or amend the current merger control rules described below?

The Federal Law No. 135-FZ dated 26 July 2006 'On Protection of Competition' (the Competition Law) (with amendments) is the basic law that determines the organisational and legal basis for protection of competition in Russia. It contains necessary definitions, general rules, rights and responsibilities.

The Code of the Russian Federation on Administrative Offences No. 195-FZ dated 20 December 2001 (the Administrative Code) (with amendments) provides for administrative liability for competition amendments and the procedures of case consideration and appellation.

The Criminal Code of the Russian Federation No. 63-FZ dated 24 May 1996 (the Criminal Code) (with amendments) sets up criminal responsibility for competition offences.

Please note, that at the time of writing this chapter the bill amending the Competition Law was in the process of adoption and it is expected to be finally adopted in the spring-summer of 2011. The bill is not expected to significantly change merger clearance rules, but some clarifications will be made.

2. What are the relevant enforcement authorities, and what are their contact details?

The Russian Federation's Federal Antimonopoly Service (FAS) is an authorised executive authority.

The FAS consists of the central office and 84 regional offices. The central office consist of the Head, five Deputy Heads (leading main sectors of regulation) and different departments and divisions, each one in charge of its specific branch of regulation (Department for Control over Industries, Department for Control over Financial Markets etc). Regional offices carry out its activities independently and are led by the Head, appointed by the Head of the central office of the FAS.

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3. What types of transactions are potentially caught by the relevant legislation?

The Competition Law provides for rather complicated merger clearance. To determine if a transaction requires merger clearance under the Competition Law one should test whether the respective thresholds based on the book value of assets of entities and on a shareholding in their charter capital are met.

The following transactions (actions) require the FAS's merger clearance, provided that the respective thresholds established by the Competition Law are met:

- Formation of a Russian legal entity provided that its charter capital is paid up by shares and/or tangible or intangible assets of another business entity and results in:
  - (i) acquisition (in ownership or the right to control) of more than 25, 50 or 75 per cent of voting shares in a Russian joint stock company; or
  - (ii) acquisition of more than one-third, a half or two-thirds of participation interest in the charter capital of a limited liability company; or
  - (iii) acquisition of the rights to own, use or possess tangible (save for land plots and non-commercial (non-industrial) buildings, constructions, premises) and/or intangible assets of a Russian commercial entity, in circumstances where the book value of the acquired assets exceeds 20 per cent of the total book value of tangible and intangible assets owned by this Russian legal entity.
- Reorganisation (in the form of merger or annexation).
- Acquisition of a more than 25, 50 or 75 per cent voting shareholding in a Russian joint stock company.
- Acquisition of more than one-third, a half or two-thirds of participation interest in the charter capital of a limited liability company.
- Acquisition of the rights to own, use or possess tangible assets (save for land plots and non-commercial (non-industrial) buildings, constructions, premises) and/or intangible assets of a Russian commercial entity, in circumstances where the book value of the acquired assets exceeds 20 per cent of the total book value of tangible and intangible assets owned by this Russian commercial entity. Please note that this calculation of assets should be applied only to legal entities operating on commodity markets. For entities operating on financial markets, the threshold is 10 per cent of the total book value of tangible and/or intangible assets owned by such entity.
- Acquisition (including, *inter alia*, under trust management, joint venture or agency agreements) of 'controlling rights' over a Russian commercial entity. Lawmakers failed to define the controlling rights in the Competition Law. The open-ended nature of this law phrase gives rise to ambiguity about whether a specific transaction requires merger clearance. As a result the FAS is allowed to freely interpret this merger clearance requirement. From the practical standpoint, the controlling rights mean the possibility to influence the company's decision-making process.

- Acquisition of managerial rights of a Russian commercial entity (means the rights to exercise functions of the executive body of a Russian commercial entity).

4. Are joint ventures caught, and if so, in what circumstances?

The law does not specially address the creation of joint ventures. Practically speaking, it is treated as an ordinary transaction that results in the acquisition of certain controlling rights over the targeted joint venture.

5. What are the jurisdictional thresholds?

The Competition Law may require merger clearance either in the form of *post facto* notification to the FAS or a prior approval of the FAS. The disclosure requirements for *post facto* notifications and for prior approvals are similar.

Apart from the thresholds based on shareholding and percentage, there are also asset-based thresholds. However, when the asset-based thresholds are not met, the alternative income-based thresholds should be applied.

The Competition Law provides for different thresholds, which depend on whether the entities operate in so-called commodity markets or financial markets. Also, there are separate thresholds for credit institutions.

Prior merger clearance test for commodity markets:

- the book value of the acquirer's worldwide assets, the assets of the commercial entities belonging to the acquirer's group worldwide and the worldwide assets of the target and of commercial entities belonging to its group worldwide, exceeds RUR 7 billion (currently €175 million); or the aggregate worldwide income of the entities listed above from the sale of commodities during the last calendar year exceeds RUR 10 billion (currently €250 million). This threshold should be applied when the abovementioned threshold is not met; and
- the aggregate worldwide value of the assets of the target and of the commercial entities belonging to the target's group exceeds RUR 250 million (currently €6.2 million). This threshold should be applied together with each of the above thresholds; or
- enrolment of the acquirer (or its group) and/or the target (or its group) in the Register of commercial entities with a market share in excess of 35 per cent maintained by the FAS. Please note that this threshold should be applied separately from the abovementioned thresholds and it is applicable only to Russian legal entities.

Post-transaction merger clearance test for commodity markets:

Where the thresholds for prior approval are not met, the Competition Law requires *post facto* notification to the FAS within 45 calendar days after the deal is closed where:

- the book value of the acquirer's worldwide assets, assets of commercial entities belonging to the acquirer's group worldwide and worldwide assets of the target and of the commercial entities belonging to its group worldwide exceeds more than RUR 400 million (currently €10 million); or

- the aggregate income of the acquirer and its group worldwide plus the target and its group worldwide from the sale of commodities during the last calendar year worldwide exceeds more than RUR 400 million (currently €10 million) This threshold should be applied when the abovementioned threshold is not met; and
- the book value of the worldwide assets of the target and of commercial entities belonging to its group worldwide exceeds RUR 60 million (currently €1.5 million).

The official exchange rate used here and in the following is €1 = RUR 40.

As regards the seller, the whole group turnover and the whole group's assets are taken into account (not only the assets/turnover of the part of the group to be sold). Value added taxes and other excise taxes (eg tobacco duties) and intra-group sales are not taken into account. The last statements submitted to the tax authorities (quarter year statements for Russia and year/half year statements for foreign companies) must be used.

6. Are these thresholds subject to regular adjustment?

The thresholds may be changed by a law introducing amendments into the Competition Law. This happens irregularly depending on the economic situation in the country. Since 2006 when the new law was adopted the threshold has been increased once in 2009.

7. Are there any sector-specific thresholds?

There are special thresholds stipulated for companies' operation in financial and credit markets.

Merger clearance test for financial markets:

In relation to financial organisations (except for credit institutions) the transactions listed above require prior merger clearance with the FAS if the book value of the target's (Russian financial organisation) assets (except for its group) exceeds:

- RUR 3 billion (currently €75 million) – for leasing companies;
- RUR 2 billion (currently €50 million) – for non-governmental pension funds;
- RUR 1 billion (currently €25 million) – for stock exchanges;
- RUR 200 million (currently €5 million) – for legal entities operating on the insurance market, management companies of investment funds (and/or mutual investment funds, non-governmental pension funds), specialised depositary institution of investment fund (and/or mutual investment funds, non-governmental pension funds), non-governmental pension funds, Russian leasing companies and professional participants of the securities market;
- RUR 100 million (currently €2.5 million) – for medical insurance organisations, registrars and pawnbroker's offices.

Please note that in relation to financial organisations (except for credit institutions) for the transactions listed above no post transaction merger clearance is required.

Merger clearance test for credit institutions:

In relation to credit institutions prior merger clearance from the FAS is required provided that the respective thresholds are met and there is a:

- merger or annexation of credit institutions if their total book value of assets (except for their groups) exceeds RUR 33 billion (currently €825 million);
- formation of a Russian legal entity, provided that its charter capital is paid up by shares and/or tangible or intangible assets of a credit institution if the total book value of assets of the credit institution exceeds RUR 33 billion (currently €825 million); and
- acquisition of shares (participation interest) in, rights in respect to or assets of a credit institution if its total book value of assets exceeds RUR 33 billion (currently €825 million).

Post facto merger clearance from the FAS is only required for credit institutions for all types of transactions if the total book value of assets of the credit company participating in the transaction exceeds RUR 2.5 billion (currently €62.5 million).

For financial and credit organisations (see below) the thresholds are established for the participating companies only.

8. In the event the relevant thresholds are met, is a filing mandatory or voluntary?

Both, the pre-transaction consent and the post-transaction notification are mandatory where the thresholds are met.

9. Can a notification be avoided even where the thresholds are met, based on a 'lack of effects' argument?

As mentioned above notifications are mandatory, so no arguments on a 'lack of effects' may be a reason for non-submission.

The penalties for failure to notify are the same for all companies and transactions as described below.

10. Are there special rules by which a notification of a 'foreign-to-foreign' transaction can be avoided even where the thresholds are met?

Foreign-to-foreign transactions are caught if they are concluded with regard to acquisition of shares or direct or indirect controlling rights over Russian-based companies or Russian-based assets.

For the moment, notification of foreign-to-foreign transactions may be avoided if the participating companies have no assets in Russia, but only turnover.

Please note that the forthcoming amendments to the Competition Law are expected to change regulation in this field.

11. Does the relevant authority have jurisdiction to initiate a review of transactions which do not meet the thresholds for a notification?

No such powers are stipulated by the Competition Law.

NOTIFICATION REQUIREMENTS, TIMING AND POTENTIAL PENALTIES

12. Is there a specified deadline by which a notification must be made?

The FAS decision in relation to the prior consent applications is valid for one year, so the application may be made well in advance.

Post facto notifications must be submitted within 45 calendar days after closing the deal.

The penalties for failure to meet the deadlines are the same as for other violations of merger clearance procedures as discussed below.

13. Can a notification be made prior to signing a definitive agreement?

If the transaction requires prior FAS approval, the application may be filed in advance before signing a definitive agreement. As mentioned above the FAS decision is valid for one year, thus the parties may start the process one year in advance.

14. Who is responsible for notifying?

In the case of acquisitions the party responsible for filing is the acquirer.

In the case of other transactions where several parties are equally engaged (mergers, joint ventures etc) both participating parties are responsible for notifying.

15. What are the filing fees, if any?

The fee for consideration of an application for pre-transaction consent is RUR 20,000 (€500). Other applications and notifications are not chargeable.

The payment must be made by the applicant to the FAS account together with the submission.

16. Where a notification is necessary, is approval needed before the transaction is closed/implemented (is there a waiting period or a suspension requirement)?

If a transaction requires prior FAS approval, it may be closed right after gaining FAS approval. No waiting periods or suspension requirements are prescribed.

17. If there is a suspension requirement, is it possible to apply for a derogation in order to close before approval is granted? If so, under what circumstances?

Transactions requiring prior consent from the FAS cannot be closed until merger clearance has been obtained. Derogation is not possible.

18. Are any other exceptions (carve-outs, etc) available to allow parties to close/implement prior to approval?

There are two exemptions that allow transactions without the preliminary consent of the antimonopoly body but, instead, with subsequent notification.

The first one applies, if all of the following conditions are met (Article

31 of the Competition Law): (i) the transaction is intra-group; and (ii) prior disclosure of the group has been made to the FAS.

Prior disclosure of the group requires submitting a list of the companies in the group and the basis on which they are included in the group. This can be submitted by any entity in the group, but it must be submitted not later than one month before the execution of the planned transaction (Article 31 of the Competition Law). If the disclosure is approved, the FAS will send the relevant notice to the applicant and the list will be published on the FAS web site.

The second one applies if the transaction in intra-group and the parties to it are connected by holding more than 50 per cent of the shares.

19. What are the possible sanctions for failing to notify a transaction?

If the FAS is not duly notified of a transaction requiring notification, the following administrative liability ensues: individuals are subject to fines of RUR 800-1,200, while office-holders are subject to RUR 5,000-7,000 fines and fines for legal entities range between RUR 150,000 and 250,000.

If failure to provide a required notification is connected with a legal entity's formation through merger or consolidation, such entity may face forced dissolution or reorganisation and if necessary notification wasn't provided in regard to a transaction, such transaction may be declared invalid. However, such consequences are enforced via FAS action in court only if the court finds that the actions which required notification have caused a restriction of competition or are likely to cause such restriction in the future.

20. What are the possible sanctions for implementing a transaction prior to receiving approval (so-called 'gun-jumping')?

Administrative code classifies such actions as a failure to provide a motion required by the antimonopoly legislation and sets forth the following sanctions: RUR 1,500-2,500 fine for individuals, RUR 15,000-20,000 for office-holders and RUR 300,000-500,000 for legal entities.

Similarly to the previous question, the FAS may pursue in court the dissolution or reorganisation of a legal entity formed without prior approval or claim that a transaction performed without such approval is invalid. And again, the court will sustain a claim only if the actions performed cause restriction of competition or are likely to cause such restriction in the future.

21. What are the possible sanctions for implementing a transaction despite a prohibition decision or in breach of a condition/obligation imposed by a conditional clearance decision?

Under the Competition Law an acquirer may only apply for clearance or submit a notification and thus the FAS can hold an acquirer only administratively liable for the failure to submit application or notification.

The consequences for failure to obtain merger clearance for qualifying transactions, submitting applications that contain deliberately false information and violating their procedures and terms of are set out below.

The FAS can initiate administrative proceedings against the acquirer for failure to obtain prior merger clearance and impose a fine of minimum RUR 300,000 up to RUR 500,000 (€7,500-€12,500).

Transactions concluded without FAS permission are not considered null by law. However, the FAS is entitled to unwind the transaction through the courts, provided that it has resulted or may lead in the future to a restriction of competition in the respective market or have any other negative consequences for the respective market.

The FAS has the right to require the parties:

- to terminate, change the terms of the agreement relating to the transaction and/or to enter into a new agreement and/or perform actions aimed at maintaining competition;
- to undo certain acts and restore the situation that existed before the transaction was performed;
- to remit to the federal budget account the income received from the transaction; and
- to perform certain acts aimed at the protection of competition.

For failure to comply with these requirements, the FAS can initiate administrative proceedings and impose a fine of RUR 300,000 to 500,000,000 (€7,500-€12,500).

22. What are the different phases of a review? Is there any way to speed up the review process?

Under the Competition Law, the FAS has 30 calendar days to consider the application. It should be noted that the FAS has the right to extend the 30 calendar-day consideration period for two additional months if it finds need for further consideration or additional information.

There is no way to speed up the process.

The period for reviewing a petition starts from the day after the FAS receives the application with all the documents and data required to be sent with it. After receiving the application, the FAS will evaluate the state of the competitive environment in the relevant commodity markets for the purpose of ascertaining the dominance of the applicant and other persons (group of persons), and also with the objective of determining if the information stated in the application entails a restriction on competition, including as a result of the emergence or strengthening of any dominant position of the applicant or other persons (group of persons).

If this is the position the FAS decides to prolong the case consideration due to the necessity to examine additional documents or information and the FAS posts on its official internet site the data regarding the transaction stated in the application. The applicants, as well as other persons, have the right to submit to the FAS data regarding the impact of the proposed transaction upon the state of competition.

23. Is there a possibility for a 'simplified' procedure or shorter notification form and, if so, under what conditions would this apply?

No simplified procedures are prescribed.

24. What types of data and what level of detail is required for a notification?

The Competition Law and the Order of the Federal Antimonopoly Service No. 129 of 17 April 2008 on Approval of the Form for Presentation of Information to the Antimonopoly Body Upon Addressing Requests and Notices Provided for by Articles 27-31 of the Federal Law on the Protection of Competition sets out an exact list of documents and information to be presented together with the application/notification.

Among the data required is corporate information of the applicant, its financial data, data on business activities and information on its group and final beneficiaries of the group. The same information must be provided with regard to the target company.

25. In which language(s) may notifications be submitted?

In Russian only.

26. Which documents must be submitted along with a notification?

All the documents executed abroad must be duly legalised (notarised and apostilled). All documents must be submitted in Russian. If the original language of the documents is not Russian, a notarised translation must be provided along with the document in its original language.

At the consideration stage the FAS is empowered to request additional documents and/or information.

The following documents must be submitted along with the notification:

- copies of the corporate charter documents of the acquirer and the target company, and documents certifying their registration/identity;
- documents evidencing the terms and conditions of the transaction (typically, a copy of the transaction agreement);
- information on the business activities, volumes of production, sales, product imports, and major performance indicators of the acquirer and the target company within the two years preceding the date of submission;
- documents identifying the book value of the acquirer's and the target's assets;
- documents confirming total book value of assets of the acquirer's and the target's groups of persons;
- acquirer's group charter; and
- target's group charter.

27. What are the possible sanctions for providing incorrect, misleading or incomplete information in a notification?

The liability for such actions is the same as has been described in the answer to the question 19.

28. To what extent is the relevant authority available for pre-notification discussions? Are pre-notification consultations customary?

No pre-notification discussions are available.

29. Where pre-notification consultations are possible, what measures does the relevant authority take to ensure that such discussions are treated confidentially?
Not applicable.

30. At what point and in what forum does the relevant authority make public the fact that a notification has been made?
The FAS publishes the data on the transaction on its official internet site only if it decides to prolong consideration of an application.

31. Once the authority has issued its decision, what information about the transaction and the decision is made publicly available?
After the FAS issues its decision it must be published on its website. Both negative and positive decisions are subject to disclosure.

Normally an FAS decision contains only the essence of a transaction, parties to it and its final decision (approval or non-approval). No sensitive information will be disclosed if it is specially noted by the applying party.

SUBSTANTIVE ASSESSMENT OF THE MERGER, ROLE OF THIRD PARTIES AND REMEDIES

32. What is the substantive test for assessing the legality of a notified transaction?
The FAS assesses the restrictions on competition that can arise from the notified concentration. The substantive test for antimonopoly clearance is whether the concentration will damage competition in Russia.

33. What theories of harm are considered by the authority in assessing the transaction? How concerned are the authorities with non-horizontal (eg, vertical or conglomerate) effects, and are any other theories of harm analysed (eg, coordination in the case of joint ventures)?
In order to assess potential harm the FAS must evaluate the status of competition in a commodity market, which consists of the following steps:

- determining the time interval for studying the commodity market;
- determining the product boundaries of the commodity market;
- determining the geographical boundaries of the commodity market;
- determining the composition of economic subjects operating in the commodity market;
- calculating the commodity market's capacity and the shares of economic subjects on the market;
- determining how concentrated the commodity market is;
- determining barriers to entering the commodity market; and
- determining the state of competition in the commodity market.

A final conclusion on the possible influence of a transaction on the relevant market will be made based on the results of such market assessment.

34. Are non-competition issues, such as industrial policy or labour policy, commonly taken into account in the assessment of the transaction?
Normally not.

35. Are economic efficiencies considered as a mitigating factor in the substantive assessment?
The parties to a transaction may present their reasons for why a certain transaction may be beneficial to third parties, especially for final customers. These reasons will be taken into account by the FAS officers when taking a final decision.

36. Does the relevant authority typically cooperate/share information with authorities in other jurisdictions?
The FAS actively cooperates with foreign antitrust authorities on different issues, but normally such cooperation does not relate to merger clearance matters.

37. To what extent are third parties involved in the review process?
If the FAS decides to prolong its consideration of an application, it publishes on its official internet site data on the transaction declared in the application. Third persons concerned may submit to the antimonopoly body data on the impact of such transactions on the state of competition.

38. Is it possible for the parties to propose remedies for potential competition issues?
Under usual circumstances the remedies to be imposed on the parties are not subject to discussion.

39. What types of remedies are likely to be accepted by the authority (eg, divestment remedies, other structural remedies, behavioural remedies, etc)?
In certain cases the FAS is entitled to authorise a transaction resulting in restriction of competition if an applicant unilaterally undertakes an obligation to meet certain FAS requirements aimed at maintenance of competition in the market.

The FAS may establish such behavioural remedies at their own discretion. The most typical requirements aimed at maintaining competition the FAS imposes are the following:

- To ensure that the transaction does not have an adverse effect on the previous business activities conducted by the acquirer, including fulfilment of obligations undertaken under agreements previously entered into by the acquirer.
- Not to cease or reduce production of certain goods.
- Within a certain period of time (usually within years after the deal is closed) to provide the FAS with information on current prices, performance of agreements, volumes of output and supply etc.
- Not to increase prices without prior notification of the FAS and for no more than five per cent per quarter.

- To proceed with business activities under non-discriminatory price conditions or to introduce special price conditions recommended by the FAS.
- To enter into an agreement(s) with other players in the respective commodity market.
- To sell a part of business.
- The FAS may also require a regular update on the corporate structure of the commercial entity that undertook the behavioural obligations.

Notably, all required actions are of injunctive nature and not of a prohibitory nature.

40. What power does the relevant authority have to enforce a prohibition decision?

The FAS does not possess special powers to enforce its decisions. Normally it does not monitor if its prohibitions are followed or not.

JUDICIAL REVIEW

41. Is it possible to challenge decisions approving or prohibiting transactions? If so, before which court or tribunal?

FAS decisions like all administrative decisions may be challenged in courts of general jurisdiction (for persons) or arbitration (commercial) courts (for companies).

42. What is the typical duration of a review on appeal?

The court claim must be considered within one month after its receipt by the court. However in practice the period may be substantially prolonged depending on the courts' daily workload and procedural issues.

43. Have there been any successful appeals?

There is no extensive practice on challenging FAS merger and acquisition clearance decisions.

STATISTICS

44. Approximately how many notifications does the authority receive per year?

During 2009 (the FAS yearly report for 2010 has not been published yet) FAS considered 4160 pre-transaction applications and 9118 post-transaction notifications. Among them 4054 applications were approved and 8646 notifications were confirmed; FAS refused its approval for 106 applications.

The main reason for rejection was failure to present information on final beneficiaries (persons who in fact control the acquirer).

45. Has the authority ever prohibited a transaction? How many prohibition decisions has the authority issued in the past five years?

For the years from 2007 to 2009 the FAS prohibited the following transactions (rejected applications): 2007 – 90 applications; 2008 – 141 applications; and 2009 – 106 applications.

FAS rejected the following notifications: 2007 – 104 notifications; 2008 – 1013 notifications; and 2009 – 472 notifications.

46. Over the past five years, in what percentage of cases have binding commitments been required in order to obtain clearance for a transaction?

In 2007 5.8 per cent of FAS approvals were issues with binding requirements or remedies; in 2008 the percentage of such approvals increased up to 6.9 per cent; in 2009 the percentage of conditional approval comprised 5.6 per cent.

47. How frequently has the authority imposed fines in the past five years?

For the period of 2008 the FAS imposed 31 fines for different violations of merger control rules, for 2009 the number decreased down to 16 fines.