This country-specific Q&A provides an overview of merger control laws and regulations applicable in Russia.

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RUSSIA
MERGER CONTROL

1. Overview
The Russian merger control rules are set forth in the Russian federal law “On the Protection of Competition” (the “Competition Law”). Since its coming into force in 2006, the Competition Law has been amended repeatedly. The Competition Law provides for basic merger control rules that apply to any industry or market and to various types of transactions involving Russian entities or assets or foreign entities that conduct business in or with Russia.

The relevant enforcement agency is the Federal Antimonopoly Service (“FAS”) with a central office in Moscow and territorial offices throughout the Russian regions. There are certain internal rules at FAS regulating the allocation of tasks and merger control applications between the central and the territorial offices. The FAS is internally subdivided into a number of specialised divisions, whereby each division covers a particular industry or economic sector.

The FAS is also the competent authority for handling filings under Russian laws on foreign investments. While the foreign investment laws are a set of regulations separate from the merger control rules, they can have a procedural impact on merger clearance and should always be considered in case of a foreign, or foreign-held, entity involved in the transaction.

2. Is notification compulsory or voluntary?
Merger clearance is compulsory in case the relevant criteria, in particular turnover and balance sheet – related thresholds, are fulfilled. Filings for approval of agreements on joint activities of competitors can be made voluntarily in case the relevant thresholds are not reached.

3. Is there a prohibition on completion or closing prior to clearance by the relevant authority? Are there possibilities for derogation or carve out?
Completion of a transaction prior to clearance by FAS may lead to the same consequences, i.e. potential administrative penalties and avoidance of the transaction, as conducting a transaction in the complete absence of clearance.

It is in principle possible to carve out Russian shares or assets from a global transaction, if the structure of the transaction permits.

In addition, there is an option for intra-group transactions that allows to submit a subsequent notification instead of an application for prior approval, provided that a group chart is submitted to FAS prior to implementing the transaction. The main disadvantages are: (i) no changes of the group are permitted other than the transaction to be filed, and (ii) the transaction cannot be completed within one month from the date of submission of such group chart (1-month waiting period).

4. What types of transaction are notifiable or reviewable and what is the test for control?
The following types of transactions require pre-transaction clearance:

- acquisition of voting stock of another company, resulting in the acquirer and its group holding in total more than 25, 50 or 75 per cent of voting stock of a Russian joint-stock corporation or resulting in the acquirer and its group holding in total more than 33.3, 50 or 66.6 per cent of the voting shares in a Russian limited liability company;
- acquisition of rights to determine the business activities of a Russian entity (e.g. management agreement, trust agreement, joint venture agreement, agency agreement;
or by way of acquisition of more than 50% of shares in the major shareholder of a Russian entity);

- acquisition of more than 50% voting shares/stock in, or otherwise control over, a company registered outside Russia if its (and its subsidiaries) Russian turnover in the preceding year exceeded 1 billion rubles;
- acquisition of fixed assets located in Russia (except for plots of land and non-industrial finished and unfinished buildings, constructions, premises and parts of premises) and (or) intangible assets of an entity (except for a financial organisation) into possession, usage (i.e. including lease) or ownership, if the book value of the acquired property exceeds 20 per cent
- of the book value of the fixed assets and intangible assets of the entity which is selling or transferring the property; various forms of corporate restructuring (mergers, accessions) of companies; entering into a an agreement on joint activities (whether in connection with a corporate or a contractual joint venture) by competitors on the Russian market;
- establishment of new companies if their capital is paid by using voting shares/stock or assets of other companies.

According to FAS various types of transactions can constitute an “acquisition”, even circumstances not depending on a party, e.g. in case of an exit of another shareholder from a jointly held entity, or the inheritance of property.

The specific trigger events are largely formal criteria rather than a universal concept of control. To the extent the events triggering a filing requirement are based on the acquisition of “control”, such control is broadly determined and refers to the ability of an individual or a legal entity to determine, directly or indirectly, the decisions to be taken by another legal entity by any means, whether of corporate (e.g. holding of more than 50% of voting shares) or contractual nature. There is court practice that the acquisition of negative control by way of granting (even far-reaching) veto rights is not sufficient to trigger a filing requirement, although this has to be carefully evaluated on a case-by-case basis. In particular veto rights with direct impact on decisions concerning the business of the company (e.g. appointment of CEO, adoption of business plan, approval of core business transactions) and granted specifically to a certain shareholder can be problematic from FAS’s perspective. According to FAS a shareholding of 50% can potentially constitute (negative) control, at least if combined with veto rights on strategic decisions, thereby triggering a filing requirement.

Apart from the determination of control as described above, differing concepts of control and allocation to a group are used at other instances in the Competition Law. For example, when determining an acquirer’s or target’s group, the necessary link between two group entities can be established even by them having one and the same CEO. In contrast, for the application of an intragroup privilege from horizontal or vertical restrictions, control is limited to holding more than 50 per cent of the voting shares in an entity or acting as a sole executive body of such legal entity.

5. In which circumstances is an acquisition of a minority interest notifiable or reviewable

The acquisition of a minority interest in a Russian entity can be notifiable. The percentage of shares triggering a filing depends on the type of entity: thresholds are 25, 50 or 75 per cent of voting stock of a Russian joint-stock corporation, or 33.3, 50 or 66.6 per cent of the voting shares in a Russian limited liability company. The shares to be taken into account include all shares held or to be acquired in the envisaged transaction by the acquirer or any other entity of the acquirer’s group.

The acquisition of a minority interest in a foreign company is generally not notifiable; as a rule only the acquisition of more than 50 per cent of shares/voting stock of a non-Russian company triggers a filing requirement. An exception from this rule can, for example, apply in case of a joint venture between competitors.

6. What are the jurisdictional thresholds (turnover, assets, market share and/or local presence)? Are there different thresholds that apply to particular sectors?

The Competition Law sets general economic thresholds that apply to most transactions. Pre-transaction filing for approval is required if:

- (i) the aggregate book value of the total assets of the acquirer with its group of entities and the target with its group of entities exceeds RUB 7,000,000,000; or
- (ii) the aggregate turnover of the acquirer with its group of entities and the target with its group of entities exceeds RUB 10,000,000,000;

and
• the aggregate book value of the total assets of the target with its group of entities exceeds RUB 400,000,000.

There are other economic thresholds for mergers between companies. Specific thresholds apply to joint venture agreements (see question 9) and for acquisitions of non-Russian entities without a local presence in Russia (see question 11).

There are also different economic thresholds for transactions involving financial entities (banks, insurance companies, etc.) which are changed from time to time by acts of the Russian government.

Upon calculation of the target-related asset and turnover values the seller’s group turnover or assets must be added in case the seller does not lose control over the target.

7. How are turnover, assets and/or market shares valued or determined for the purposes of jurisdictional thresholds?

As a general rule, turnover and book value of assets are determined on a world-wide basis. For the purpose of calculating the book value the consolidated balance sheet of the parties to the transaction may be used.

The criterion of a market share as a trigger event does not apply.

8. Is there a particular exchange rate required to be used to convert turnover and asset values?

The official exchange rates determined by the Central Bank of the Russian Federation are used to convert foreign currencies into Russian roubles. For most currencies, the rates are determined on a daily basis. The official rates are available on the website of the Central Bank of the Russian Federation (http://www.cbr.ru/eng/). With respect to data submitted to FAS, as a rule the exchange rate as of the last date of the relevant accounting period (usually the calendar year, i.e. 31 December) is applied.

9. In which circumstances are joint ventures notifiable or reviewable (both new joint ventures and acquisitions of joint control over an existing business)?

Entry into, and amendment of, joint venture agreements by competitors requires a mandatory merger control filing if the aggregate asset value of all parties (and their groups) exceeds RUB 7,000,000,000 or their aggregate turnover exceeds RUB 10,000,000,000 for the calendar year preceding the entry into the joint venture agreement.

Conclusion of a joint venture agreement by two competing non-Russian entities can also be subject to FAS approval if the parties perform or are contemplating joint activities in Russia. Competitors for purposes of this filing requirement can, in principle, also be enterprises that compete not within, but only outside the area of the specific collaboration.

Shareholder agreements regulating purely corporate relationships between shareholders of a joint venture entity are generally not regarded as joint venture agreements for purposes of merger control, subject to careful review and scrutiny of their provisions.

 Syndicated loan agreements are not qualified as joint venture agreements either.

This filing requirement on joint venture agreements between competitors applies irrespective of the allocation of control. There is no specific filing requirement for joint ventures between enterprises that do not compete with each other. In this respect the general filing requirements as to types of transactions (see question 4) apply. Consequently the joint formation of a new Russian entity with cash contributions by two or more non-competing partners does generally not trigger a filing requirement.

Russian merger control does not distinguish between full-function and non-full-function joint ventures. There is no concept of joint control under the Russian Competition Law.

10. Are there any circumstances in which different stages of the same, overall transaction are separately notifiable or reviewable?

Each stage of an overall transaction is to be assessed separately from the perspective of Russian merger control rules. Consequently it may happen that multiple steps of an overall transaction each require approval under Russian merger control rules. In most cases interrelated steps can be combined into one merger control filing.
“foreign-to-foreign” mergers and transactions involving a target/joint venture with no nexus to the jurisdiction?

For foreign-to-foreign transactions, a specific economic threshold applies in addition to the general thresholds as set out in question 6. Transactions leading to the acquisition of control over a company registered outside Russia require approval only if the target company (including all of its subsidiaries) had supplies of goods (services) into Russia amounting to more than RUB 1,000,000,000 in the year preceding the year when the respective transaction is intended to take place.

12. For voluntary filing regimes (only), are there any factors not related to competition that might influence the decision as to whether or not to notify?

No.

13. What is the substantive test applied by the relevant authority to assess whether or not to clear the merger, or to clear it subject to remedies? Are there different tests that apply to particular sectors?

FAS assesses whether or not the transaction leads to a limitation of competition in the relevant market.

A limitation of competition usually occurs when the notified transaction leads to the creation or expansion of a dominant position of any entity in the relevant market. A market share of more than 35% is required for market dominance, and in case of more than 50% market share the market dominance is presumed. A market share percentage lower than 35% can suffice in case several companies together are regarded as market dominant. Sometimes a dominant market position can easily be obtained, in case the relevant market is defined very narrowly (e.g. specific spare parts, consumables, medicine). Other assumptions of dominance apply to financial organisations, telecom operators and certain other regulated industries.

Apart from market dominance, other effects of the notified transaction are evaluated in order to assess a potential limitation of competition:

- reduction in the number of independent participants of a certain product market;
- increase or decrease in the price for a particular product that is not connected with the relevant changes of general conditions of circulation for that product;
- refusal of market participants that do not belong to the same group to independently conduct their business activity on the market;
- determination of general terms and conditions for commodity circulation on a particular goods market by an agreement between market participants; or
- any other circumstances enabling one or several market participants to affect the general conditions for circulation of goods on a market at its/their sole

14. Are factors unrelated to competition relevant?

In parallel with ordinary merger control filing requirements provided for by the Competition Law there are also filing requirements for foreign investments as set forth in the Federal Law No. 57-FZ “On the Procedure for Making Foreign Investments in Business Entities of Strategic Importance for National Defence and State Security” dated 29 April 2008 (the “Strategic Investment Law”) and the Federal Law No. 160 “On Foreign Investments in the Russian Federation” dated 9 July 1999 (the “Foreign Investment Law”). These filings can be made in parallel with the merger control filing.

A transaction will not be cleared by the FAS if that transaction also requires approval under the Strategic Investment Law and such approval has not been obtained. In the past the practical criterion for determining whether or not an entity qualified as a strategic entity often used to be the holding of a license that entitles the respective entity to carry out a certain business activity of strategic importance. However, recent court practice indicates that the types of activities of strategic importance can be interpreted widely to include ancillary activities, for example, the provision of maintenance of equipment to an entity holding an oil exploration license. Please note that the Foreign Investment Law provides for the authority of the Head of the Government of the Russian Federation to request an approval of any foreign investment transaction in a manner provided by the Strategic Investment Law (i.e. prior approval with the consequence of a transaction being void in case of absence of such approval).

15. Are ancillary restraints covered by the authority’s clearance decision?

The clearance decision usually approves the transaction without mentioning ancillary restraints or other provisions, except for cases when approval is granted
subject to the fulfilment of certain conditions. Therefore, the clearance decision can generally not be regarded as covering ancillary restraints with legally binding effect.

However, during the review process the authority normally reviews all relevant arrangements of the parties to the concentration, including non-compete and exclusivity arrangements. Therefore, in practice the approval of a transaction is usually sufficient indication for the parties to believe that all information they have submitted to the FAS has been found satisfactory by the authority as a matter of fact.

16. For mandatory filing regimes, is there a statutory deadline for notification of the transaction?

No. The formal approval (clearance decision) must be obtained before the transaction is completed, e.g. before a share transfer becomes effective.

17. What is the earliest time or stage in the transaction at which a notification can be made?

A notification must be made in time to ensure that the clearance decision is obtained before the first notifiable stage of a transaction. There is no statutory limitation of the earliest time, although the clearance decision is valid for one year following the date of issue of the clearance decision. If the parties have not completed the transaction within one year, it is necessary to obtain another (new) approval.

Practically the possibility to notify early is also limited by the requirement to submit the relevant transaction agreement, e.g. share purchase agreement, underlying the filing requirement. The document can, however, be submitted in the form of a draft that has not been finalized yet, although the draft should contain the key structural elements of the transaction.

18. Is it usual practice to engage in pre-notification discussions with the authority? If so, how long do these typically take?

Pre-notification discussions occur but are not common. A formal pre-notification procedure had been introduced in 2016, but is apparently not being used frequently. Intense communication with the authority usually takes place after the merger control filing has been made.

19. What is the basic timetable for the authority’s review?

The general term for review of the merger control application is 30 calendar days, although an extension is not uncommon (see question 20 below).

20. Under what circumstances may the basic timetable be extended, reset or frozen?

The general term can be extended by up to another 2 months if FAS requires additional information for making a decision regarding the transaction.

This general term can also be prolonged by another 9 months if FAS issues certain conditions which have to be met within this 9-month period.

21. Are there any circumstances in which the review timetable can be shortened?

There are no legal grounds for shortening the review period of the merger control application. In practice this term can be shortened if FAS is satisfied with the documents provided and has no additional questions, although this also depends on the potential impact of the transaction on competition in the relevant market.

22. Which party is responsible for submitting the filing?

This depends on the kind of transaction to be approved. In the case of an acquisition of shares/assets, the acquirer is the responsible party. In the case of a merger or a conclusion of a joint venture agreement, both parties are responsible.

23. What information is required in the filing form?

The filing form must contain certain information, in particular:

- information regarding the entities involved in the transaction and their groups, in particular, general information, information on their direct shareholders and ultimate beneficiaries, their shareholdings, balance sheet value;
- information on the structure of the transaction;
- information on the impact of the transaction on the markets.
24. Which supporting documents, if any, must be filed with the authority?

The application must be accompanied by several supporting documents, including:

- constitutional documents of the companies;
- extract from the trade register regarding the companies;
- balance sheet statements of the companies;
- tables of economic activities of the companies;
- copies of licenses of the companies;
- copy (or draft) of the main transaction document (e.g. share purchase agreement)

as well as some other documents depending on the type of transaction. All non-Russian documents must be notarized and apostilled and accompanied by a notarized translation into Russian.

Due to the formal requirements and the scope of information to be provided, the preparation of a filing often takes 1-2 months. FAS can refuse to accept a filing for review if they consider the filing to be incomplete. FAS can also request additional information that it considers necessary to assess the filing. It is therefore generally advisable to contact the case handler at the authority once appointed. The identity of the case handler is, however, not disclosed if part of the filing is marked as commercial secret.

25. Is there a filing fee?

The filing fee is RUB 35,000.

26. Is there a public announcement that a notification has been filed?

Yes, the information regarding submission of the application is to be published on the website of FAS (www.fas.gov.ru) as a matter of law. However, in practice FAS does not always appear to fulfill this requirement.

27. Does the authority seek or invite the views of third parties?

The information regarding submission of the application which is published on the website of FAS often contains such an invitation for third parties to share their views on the impact of the transaction on the markets concerned. In addition, FAS may request certain information or opinions from third parties during the review process. However, in practice such collection of the views of third parties is quite rare.

28. What information may be published by the authority or made available to third parties?

The information on the parties to the transaction, their addresses and main kinds of business activity, as well as the description of the transaction may be published by FAS.

Parties to the transaction can request FAS to keep information regarding the transaction and the conditions of the approval confidential. In this case, FAS must not disclose this information.

29. Does the authority cooperate with antitrust authorities in other jurisdictions?

FAS cooperates with antitrust authorities in other jurisdictions and is trying to expand such cooperation. According to FAS, FAS has been increasingly coordinating its approach in global transactions with competition authorities from other countries. In particular working groups with other BRICS countries have been set up over the last few years, and an ongoing relationships with other competition authorities exist. As an example, in Siemens/Alstom FAS consulted with the EU Commission and the competition authorities in South Africa, India, China, Brazil, the United States, Australia and Saudi Arabia.

30. What kind of remedies are acceptable to the authority?

There are two options that allow clearance to be obtained if FAS regards the transaction as perilous for competition:

- In the first scenario, FAS may delay clearance and request the parties to perform certain actions in order to decrease the negative effect on competition;
- In the second scenario, FAS approves the transaction under certain conditions, e. with the obligation for the parties to perform certain actions, regularly provide FAS with certain information, prohibition on the sale or purchase of certain assets.

The scope of actions prescribed by FAS can comprise divestiture of certain assets, obligation to regularly provide FAS with certain information/reports, obligation
to enter into agreements with certain customers, obligation to keep a certain level of supply of goods on certain markets, etc.

31. What procedure applies in the event that remedies are required in order to secure clearance?

As described above, there are two types of remedies available for FAS. In the first scenario, if FAS believes that the transaction could actually lead to restriction of competition in a certain market, FAS issues a decision on the delay of the review process and obliges the parties to perform certain actions or meet certain requirements. The duration of such delay may not exceed 9 months.

In the second scenario, FAS issues such conditions simultaneously with the clearance decision. Such conditions can be limited to a specific period or unlimited in time.

There are no voluntary remedies that can be used by the parties in advance to secure clearance. However, despite the fact that there is no legally provided mechanism for negotiation of such conditions with FAS, it is always advisable to actively negotiate with FAS in case the transaction could actually restrict competition in order to minimize the imposed conditions or receive unconditional clearance.

32. What are the penalties for failure to notify, late notification and breaches of a prohibition on closing?

The following negative consequences are provided for failure to notify, late notification and breaches of a prohibition on closing:

- fine imposed on the company which is responsible for the filing in the amount of up to RUB 500,000;
- fine imposed on the general director (CEO) in the amount of up to RUB 20,000;
- potential challenge of the transaction by FAS in court if the transaction could lead to the restriction of

33. What are the penalties for incomplete or misleading information in the notification or in response to the authority’s questions?

The penalty for incomplete or misleading information is RUB 500,000 for the company (applicant) and up to RUB 20,000 for the company’s general director. In addition, FAS can refuse to approve the transaction.

34. Can the authority’s decision be appealed to a court?

Yes, the decision of FAS can be appealed to a court within 3 months from the date of issue.

35. What are the recent trends in the approach of the relevant authority to enforcement, procedure and substantive assessment?

In the wake of Bayer/Monsanto in 2018, FAS appears to have become more inclined to use the imposition of conditions or restrictions in connection with a merger clearance. In the past this had happened only on rare occasions. Recently FAS applied this approach in a transaction between two popular retail chains, Magnit and Diksi. Certain regions or municipalities where Magnit had a high market share (more than 25%) were to be carved out from the transaction, and Magnit committed not to add any profit margins on certain socially important products (milk, bread, chicken).

In June 2021 FAS published clarifications on merger control. The comprehensive document aims to address questions across a number of issues concerning merger control, ranging from the criteria triggering a filing requirement and procedural questions to the determination of market impact, issuance of a decision and consequences of conducting a transaction without clearance.

In practical procedural terms FAS appears to have become less inclined to provide the identity and contact details of the case handler to the applicant, after receiving a merger control filing. During the review process more attention than previously is apparently being focused on ultimate beneficiaries of the parties. As a result FAS tends to request more detailed information on UBOs than in the past, even though the very detailed and comprehensive disclosure of UBOs under foreign direct investment regimes is legally required only for FDI filings and should strictly speaking not apply directly to merger control filings.

36. Are there any future developments or planned reforms of the merger control regime in your jurisdiction?

FAS is still pursuing the so-called “fifth antimonopoly
package” which provides for certain amendments to the merger control regime. In particular, it is envisaged that a new economic threshold will be established as a requirement for merger control clearance, namely a transaction value of RUB 7 billion. According to FAS this amendment, *inter alia*, would allow FAS to better supervise digital markets and prevent abuses by IT giants, with FAS also citing a transaction between Yandex Taxi and Vezet Taxi that, in FAS’s view, hurt the level of economic concentration in the taxi market but did not require approval of FAS under the current legislation.

In July 2021 FAS publicly stated that it has prepared a draft law proposing to raise the threshold of antimonopoly control from 400 to 800 million Russian rubles. The draft law aims to reduce the administrative burden for small and mid-sized businesses. This concerns both the applicability of rules on a dominant market position, i.e. a company cannot be recognized as a dominant economic entity if its annual revenue does not exceed 800 million rubles, as well as the applicability of merger control.

Thus, the draft law establishes that whenever the amount of the merger or acquisition transaction (i.e. the book value of the target’s assets) does not exceed 800 million rubles, such a transaction will not require the approval of an antimonopoly body.

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