The Merger Control Review

Sixth Edition

Editor
Ilene Knable Gotts

Law Business Research

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EDITOR'S 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, particularly in Asia, are poised to add pre-merger notification regimes in the next year or so. The 10 Member States of the Association of Southeast Asian Nations, for example, have agreed to introduce national competition policies and laws by year-end 2015. We have expanded the jurisdictions covered by this book to include the newer regimes as well in our endeavour to keep our readers well informed.

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. China, for instance, in 2009 blocked the Coca-Cola Company's proposed acquisition of China Huiyuan Juice Group Limited and imposed conditions on four mergers involving non-Chinese 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. It is, therefore, imperative that counsel for a transaction develops a comprehensive plan prior to, or immediately upon, execution of the agreement concerning where and when to file notification with competition authorities regarding the transaction. In this regard, this book provides an overview of the process in 43 jurisdictions, as well as a discussion of recent decisions, strategic considerations and likely upcoming developments. Given the number of recent significant M&A transactions involving pharma and high-technology companies, we have added to this year's edition chapters focusing on the US and EU enforcement trends in these important sectors. In addition, as merger review increasingly includes economic analysis in most, if not all, jurisdictions, we have added a chapter discussing the various economic tools used to analyse transactions. 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.

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 clients on a particular transaction. Almost all jurisdictions vest exclusive authority to review transactions in one agency. The US and China may end up being the exceptions in this regard. 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, for instance, provides for a *de minimis* exception for transactions occurring in markets with sales of less than €15 million. There are some jurisdictions, however, that still use 'market share' indicia (e.g., Bosnia and Herzegovina, Colombia, Lithuania, Portugal, Spain, Ukraine and the UK). 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, Turkey recently issued a decision finding that a joint venture (JV) that produced no effect in Turkish markets was reportable because the JV's products 'could be' imported into Turkey. 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., Australia, Singapore, the UK and Venezuela), the vast majority impose mandatory notification requirements.

The potential consequences for failing to file in jurisdictions with mandatory requirements varies. Almost all jurisdictions require that the notification process be concluded prior to completion (e.g., pre-merger, suspensory regimes), rather than permitting the transaction to close as long as notification is made prior to 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 Authority imposed a €4 million fine on Castel Frères for failure to notify its acquisition of part of Patriache group. 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 and India provide for 15 days after signing the agreement; and Hungary, Ireland and Romania have a 30-calendar-day time limit commencing with the entering into the agreement for filing the notification. 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, India 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., Greece, Portugal, Ukraine and the US). 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 addition, other jurisdictions have joined the EU and US in focusing on interim conduct of the transaction parties. Brazil, for instance, issued its first 'gun jumping' fine last year and recently issued guidelines on gun jumping violations. In most jurisdictions, a transaction that does not meet the pre-merger notification thresholds is not subject to review and challenge by the competition authority. In Canada – like the US – however, the agency can challenge mergers that were not required to be notified under the

pre-merger statute. In 2014 alone, the Canadian Competition Bureau took enforcement action in three non-notifiable mergers.

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 EU model than the US 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 Japanese Federal Trade Commission (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 process with the EU model. There remain some jurisdictions even within the EU that differ procedurally from the EU 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 are to 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 EU and Germany), third parties may file an objection to a clearance decision. In some jurisdictions (including Canada, the EU and the US), 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 Authority.

In almost all jurisdictions, once the authority approves the transaction, it cannot later challenge the transaction's legality. The US 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, in that the Authority has the ability to

mandate notification of a transaction for a period of up to three months following the transaction's consummation.

It is becoming the norm in large cross-border transactions raising competition concerns for the US, Canadian, Mexican and EU authorities to work closely together during the investigative stages, and even in determining remedies, minimising the potential of arriving at diverging outcomes. The Korean Fair Trade Commission 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 CADE, 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 EU jurisdictions, Member States often keep each other informed during the course of an investigation. In addition, transactions not meeting the EU threshold can nevertheless be referred to the Commission in appropriate circumstances. In 2009, the US signed a memorandum of understanding with the Russian Competition Authority to facilitate cooperation; China has 'consulted' with the US and the EU on some mergers and entered into a cooperation agreement with the US authorities in 2011. The US also has recently entered into a cooperation agreement with India.

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 EU 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 UK 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 standalone 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. Multijurisdictional 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 US 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 environment, obtaining the approval of jurisdictions such as Brazil and China can be as important as the approval of the EU or the US. 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 EU, France, the Netherlands, Norway, South Africa, Ukraine and the US). For instance, some recent decisions have included as behavioural remedies pricing, sales tariffs and terms of sale conditions (e.g., Ukraine and Serbia), employee retrenchment (South Africa) and restrictions on bringing antidumping 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*, 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.

Ilene Knable Gotts
Wachtell, Lipton, Rosen & Katz
New York
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Chapter 32

RUSSIA

Anna Numerova and Elena Kazak[1]

I INTRODUCTION

The principle law regulating merger control in Russia is still Federal Law No. 135-FZ dated 26 July 2006 'On Protection of Competition' (Competition Law). The sole agency in charge of its enforcement is the Federal Antimonopoly Service of Russia (FAS). Decrees of the government, administrative regulations of the FAS and other by-laws may only specify and regulate details regarding certain issues.

The merger control rules and thresholds with regard to financial institutions differ from those provided for other undertakings. Financial institutions include credit, insurance and microfinance institutions, and other institutions rendering financial services. The thresholds for such institutions are established by the government either on its own or together with the Central Bank of Russia. In October 2014, a new Governmental Decree revising the assets value of financial institutions for the purposes of merger control was adopted.

Depending on the parties and the transaction's character, in addition to being subject to the merger control rules and thresholds, a transaction with a foreign element may require other regulatory clearances under separate grounds and a filing procedure. Such filings are provided for by, *inter alia*, Federal Law No. 57-FZ dated 29 April 2008 'On Procedures for Foreign Investments in Companies Having Strategic Importance for National Defence and State Security' (Strategic Investments Law) and the Federal Law No.160-FZ dated July 09, 1999 'On Foreign Investments in the Russian Federation' (Foreign Investments Law). For further details, see Sections II and V, *infra*.

The number of foreign undertakings that applied for clearance amounted to approximately 15 per cent of the total number of notifications filed (299 notifications)

1 Anna Numerova is a counsel and Elena Kazak is a senior associate at Egorov Puginsky Afanasiev & Partners.

in Russia in 2014. Only seven foreign undertakings were rejected for clearance. Rather than competition concerns, the reason for rejection is commonly failure to provide information in the absence of which the FAS cannot make a decision, or providing misleading information that is important for its decision-making process.

II YEAR IN REVIEW

i Transactions with foreign investments

In 2014 the FAS cleared a number of global transactions, including *Holcim/Lafarsh*, *AMEC/Foster Wheeler*, *Nestlé/Galderma* and *Bosch/Siemens*. Despite the current political environment, the Government Commission on Monitoring Foreign Investments (Commission) continues to approve transactions involving foreign investment in Russian companies. For example, the Commission has approved deals by investors such as Abbott Laboratories, Blitz F14-206, Fresenius, Palfinger and Liebherr.[2]

ii Approach to mergers on the pharmaceuticals market

The FAS maintains a conservative approach regarding mergers in the pharmaceuticals market. The regulator defines the product boundaries of pharmaceutical drugs based on their international non-proprietary name (INN), and under this assumption will issue conditional clearance. Thus, for example, if there are no generics available in Russia, the original drug manufacturer should be declared as having a dominant position on the market. Where a transaction is entered into between manufacturers of pharmaceutical drugs having the same INN, the regulator either prohibits the transaction or issues a conditional clearance (with structural or behavioural remedies). The European approach regarding the potential interchangeability of pharmaceutical drugs based on their health-care effect, and accordingly the extension of the product boundaries, has not yet been supported by the FAS. By way of illustration, examples of such transactions include *Nestlé/Galderma* and *Pharmstandart/NPO Petrovax Pharm*.

iii Statistics

According to the FAS' Analytical Department, 1,928 notifications were considered in 2014, of which 1,899 were cleared. Of these, 154 (i.e., less than 10 per cent) were granted conditional clearance. The remedies that were imposed are mostly behavioural.

iv Legislative developments

A package of amendments to the Competition Law and other relevant laws (Fourth Antimonopoly Package) is still under consideration. The first reading at the State Duma has taken place, and the legislators supported those amendments cancelling the Russian Register of companies with market share exceeding 35 per cent (Register) and introducing new procedures for joint venture approvals.

2 See, e.g., the Commission's meeting minutes (26 June 2014) (approving requests from Abbott Laboratories and Fresenius), available at http://government.ru/en/news/13359.

During the almost two decades that the Register has been maintained by the FAS, there have been continuous debates about whether it should be abolished. Currently, merger notification is required if a buyer or target (or any company within their groups) is listed in the Register, regardless of actual assets or turnover. 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 and Edwards Lifesciences. Under the Fourth Antimonopoly Package, the Register will be cancelled, and a filing requirement for any firm listed in the Register will no longer exist. This change will reduce the administrative burden on businesses and decrease the number of notifications submitted, especially in the Russian jurisdiction.

The Fourth Antimonopoly Package also proposes bringing 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 agreements that will potentially restrict competition to the FAS for review. The amendments will make notification mandatory. This would mean that if 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 is subject to an obligation to notify.

III THE MERGER CONTROL REGIME

Under the Competition Law, generally, the following transactions are subject to merger control: mergers and takeovers, incorporation of a company (if its charter capital is paid by shares or assets, or both, of another company), and the acquisition of shares, assets and controlling rights. The Competition Law has extraterritorial effect, and is applicable to foreign-to-foreign transactions with certain peculiarities specified below.

There are two forms of merger control: pre-closing clearance and post-closing notification. The latter has been significantly changed by amendments to the Competition Law effective as of 30 January 2014. Post-closing notifications are now only applicable to intra-group transactions. There is an exception: intra-group transactions between companies connected directly or indirectly by 50 per cent share ownership are not subject to any form of merger control.

Filing thresholds differ according to the type of merger control transaction, although there is an additional threshold for foreign companies. Triggering events are generally the same for both Russian and foreign targets, although there are certain peculiarities for the latter.

The filing thresholds (turnover and assets test) are as follows:

a for mergers, takeovers and the incorporation of a company (if its charter capital is paid by shares or assets, or both, of another company) the following thresholds apply to both Russian and foreign companies:

- the combined worldwide value of assets of the parties (and their groups) according to the latest accounts exceeds 7 billion roubles, or their combined worldwide revenue exceeds 10 billion roubles; or
- the parties (or their groups' members) are listed separately in the Register;

b for the acquisition of shares, assets and controlling rights, the following filing thresholds apply to both Russian and foreign companies:
- the combined worldwide value of assets of the acquirer (with its group) and the target (with its group) according to the latest accounts exceeds 7 billion roubles, or their combined worldwide turnover in the last business year exceeds 10 billion roubles; and
- the worldwide value of the assets of the target (with its group) according to the latest accounts exceeds 250 million roubles; or
- one of the entities (the acquirer, target or any entity from their groups) is included separately the Register.

As regards foreign companies, there is an additional threshold: a foreign company should have supplied goods to Russia in an amount exceeding 1 billion roubles during the year preceding the transaction closing. This threshold embodies principles similar to the effects doctrine and is aimed at excluding foreign-to-foreign transactions with only a very insignificant effect on competition in Russia. However, if a foreign target company has a Russian subsidiary or assets, the 1 billion roubles threshold is not applicable and the transaction can be subject to merger clearance.

Filing thresholds for financial organisations are different, and are set from time to time by the government or by the government and the Central Bank of Russia.

The following triggering events (substantive test) are general and relate to both Russian and foreign targets:

a mergers and takeovers;

b incorporation of a company (if its charter capital is paid by shares or assets, or both);

c acquisition of controlling rights (to determine business activity or to perform the functions of an executive body); and

d acquisition of assets (fixed production assets or intangible assets, or both, located or registered in Russia, the book value of which exceeds 20 per cent of the total book value of the fixed production assets and the intangible assets of the selling company).

As regards Russian targets, there is the following specific triggering event: acquisition of more than 25, 50 or 75 per cent of the voting shares in a Russian joint-stock company, or of one-third, one-half or two-thirds of the participatory shares in a Russian limited liability company.

As regards foreign targets there is the following specific triggering event: acquisition of more than 50 per cent of the voting shares of a foreign company.

In practice, one of the most common triggering events for foreign-to-foreign transactions is acquisition of controlling rights or, as specified by the Competition Law, rights to determine business activity or to perform the functions of an executive body of an undertaking. This triggering event usually occurs if a foreign target has a Russian subsidiary or a foreign subsidiary with large Russian turnover. The notion of such 'controlling rights' for the purposes of merger control is not defined by the Competition Law. There are also no official guidelines or clarifications with regard to their precise scope. The general provisions of the Competition Law contain only a definition of

'control' that includes both merger control and restrictive agreements as the disposal of more than 50 per cent of the voting shares or exercising functions of an executive body. Based on a comprehensive interpretation of the Competition Law and case law, the following rights may count as 'controlling' rights for merger control purposes: the rights to determine decisions of an undertaking and to give binding instructions or otherwise exercise control (*inter alia*, through blocking its management decisions), and veto rights (negative control). In practice, whether such rights are to be acquired is determined on case-by-case basis taking into account all the circumstances of a particular transaction. The final decision is vested with the FAS.

The Competition Law does not provide for any special foreign exemptions. As previously mentioned, an additional turnover threshold (of 1 billion roubles) and a higher trigger for share deals (more than 50 per cent) are the qualifying elements, and are aimed at excluding transactions that will have a very insignificant effect on competition in Russia. As such, if a foreign target does not generate significant turnover in Russia, or does not have any Russian subsidiaries or assets, the foreign-to-foreign transaction should not be subject to Russian merger control.

The Competition Law does not provide for pre-notification discussions, and official communication only commences once the filing is submitted. The statutory waiting period for a pre-closing clearance is 30 calendar days starting from the date of the notification submission (similar to Phase I). If the filing is incomplete or documents are provided not in correct form, the filing is considered incomplete and will be returned to the applicant.

The initial period may be prolonged, upon the FAS' decision, for up to two months for further consideration and submission of additionally requested data if there are any competition concerns and an in-depth review is required (similar to Phase II).

In 2012, the FAS was empowered to prolong the consideration period until the structural remedies imposed on a company were fulfilled as pre-closing conditions, after which the final approval is granted. In such cases, the term for the implementation of the structural remedies can be up to nine months. Thereafter, within 30 calendar days, the FAS will review the documents confirming compliance with the structural remedies and, if confirmed, grants clearance.

It should be noted that prolongation due to structural remedies is a very rare practice, and is used only if a transaction seriously impedes competition in Russia. In 2014, the regulator used this mechanism in three cases only. As a rule, transactions are cleared within the initial 30-day period, or within three months in the case of an in-depth review.

Upon review of the notification, the FAS shall grant an unconditional clearance; clear the transaction with remedies (behavioural or structural); or reject clearance. As regards conditional clearances, the FAS still tends to impose behavioural rather than structural remedies. Clearance is rejected in very few cases, and mostly due to non-compliance with the formal reporting requirements rather than due to competition

concerns. According to official statistics, only about 1 per cent of notifications are rejected.[3]

There is no official procedure under the Competition Law for parties to accelerate the review process. However, if a transaction does not raise competition concerns, the FAS may clear it before the expiration of the initial 30 calendar day waiting period in accordance with an official request submitted by the applicant.

The Competition Law does not grant rights to any third parties to access merger control files, and provides that information containing commercial secrets received by the FAS under the merger control process should not be disclosed to any third parties except in those cases where such disclosure is expressly provided by the law. Theoretically, the FAS may pass confidential information to other government agencies in the event of an official request from such agencies. The unauthorised disclosure of information containing commercial secrets by FAS officers may incur civil, administrative or criminal liability under the law. Information submitted to the FAS, if marked with a confidentiality sign, should be subject to a special treatment regime under which only the FAS case handler responsible for considering the filing and the heads of the respective FAS departments are authorised to review it. Such information cannot be disclosed to any third parties, and FAS officials are mostly very careful in their handling of confidential information.

Third parties also have limited ability to take part in a review process and no rights to challenge mergers in court. Under the Competition Law, the FAS shall publish on its website information only about transactions subject to a prolongation of an initial waiting period for an in-depth review. In such cases, third parties have a right to provide information on the transaction's influence on competition. However, there are no clearly stated respective obligations on the FAS' side, and no procedure is in place for third parties to provide comments on the proposed transaction. Under the Competition Law, only the FAS is authorised to challenge mergers. Therefore, if third parties wish to challenge a merger, they must first approach the FAS.

If the FAS has any competition concerns, as a rule these are resolved by behavioural or structural remedies. Despite the fact that the latter became available as a pre-closing condition in 2012, the FAS continues to favour behavioural remedies to resolve competition concerns.

There are no statutory procedures or special guidelines regarding which remedies should be applied in any given situation. The procedure for arriving at an appropriate remedy lacks transparency, and competitors or other interested parties may take advantage of this lack of transparency and attempt to influence the FAS. Strictly speaking, the FAS is not under a duty to inform an applicant about potential remedies. As a result, the applicant may first learn of proposed remedies on 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. However, this is solely down to goodwill on the part of the FAS, and not because of any statutory obligation.

3 www.fas.gov.ru/fas-news/fas-news_36176.html.

FAS merger control decisions are subject to judicial review. If the undertakings concerned do not agree with the conditional clearance or rejected clearance, they have a right to bring a claim to a commercial (arbitrazh) court. In practice, there is rather a good chance that parties can appeal FAS decisions, mostly due to inherent peculiarities and drawbacks in the decision-making process (i.e., lack of transparency, economic analysis, and involvement of an applicant and third parties) and the decisions themselves, which are commonly very short (one or two pages) and do not contain sufficient argumentation.

The Competition Law provides for a suspensory regime, and formally does not allow for any possibility of derogation from such suspensory regime. Upon completion of the notification review, the FAS must issue a decision; there is no such statutory option available whereby the transaction is considered cleared upon expiration of the waiting period without the regulator's reaction, or that the waiting period can be terminated early. This strict suspensory effect sometimes causes problems for foreign undertakings, especially when timing is essential and Russian clearance is the only condition precedent left.

The transaction should be implemented within one year from the date of clearance; otherwise, the validity period of the clearance decision expires, and the transaction must be cleared again.

Despite the fact that the FAS is the sole agency in charge of merger control under the Competition Law, clearances of other state agencies under other laws can also be required for a transaction that is subject to merger control, and one transaction can require several regulatory clearances. The Central Bank of Russia has the authority to grant clearance in cases of acquisitions of credit institutions' shares or participation interests. The Commission, which is chaired by the Prime Minister, is authorised to clear such transactions under the Strategic Investments Law and the Foreign Investments Law, which is similar to the Committee on Foreign Investment in the United States.

It should be noted that Russia's merger control regime is closely related to the special regulation of foreign investors' transactions regarding Russian companies engaged in activities of strategic importance for national defence and state security (strategic companies). Such transactions are regulated by a special law, the Strategic Investments Law, and require a separate clearance procedure. In particular, transactions regarding strategic companies are considered over a longer waiting period and require pre-closing approval of the Commission. Documents must be submitted through the FAS, which makes a preliminary assessment, collects opinions from other agencies, prepares a set of documents and circulates them to the Commission. In cases where a transaction is subject to clearance under both the Competition Law and the Strategic Investments Law, no clearance under the Competition Law can be issued unless approved by the Commission. Moreover, a transaction rejected by the Commission (this happens rarely) cannot be cleared by the FAS.

IV OTHER STRATEGIC CONSIDERATIONS

Although the Competition Law and by-laws are frequently amended, there are still a number of issues that lack regulation or are still unsettled. One such issue is the non-compete clause in sale and purchase agreements (SPAs) under merger and acquisition

(M&A) transactions. A non-compete clause may be considered to violate Article 11.4 of the Competition Law, which prohibits agreements between legal entities that lead or can lead to restriction of the competition. However, there are no official guidelines with regard to non-compete clauses within the framework of M&A transactions. Taking into account international practice, in 2013 the FAS issued Guidelines on Assessment of Joint Ventures, clarifying under what conditions a non-compete clause may be justified in joint-venture agreements without contradicting the Competition Law. However, the Guidelines do not cover share purchases or other agreements used in M&A, and may be applied by analogy only. Therefore, it is entirely possible that such clause may constitute grounds for initiation of a separate investigation or for clearing a transaction with a condition to remove this from the SPA, or both. In theory, the FAS may also reject clearance where a transaction can potentially be considered as restricting competition by hindering market access to the target, which is usually subject to a non-compete obligation. The Competition Law provides for a separate filing procedure for the approval of agreements containing restrictive clauses that may be applied to mitigate possible risks. During consideration of such filing, the applicant is required to justify to the regulator that such agreement is permissible under legally listed grounds, respond to the regulator's concerns and provide sufficient evidence. This procedure may be undertaken in parallel with the merger control notification consideration.

The applicability of the hold-separate agreement concept in Russia also remains unresolved. For various reasons, global transactions may need to be closed prior to being cleared by the FAS. Under the suspensory regime set out in the Competition Law, a transaction cannot be closed without obtaining clearance from the regulator, or the acquirer is subject to an administrative fine of up to 500,000 roubles. An administrative fine of between 15,000 and 20,000 roubles may also be imposed on the CEO of the acquirer depending on the character and gravity of the violation. If it is discovered that a transaction implemented without clearance has resulted, or may result, in the restriction of competition in Russia, the FAS may also bring a claim to invalidate the transaction in court, although this rarely occurs in practice, and the restriction of competition as a result of the transaction must be proved. Because a hold-separate agreement would allow the maintenance of *de jure* and *de facto* control over the Russian assets pending FAS clearance, this mechanism would be very useful. As such, it seems likely that the regulator may view such mechanism positively, as it ensures compliance with Russian law without holding up the implementation of a transaction on a global level.

Foreign companies often ask whether a merger control filing is needed when the Russian target is under bankruptcy or liquidation. Under Russian bankruptcy and corporate legislation, a company shall be considered liquidated only after the relevant record is introduced into the companies register (Unified State Register of Legal Entities). Liquidation takes about a year. As such, as long as the register contains information on the Russian target, the proposed transaction is subject to clearance (provided the filing thresholds are met).

Under Federal Law No.160-FZ dated 9 July 1999 'On Foreign Investments in the Russian Federation' (Foreign Investments Law), foreign states, and international organisations or organisations controlled by them, are subject to a further, separate filing when they acquire, either directly or indirectly, more than 25 per cent of Russian companies or the right to block decisions of such companies' managing bodies. Such

transactions should be cleared under the procedure provided by the Strategic Investments Law. In addition to the merger control notification (if required), the above-mentioned applicants must also submit a separate notification regardless of the nature of the business activity performed by the Russian target company. Exceptions have been provided under the Foreign Investments Law exclusively for the International Bank for Reconstruction and Development, the European Bank for Reconstruction and Development and the International Investment Bank, as well as other organisations listed by the government.

In transactions that involve the establishment of control by foreign investors over strategic companies, the activity of such foreign investors should be checked very carefully. To determine whether the activity of a Russian target is strategic, it is not sufficient merely to check if it the target possesses any licences. Despite the fact that most activities referred to in the Strategic Investments Law require licences, certain activities are not necessarily subject to licensing but, due to their nature, still have strategic importance for national defence and domestic security. Thus, for example, in the *Schlumberger/EDC* transaction, a decision to submit the transaction to the Commission was made based on the conclusion that drilling activities are an integral part of minerals exploration, development and mining, and that such activities may have significance for state security even though the services themselves are not subject to licensing.

V OUTLOOK AND CONCLUSIONS

The FAS endeavours to follow the European approach and best foreign practices in merger control. It generally demonstrates a friendly approach, understanding and openness to parties involved in complicated transactions. In most cases, notifications are considered within the initial 30-day waiting period, and timelines are complied with.

A number of issues, some of which are discussed above, have not yet been settled from the legal point of view. The expert community, in particular the Non-Commercial Partnership for Competition Support, is actively involved in lawmaking, the establishment of consistent practices and advocacy, including explanatory works. The Guidelines on the Assessment of Joint Ventures is the first document that was drafted in close cooperation between the Partnership and the regulator.

In the coming year, guidelines elaborating non-compete clauses and hold-separate agreements are planned. The FAS has also prepared amendments to the current legislation that provide for the electronic filing of notifications, which should significantly optimise the filing process and the filing review monitoring. They are expected to become effective along with the Forth Antimonopoly Package (see Section II, *supra*).

Appendix 1

ABOUT THE AUTHORS

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Anna Numerova has outstanding experience advising on a wide range of antitrust issues, including those related to M&A transactions and the transfer of assets by large local and international companies in Russia and abroad. She also represents clients before the Federal Antimonopoly Service of Russia as well as in arbitration courts, advises on various commercial and corporate law issues, and conducts legal due diligence in sectors such as banking, automotive, telecommunications, FMCG, B2B services and business processes, aircraft and other manufacturing and VoIP services.

Ms Numerova is the chair of the General Council of the Non-Profit Partnership for Competition Support, a member of the Government Commission on Competition and Development of Small and Medium-sized Businesses, and a member of the Advisory Board on Advertising of the Federal Antimonopoly Service of Russia and of the non-profit partnership 'CIS Competition Support Association'. She also plays an active role in the steering committees of the International Bar Association and the American Bar Association. She is an associate professor at the chair of the Federal Antimonopoly Service at the Higher School of Economics.

She graduated from Moscow Humanitarian University in 2000. She holds a master's degree in private law from Russia's School of Private Law (2008) and an LLM in International Business and Economic Law from Georgetown University Law Center (US) (2011).

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Elena Kazak has vast experience in obtaining clearances from competition authorities with regard to complicated international merger deals. She advises both Russian and international clients on competition law compliance issues, strategic investment law

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Ms Kazak graduated with honours from the Lomonosov Moscow State University, Faculty of Law. She has a PhD in law, and undertook secondments at Universität Regensburg, Germany, and Universität Salzburg, Austria.

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