Expanding of Merger Rules on JV Agreements in Russia

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The most recent amendments to the Russian Competition Law, called the Fourth Antimonopoly Package, became effective January 6, 2016.[1] Among other developments, the Fourth Antimonopoly Package brought joint venture (JV) agreements under mandatory merger control clearance procedures.

Before enactment of the amendments, the Competition Law provided for the right, but not the obligation, of parties to clear a JV agreement with the Federal Antimonopoly Service (FAS). Companies seeking legal certainty could have voluntarily submitted to the FAS for review agreements potentially restricting competition. Moreover, the Competition Law contained rules for evaluating which JV agreements could lead to consequences common for restrictive agreements (e.g., price fixing, market sharing). In order to ensure correct application of such provisions, the FAS, together with the Non-Commercial Partnership for Competition Support, elaborated and issued guidelines (Guidelines) on the process and methodology for JV agreement analysis containing detailed explanation under which conditions such agreements can be considered acceptable.

As amended by the Fourth Antimonopoly Package, the Competition Law stipulates that conclusion by competing undertakings of agreements on joint activity in the territory of the Russian Federation is subject to pre-closing merger control filing if asset or turnover thresholds are met. The thresholds for pre-closing filing are as follows: (i) the worldwide aggregate value of assets of the parties (and their respective groups) according to the latest financial statements should exceed RUR 7 billion (approx. EUR 87.8 million); or (ii) the worldwide aggregate turnover of the parties (and their respective groups) in the last business year should exceed RUR 10 billion (approx. EUR 125 million). The Competition Law does not make any distinction between contractual JVs and equity JVs, in the latter of which parties set up a separate legal entity. According to the letter of the law, either type of JV falls within the scope of the new rules. The Fourth Antimonopoly Package made notification of JV agreements mandatory.

Despite the amendments, a number of practical and theoretical questions remain unanswered. On the one hand, this is due to peculiarities of the new provision's wording, but it is also due to lack of established practices and complexity of the issue in general. No practice guidelines have been adopted, compounding uncertainty.

There are many questions with regard to application of the Fourth Antimonopoly Package to JV agreements. For instance, the filing thresholds are easily met by international companies. Joint activity can be undertaken worldwide, including Russia, without creation of a separate legal entity (as allowed in many foreign jurisdictions). Under the letter of the Competition Law, the parties to such a JV agreement should, if they are competitors, submit a merger control filing. However, the Competition Law sets forth a special nexus to Russia with regard to foreign-to-foreign transactions that would otherwise be subject to filing: foreign companies should have supplied goods, services or works into Russia in the amount exceeding RUR 1 billion (approx. EUR 13 million) during the year immediately preceding the transaction closing. Currently, it is unclear how these two provisions will correlate with each other. We think that the nexus to Russia can be considered as a barrier, restricting applicability of the Competition Law to a foreign-to-foreign JV agreement whose parties are not active in Russia.

In evaluating whether a transaction is notifiable, parties to a proposed JV should first determine if they are competitors in the market in which the JV will be operating. To be on the safe side, the parties should undertake an independent market analysis, as market estimation by the FAS and private firms can differ in relation to defining product and geographic boundaries. It is unclear whether competition between the parties should be taken into account for Russia only or also outside Russia. It is also unclear whether potential competitors fall within the scope of the new regulation. There are no statutory answers to such questions or official clarifications from the FAS. We believe that it would be prudent to follow the approach suggested by the Guidelines. Under the Guidelines, potential competitors should be taken into account along with actual competitors. As regards the relevant market, the Guidelines do not shed light on whether foreign markets should be considered, but it is likely that the relevant market would be limited to Russia, unless the products in question have worldwide distribution.

The Fourth Antimonopoly Package raises questions about reporting of a JV formed outside of Russia that will have Russian effects. What if a JV is formed in a foreign jurisdiction for doing business in Russia, or if Russia is among strategic markets which a foreign JV has targeted? The Competition Law has extraterritorial effect and is applicable to transactions or actions with foreign companies affecting competition in Russia. Therefore, we believe that if a JV formed abroad has a close nexus to Russia and so can influence competition in Russia, it can meet territorial criteria set forth in the new regulation. Whether reporting will be required will be conditional upon various factors, however, and should be made in each case separately.

Other questions relate to the qualification of a particular transaction and to filing procedures. It may be difficult to determine which event triggers a reporting obligation. Obtaining the

right to determine business activity of a Russian company resulting from formation of a JV in a foreign jurisdiction is a separate triggering event, for example, from creation of a JV itself. Here, much will depend on the transaction structure. On the procedural side, the FAS has not adopted new rules or introduced amendments to the existing rules on the scope of documents and information to be provided with the JV filing. It is not clear which data should be filed and what can additionally be requested by the FAS for JV agreement clearance. It would, thus, appear reasonable to use the existing regulation by analogy and to rely on experience in working with the FAS with regard to data which may potentially be requested for JV agreement consideration.

As regards liability, the Fourth Antimonopoly Package has not provided for any special penalties in case of failure to comply with the new requirements. Existing liability rules under the Competition Law with regard to mergers and takeovers should be applicable – namely, imposition of an administrative fine and liquidation of the JV, if its creation leads or could lead to a restriction of competition. There are some questions concerning implementation of any such liability for formation of a JV, in particular regarding foreign companies that are parties to JV agreements. For instance, existing law does not take into account contractual JVs, which are not legal entities and cannot be liquidated. Additionally, in relation to foreign companies, implementation of FAS decisions on imposition of fines and the legal effect of court decisions on liquidation of a JV pose problematic and complex issues. It cannot be excluded that, in the absence of FAS clearance, a JV agreement could be considered as a cartel by the FAS if it leads to price fixing, market sharing or refusal to deal. Liability for cartel activity is far more serious,. e.g., a fine for the undertakings based on sales turnover and criminal liability for their officers.

In summary, the Fourth Antimonopoly Package expanded merger control regulation on JV agreements. When foreign companies are planning to establish a joint venture related to Russia with foreign or Russian partners, a preliminary assessment should be undertaken to determine if the JV agreement will be subject to notification. The JV clearance regulation contains many gaps and uncertainties, and it entails additional complexity for market players, especially for foreign companies. Consequently, an assessment of whether clearance in Russia is required should be made by taking into account specifics of the JV structure and wording of the JV agreement.

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[1] *See* Press Release, Fed. Antimonopoly Serv., FAS reformed the antimonopoly law (Jan. 18, 2016), *available at* www.en.fas.gov.ru/press-center/news/detail.html?id=44429.

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