

Merger Control

Jurisdictional comparisons

Second edition 2014

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Van Bael & Bellis**



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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 to date) is the basic law that determines the organisational and legal grounds for protecting 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 Offences Code') (with amendments to date) provides, *inter alia*, for administrative liability for violations of requirements prescribed by the Competition Law.

Note that at the time of writing this chapter, a law amending the Competition Law was recently adopted. The amended law excludes the subsequent notification of the Russian Federation's Federal Antitrust Service (the 'FAS of Russia' or 'FAS') about certain types of actions and transactions.

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

The FAS of Russia is an authorised executive authority.

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

The FAS of Russia address:

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W: www.fas.gov.ru
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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 shareholding in their charter capital apply.

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

- Formation of a Russian legal entity if 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 1/3, 1/2 or 2/3 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 of legal entities (in form of merger or annexation).
- Reorganisation of financial organisations (in form of merger or annexation).
- Acquisition of a more than 25, 50 or 75 percent voting shareholding in a Russian joint stock company.
- Acquisition of more than 1/3, 1/2 or 2/3 of participation interest in the charter capital of a limited liability company.
- Acquisition of the rights to own, use or possess tangible assets (except 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. Note that this calculation of assets applies only to legal entities operating on commodity markets. For entities operating on financial markets, all thresholds are established by the Government of the Russian Federation.
- Acquisition (including, *inter alia*, under trust management, joint-venture or agency agreements) of 'controlling rights' over a Russian commercial entity.
- Acquisition of managerial rights in a Russian commercial entity or financial organisation (the rights to exercise functions of the executive body or to determine the commercial activity).
- Acquisition of 50 per cent voting shareholding in a foreign company or managerial rights in a foreign company (the rights to exercise

functions of the executive body of a foreign company or to determine its commercial activity) subject to thresholds as indicated in the response to question 5.

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

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

The bill amending the Competition Law is expected to introduce special requirements and regulation in respect of joint ventures.

5. What are the jurisdictional thresholds?

The Competition Law may require merger clearance in the form of prior approval of the FAS of Russia. The disclosure requirements for prior approvals are the following.

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

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 about EUR 156 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 EUR 223 million). This threshold applies when the above-mentioned threshold is not met; and
- the aggregate worldwide value of assets of the target and of the commercial entities belonging to the target's group exceeds RUR 250 million (currently about EUR 5.5 million). This threshold applies 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 of Russia. Note that this threshold applies separately from the above-mentioned thresholds and only to Russian legal entities.

6. Are these thresholds subject to regular adjustment?

The thresholds may be changed by a law introducing amendments to the Competition Law. This happens irregularly depending on the economic situation in the country.

7. Are there any sector-specific thresholds?

There are special thresholds stipulated for companies' operations in financial and credit markets. The amounts of such thresholds are established by the Government of the Russian Federation (for transactions with stocks (shares), assets of credit institutions or rights in respect of a credit institution, this amount is established by the Government of the Russian Federation together with the Central Bank of the Russian Federation).

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

- RUR 3 billion (currently about EUR 66.5 million) – for leasing companies and microfinance organisations;
- RUR 2 billion (currently about EUR 44.3 million) – for non-state pension funds;
- RUR 1 billion (currently about EUR 22 million) – for stock exchanges;
- RUR 500 million (currently about EUR 11 million) – for legal entities operating on the insurance market, management companies of investment funds (and/or mutual investment funds, non-state pension funds), specialised depository institution of investment fund (and/or mutual investment funds, non-state pension funds), non-state pension funds, Russian leasing companies and professional participants of the securities market;
- RUR 100 million (currently about EUR 2.2 million) – for medical insurance organisations and pawnbrokers' offices.

Merger clearance test for credit institutions:

In relation to credit institutions, prior merger clearance from the FAS is required if 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 24 billion (currently about EUR 532 million);
- formation of a Russian legal entity if its charter capital is paid up by shares and/or tangible or intangible assets of a credit institution and the total book value of assets of the credit institution exceeds RUR 24 billion (currently about EUR 532 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 24 billion (currently about EUR 532 million).

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

The pre-transaction consent is 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 given as 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.

Foreign-to-foreign transactions are also subject to state control if foreign companies supply goods to the territory of the Russian Federation and the amount of such supplies within the year preceding the transaction exceeds RUR 1 billion (currently EUR 22.3 million).

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.

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 a 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 examination of an application for pre-transaction consent is RUR 20,000 (EUR 450).

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 immediately

after obtaining 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 antitrust 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 grounds on which they are included in the group. This can be submitted by any entity in the group, but it must be submitted no 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 website.

The second exemption applies if the transaction is intra-group and the parties to it are connected by holding more than 50 per cent of shares of the other party involved.

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

As mentioned above, the post-transaction notification requirement was excluded from the Competition Law. Thus, the sanctions are currently not applied.

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

The Administrative Offences Code classifies such actions as a failure to provide a motion required by the antitrust legislation and sets forth the following sanctions: RUR 1,500–2,500 fine for individuals; RUR 15,000–20,000 for officers; and RUR 300,000–500,000 for legal entities.

Similar to the previous case, 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 only hold an acquirer liable for the failure to submit an 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 are set out below.

The FAS can initiate administrative proceedings against the acquirer for failure to obtain prior merger clearance and impose a fine from RUR 300,000 to 500,000 (EUR 6,500–11,000).

Transactions concluded without FAS permission are not considered void by law. However, the FAS is entitled to annul the transaction through court, provided it has resulted or may lead in the future to a restriction of competition on 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 state of affairs that existed before the transaction;
- to remit to the federal budget the income received from the transaction; and
- to perform certain acts aimed at 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 (EUR 6,500–11,000).

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 examine the application. It should be noted that the FAS has the right to extend the 30-day examination period by two additional months if it finds the need for further examination or additional information.

There is no way to speed up the process.

The period for reviewing a petition starts to run 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 (or groups of persons), and also with the aim of determining if the proposed action 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 (or group of persons).

If this is the position, the FAS decides to prolong the case examination due to the need to examine additional documents or information and the FAS posts on its official website 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 No. 129 of the Federal Antitrust Service of 17 April 2008 on approval of the form for presenting information to the antitrust body when addressing requests and notices provided for by Articles 27–31 of the Competition Law sets out an exhaustive 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 end 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 examination stage the FAS can request additional documents and/or information.

The following documents must be submitted along with the notification:

- copies of the corporate statutory documents of the acquirer and the target company, and documents certifying their registration/identity;
- documents with 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 entities;
- acquirer's group composition; and
- target's group composition.

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 described in the response to question 19.

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

No pre-notification discussion is 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 website only if it decides to extend examination 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, the 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 this 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 of Russia assesses the restrictions on competition that can arise from the presumed future concentration. The substantive test for antitrust clearance is whether the new assumed 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 of Russia 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 the concentration of the commodity market;
- determining barriers for 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 end-consumers. These reasons will be taken into account by the FAS officers when adopting 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 website data on the transaction as declared in the application. Third parties concerned may submit to the antitrust 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 on the market.

The FAS of Russia may establish such behavioural remedies at its own discretion. The most typical requirements aimed at maintaining competition 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 of Russia 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 by no more than 5 per cent per quarter.
- To proceed with business activities on non-discriminatory price conditions or to introduce special price conditions recommended by the FAS.
- To enter into an agreement(s) with other players on the respective commodity market.
- To sell a part of the business.
- The FAS may also require a regular update on the corporate structure of the commercial entity that undertook the behavioural obligations.

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

The FAS does not possess special powers to enforce its prohibition decisions.

JUDICIAL REVIEW

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

FAS decisions may be challenged in commercial arbitration courts.

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

The court claim must be considered within three months after being received by the court. However, in practice the period may be substantially prolonged to six months depending on the court's daily workload and complexity of the case.

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 2012, the FAS of Russia considered 2,494 pre-transaction applications.

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

In 2008–2012, the FAS of Russia prohibited the following transactions:

- 2008 – 141 applications
- 2009 – 106 applications
- 2010 – 57 applications
- 2011 – 60 applications
- 2012 – 50 applications

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

During the past five years about 6 per cent of FAS approvals have been issued with binding requirements or remedies.

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

Such statistics are not available to the public.