

Unclassified

DAF/COMP/GF/WD(2011)1



Organisation de Coopération et de Développement Économiques
Organisation for Economic Co-operation and Development

03-Jan-2011

English - Or. English

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

DAF/COMP/GF/WD(2011)1
Unclassified

Global Forum on Competition

ROUNDTABLE ON CROSS-BORDER MERGER CONTROL: CHALLENGES FOR DEVELOPING AND EMERGING ECONOMIES

Contribution from the Russian Federation

-- Session I --

This contribution is submitted by the Russian Federation under session I of the Global Forum on Competition to be held on 17 and 18 February 2011.

JT03294760

Document complet disponible sur OLIS dans son format d'origine
Complete document available on OLIS in its original format

English - Or. English

CROSS-BORDER MERGER CONTROL: CHALLENGES FOR DEVELOPING AND EMERGING ECONOMIES

-- Russian Federation --

1. According to the Russian legislation, mergers, joining and foundation of companies as well as purchasing of stocks (shares) of companies are subject to the antimonopoly control.
2. At that, the antimonopoly legislation provides for both pre- and post- merger control.
3. Since 2006 thresholds for obtaining pre merger approval by the antimonopoly authority or provision of post merger notification to the antimonopoly authority have been repeatedly raised. It was made in order to reduce administrative burden for business and control more effectively those transactions that may affect competition in the relevant markets. The last increase of the thresholds (nearly twice) was set in the Federal Law No. 164-FZ of 17 July 2009.
4. Currently, prior approval of the antimonopoly authority is needed in the following cases:
 - merger or joining of companies if the aggregate value of their assets exceeds 3 bln rub. (75 mln Euro) or their total revenues from sale of products for the preceding calendar year exceed 6 bln rub. (150 mln. Euro);
 - foundation of a company through placing stocks (shares) or property into its capital stock if the total value of the companies' founders assets exceeds 7 bln rub (175 mln Euro) or their total revenues from sale of products for the preceding calendar year exceed 10 bln rub (250 mln. Euro);
 - transactions between the companies if total value of assets of acquirer company and of the company the stocks (shares) and property or rights of which is acquired exceeds 7 bln rub (175 mln. Euro) or their total revenues from sale of products for the preceding calendar year exceed 10 bln rub (250 mln Euro) while the total value of assets (group of persons) of the acquiring company whose stocks, property or rights are acquired exceeds 250 mln rub (6, 3 mln Euro).
5. Besides, prior approval of the antimonopoly authority is needed if a company involved in the transaction or included in one group of persons is included in the Register of economic entities occupying more than 35% of the market share on a particular product market (the Register is maintained by the FAS Russia).
6. The companies have the right to send to the antimonopoly authority a post notification, instead of receiving the prior authority's approval, about similar actions or transactions if they are made within a group of persons.

7. The FAS Russia should receive post notifications in the following cases:

- establishment of a company as a result of merger, joining to the company of one or more companies, if the aggregate value of their assets or their total revenues from sales of products during the preceding year exceeds 400 mln rub (10 mln. Euro);
- transactions, if the total value of the acquiring company assets, and the company whose shares, property or rights are acquired, or their total revenues from sales of products during the preceding year exceeds 400 mln rub (10 mln. Euro) while the total value of assets, shares, property or rights of the acquired company exceeds 60 mln rub (1, 5 mln. Euro).

8. The different thresholds are established by the antimonopoly authority for the financial and credit organizations for obtaining pre-merger approval and submission of post notification. The thresholds are established on the basis of total value of assets of the parties to the transaction.

9. Currently the FAS Russia is proposing to cancel the procedure of submission of post notifications. If the remedies imposed by the antimonopoly authority are not fulfilled, the authority can bring a case to the Court and request for annulment of the transaction.

10. The antimonopoly authority can do the following when carrying out prior control over economic concentration:

- satisfy an application if the transaction, other action declared in the application would not lead to restriction of competition;
- satisfy an application imposing structural and behavioral remedies aimed at ensuring competition;
- prolong the period of examination of application in case if the antimonopoly authority suspects the transaction or other action can lead to restriction of competition;
- refuse to satisfy an application if the antimonopoly authority during the examination of an application comes to a conclusion that the transaction or other actions declared in the application would lead or can lead to restriction of competition.

11. The procedure of applications examination as well as procedure of submitting applications and notifications, including a list of information required to be submitted are provided in the Federal Law "On Protection of Competition" (hereinafter - Law), as well as in the number of other regulatory legal acts.

12. The merger decisions taken by the antimonopoly authority are published on the FAS Russia official website (www.fas.gov.ru) that ensures transparency of the authority's activity and allows the stakeholders to express their opinions on the cases/transactions.

13. If the company is established without prior approval of the FAS Russia, it has to be liquidated or reorganized; if the transaction is carried out without obtaining the prior approval of the antimonopoly authority it is recognized as invalid. However it can be done only in case if the Court upholds a decision of the FAS Russia about the fact that such an establishment of a company or such transaction has led or may lead to restriction of competition.

14. Failure to submit an application, as well as violation of the order of submission of application can be subject to the administrative liability.

15. The state fee for examination of application equals 20,000 rub (500 Euro) (according to Point 89, Part 1, Article 333.33 of the Tax Code of the Russian Federation).

16. It is worth mentioning that the FAS Russia, introducing changes to the legislation, followed the OECD Council recommendations on mergers and acquisitions control C(2005) 34 aimed at effective, efficient and timely examination of transactions (increase of thresholds for obtaining pre merger approval and receiving post merger notification, facilitating of the procedure for submitting applications within a group of persons, specification of requirements for submitting the notifications and procedure of examination of transactions).

17. The norms of control over economic concentration prescribed in the Law are to be applied equally by the Russian and foreign legal entities (Article 3 of the Law).

18. With regard to international cooperation, the FAS Russia has a right to cooperate with international organizations, foreign government Agencies, to participate in development and implementation of international agreements of the Russian Federation.

19. The FAS Russia widely uses its powers in the field of international cooperation. It signed and implements a number of multilateral and bilateral agreements with foreign Competition Authorities and associations (Austria, Bulgaria, Brazil, Canada, Chile, China, Denmark, Italy, Japan, Korea, Latvia, Mexican United States, Mongolia, Poland, Romania, Slovakia, USA, Ukraine, Finland, France, Czech Republic, Sweden, Estonia, ICAP, BRIC) which cover various types of cooperation.

20. These documents contain, inter alia, provisions regulating the procedure of information exchange between Competition Authorities, including confidentiality issues, during holding of investigations and/or examination of transactions by Competition Authorities that signed these agreements.

21. Most clearly the mechanism and procedure of interaction between the parties in part of application of the antimonopoly legislation are provided in the two new type agreements in the field of competition policy signed between the FAS Russia and the Federal Competition Commission of the United Mexican States (June 2010) and between the FAS Russia and the Hungarian Competition Authority (September 2010).

22. Example of cooperation between the Russian and Hungarian Competition Authorities can be described by a request submitted by the Hungarian Competition Authority to the FAS Russia where they requested to provide information on acquisition of the EMFESZ Company (the second largest gas seller in Hungary after the German company E.On), belonging to Gazprom group of persons, by the RosGas AG Company; and along with this it was pointed out that the Gazprom Company has denied any involvement in the transaction. The request was sent to evaluate the degree of natural gas supply influence on the Hungarian market. The FAS Russia sent an official request to the Gazprom company, the response from which was immediately resent to the Hungarian Competition Authority.

23. One of the practical results of cooperation between the FAS Russia and the Directorate General for Competition of the European Commission were consultations on the merits of consideration of the acquisition of the Sun Microsystems company by the Oracle Corporation Company.

24. Notifications for this transaction have been submitted for consideration to many competition authorities worldwide, including Russia and the European Commission. For the FAS Russia it was extremely important to understand the views of the European Commission concerning the consequences of this transaction in order to take a coordinated decision on this issue.

25. The precondition of the European Commission for holding the consultations was a submission of waiver by those companies by which they confirm their consent on holding of consultations between the FAS Russia and the European Commission with the possibility to exchange confidential information.

26. The waivers submitted by the companies to the FAS Russia and the European Commission contained restrictions that the submitted confidential information could be exchanged only within the frameworks of consultations held between the FAS Russia and the European Commission in order to define a common position, thus imposing a ban to pass this information to the third parties, as well as to use it for any other purposes.

27. After receipt of these letters, the FAS Russia and the European Commission held telephone consultations during which they discussed the basic approaches to market analysis and to examination of the transaction, as well as concerns in relation to maintenance of competition in the markets where these companies operate.

28. Apart from the indicated above ways of cooperation, the FAS Russia attempted to cooperate with the Department of Justice and Federal Trade Commission of the United States and the DG Comp. Thus, after examination of the application submitted by the Graftech Holdings Inc and Graftech Seadrift Holding companies to the FAS Russia by which they asked for the permission to acquire 81,1% of shares in the share capital of the LLC «Seadrift Coke LP», as well as to acquire the rights allowing to operate the «Seadrift Coke LP» Company business, the FAS Russia came to a conclusion that this transaction can affect competition in the global market of graphite electrodes and informed above mentioned authorities about its position concerning this transaction with the recommendation to take it into account in case if the companies also submit to them their applications.

29. An example of imposing the remedies by the antimonopoly authority during consideration of cross-border transaction was the acquisition of the RUSAL assets by the Alcoa Company (the world's largest producers of aluminum). The FAS Russia approved this transaction imposing a number of behavioral remedies on the Alcoa Company.

30. It is important to note that one of the major restrictions for effective cooperation between the Competition Authorities of different countries is the confidentiality issues, as the right to refer the information to the confidential one belongs to its owner and without his permission such information can not be provided to the third parties.

31. Inability of the FAS Russia to receive confidential information from foreign Competition Authorities creates considerable difficulties during examination of cross-boarder transactions or transactions committed outside the Russian Federation, as well as during the investigation of violations of antimonopoly legislation. The FAS Russia needs such information in order to conduct a comprehensive investigation of the market and activities of economic entities operating on this market, to obtain evidences of violations of antimonopoly legislation and to assess possible consequences of the transactions or other actions performed by the economic entities.

32. In this regard, the FAS Russia is currently doing its best to eliminate these difficulties that would enhance the cooperation with foreign Competition Authorities within the frameworks of examination of cross-border transactions.