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ECONOMIC ANALYSIS IN MERGER INVESTIGATIONS – Contribution from the Russian Federation

- Session III -

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This contribution is submitted by the Russian Federation under Session III of the Global Forum on Competition to be held on 7-10 December 2020.

More documentation related to this discussion can be found at: oe.cd/eami.

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Economic Analysis in Merger Investigations

- Contribution from the Russian Federation¹ -

1. Control over economic concentration is one of the main directions of antimonopoly policy, the purpose of which is to prevent changes in the market structure in a direction that creates risks of restricting competition.
2. In accordance with Russian antimonopoly legislation², obtaining the preliminary approval of the antimonopoly authority is required in the event of a merger of any type (“horizontal”, “vertical”, “conglomerate”), as well as a different type of transaction (share/asset deals) when groups of persons exceed the parties to the transaction (acquirer/target groups) corresponding financial thresholds. At the same time, not every transaction is subject to a thorough review by the antimonopoly authority: market analysis is carried out in the required volume, depending on the complexity of the transaction.
3. FAS Russia uses all the necessary tools for economic analysis of the possible impact of the transaction on competition. Approaches to economic analysis are contained in a special regulation “Procedure for assessing the state of competition in commodity markets”³, approved by the FAS Russia, together with the general recommendations of the FAS Russia on the application of this regulation. In accordance with this document, a unified methodology was adopted for conducting economic analysis not only by the central office of the FAS Russia, but also by 84 FAS regional offices.
4. The FAS Russia has also prepared a draft recommendation on merger control, which is expected to be adopted shortly.
5. The Recommendations contain clarifications of the main substantive and procedural issues of mergers and acquisitions control, based on extensive law enforcement practice and modern approaches to the analysis of transactions, decision-making and the formulation of instructions that FAS Russia is guided by.
6. This document will allow for a uniform interpretation of the provisions of the Law on Protection of Competition, the provisions of the FAS Russia regulations governing the control of economic concentration, and will make the practice of the antimonopoly authority more understandable and predictable for business.
7. When exercising control over M&A, the Russian competition authority carries out an economic analysis with focus on such factors as:
 1. the size of the market share in terms of overcoming the corresponding threshold values for individual and collective dominance (quantitative criterion) at the time of the transaction and the aggregate market share of the acquirer and the object of economic concentration after the completion of the transaction, as well as the

¹ The report was prepared by the FAS Russia jointly with the Association of Antimonopoly Experts.

² Chapter 7 "State control over economic concentration" of the Federal Law of July 26, 2006 No. 135-FZ "On Protection of Competition".

³ Order of the FAS Russia dated 28.10.2010 No. 220 “On approval of the Procedure for assessing the state of competition in commodity markets”: <https://fas.gov.ru/documents/576468>.

dynamics of growth of economic concentration in terms of the Herfindahl — Hirschman index;

2. the ratio of the market shares of the participants in the transaction with the market shares of other market participants, the degree of change in market shares in the studied period of time, including in the future, taking into account the presence of barriers to entry into the market and determining the possibility of overcoming the identified barriers to entry, as well as other features of the functioning of the studied commodity market from the point of view of the competitive environment;
 3. the possibility of acquiring market power following the results of the transaction, that is, the opportunity for the acquirer of the newly formed company to unilaterally determine the general conditions for the circulation of goods on the studied commodity market.
8. When exercising state control over economic concentration, it can be established that, despite exceeding the threshold value of the market share, the position of an economic entity in the product market is not dominant, and the transaction does not lead to restriction of competition. At the same time, the analysis of these factors is carried out by the antimonopoly body, taking into account the specifics of each transaction declared in the application, based on the specifics of the commodity markets affected by such a transaction, and also taking into account both quantitative and qualitative factors of the transaction. In particular, the regulator takes into account the possibility of switching consumers to alternative suppliers, the degree of market power of buyers, as well as the level of barriers to entry for new players to the commodity markets affected by the transaction.
9. The choice of analysis tools depends on the complexity of the transaction (case by case basis). The FAS Russia also conducts surveys of market participants and consumers, on which the hypothetical monopolist test is based. External experts are rarely involved due to the lack of funds to attract them, but they are regularly involved by the courts to challenge the decisions of the FAS Russia, resulting in more transparent and thorough antimonopoly procedures.
10. In 2020, the FAS Russia approved a deal for the applicant to acquire fixed assets (capacities) of a competitor, since the deal will not entail restriction of competition⁴.
11. As part of the analysis, FAS Russia took into account that the acquirer is one of the largest economic entities in several product markets, including office and offset paper, cardboard, paper products for personal hygiene, where it partially overlaps with the object of economic concentration. At the same time, the FAS Russia took into account the presence of other large producers on the commodity market affected by the transaction and the insignificance of the market share of the object of economic concentration, which in aggregate did not lead to an increase in economic concentration and market power of the acquirer.
12. For the purpose of determining whether a horizontal transaction entails restricting competition in the affected market, the antimonopoly authority analyzes the ability of the parties to the transaction to unilaterally (i.e., without taking into account the actions of competitors) to determine the general conditions for the circulation of goods in the affected market, in particular, in the case of their mergers by the results of the transaction, that is, whether the parties will receive market power as a result of the transaction, or such a transaction will increase the market power of the merged company.

⁴ Decision of the FAS Russia dated January 20, 2020 No. PZ/2926/20 based on the results of consideration of the application: <https://br.fas.gov.ru/ca/upravlenie-kontrolya-promyshlennosti/1e3e0922-7abd-4832-82f3-7a6f11e38a83/>.

1. Siemens/Alstom

13. For example, as part of the consideration of the global Siemens/Alstom deal and based on the results of an economic analysis in the markets affected by the transaction, the FAS concluded that the transaction had a negative impact on the state of competition in the railway engineering industry in Russia (markets for electric trains, electric locomotives and components for them (traction systems and electric drives) in view of the following circumstances.

14. The deal is global in nature. If implemented, there would be a merger of the two largest manufacturers of railway rolling stock in the European Union. The merged Siemens-Alstom company would become one of the key players in the global market for the production of high-speed electric trains and electric locomotives.

15. In the event of the transaction, the merged Siemens-Alstom company would receive partial control over two Russian manufacturers of railway equipment, which prior to the transaction are independent market participants and compete with each other: 50% stake in Uralskie Lokomotivy LLC (an affiliate of "Siemens AG") and 20% of shares of CJSC "Transmashholding"(an affiliate of the company "Alstom SA").

16. After the blocking of this transaction by the European Commission, Siemens AG withdrew the application for consideration of the transaction.

17. It is important to note that if the regulator comes to the conclusion that there is a threat to competition during the transaction, its approval is possible, if such a transaction does not create an opportunity for individuals to eliminate competition in the relevant product market, restrictions are not imposed on their participants or third parties that do not correspond to the achievement of the objectives of such a transaction, as well as if its result is or may be:

- Improving the production, sale of goods or stimulating technical, economic progress or increasing the competitiveness of Russian-made goods on the world commodity market;
- The receipt by buyers of advantages (benefits) commensurate with the advantages (benefits) received by business entities as a result of actions (inaction), agreements and concerted actions, transactions⁵.

18. To make such a decision, an appropriate economic analysis is carried out, and the following conditions must be met:

- The parties will prove its admissibility of the given transaction (efficiency claim), i.e. consumers receive benefits commensurate with the benefits that the parties to the transaction will receive if it is completed;
- The parties to the transaction may be required to significantly reduce or eliminate potential anti-competitive consequences in the affected commodity markets (behavioral/structural remedies). Such obligations in practice can be voluntarily offered by the parties by transactions within the framework of commitments.

⁵ Article 13 of the Law on Protection of Competition.

2. Yandex.Taxi/Uber⁶

19. Thus, the FAS Russia approved the creation in the Russian Federation of a joint venture of two taxi aggregators Yandex and Uber⁷.

20. When considering the transaction, the FAS analyzed the market for organizing information interaction between taxi drivers and passengers and came to the conclusion that at the time of consideration of the transaction, the market is in a stage of active growth, largely due to qualitative transformations, namely the emergence of aggregators providing information interaction services using a new convenient way of how to order a taxi - in the application of a mobile device.

21. At the same time, taking into account the increasing role of digital technologies in the economy and social sphere, the increase in the penetration of wireless access to the Internet, as well as the increase in the share of smartphones in the total volume of subscriber devices, trends and prospects for the development of the market with a “digital component”, the FAS Russia adopted the decision to issue a ruling aimed at developing competition in the new conditions of interaction between passengers and drivers.

22. The companies were instructed to provide the most complete and accessible information to users about the legal entity carrying out transportation with the preservation of the travel history; not to prohibit partners, drivers and passengers from working with other aggregators of taxi services.

3. Yandex.Taxi/ Fasten CY Limited (Vezyot taxi)⁸

23. On May 15, 2020, the FAS Russia received a request for approval of the transaction for the acquisition by Yandex of the Vezyot taxi aggregator, including all the trademarks of the Vezyot taxi group, such as Fasten, Leader, RedTaxi, etc.

24. When considering this merger, FAS Russia analyzed the taxi aggregator market especially thoroughly, relying not only on its own analysis data, but also on numerous market analysis materials received from the merger parties and third parties (about 10 different market analyzes).

25. As a result, the FAS Russia established that in the event of a transaction and an additional agreement, the total share of taxi aggregators Yandex.Taxi and the Vezyot group will increase and amount to 70% within the geographical boundaries of the Russian Federation, over 80% within the boundaries of nineteen subjects of the Russian Federation and over 50% within thirty-two subjects. Thus, Yandex.Taxi and the Vezyot group strengthen their dominant position both throughout the Russian Federation and within more than half of the regions.

26. After analyzing all the materials submitted by the parties to the transaction, taking into account the analysis of the taxi aggregator market, the FAS Russia came to the conclusion that the transaction leads to an increase in market concentration, to a narrower choice of taxi drivers and passengers. Accordingly, the consequences of the transaction could adversely affect competition in the market for taxi aggregators.

⁶ <http://en.fas.gov.ru/documents/documentdetails.html?id=15350>.

⁷ <https://en.fas.gov.ru/press-center/news/detail.html?id=52562>.

⁸ <https://fas.gov.ru/news/29967>.

27. On June 11, 2020, FAS Russia made a decision to block the merger⁹.

4. Bayer/Monsanto¹⁰

28. In another Bayer / Monsanto merger case, FAS Russia, having analyzed the impact of merger of the latest biotechnology, big data and platform solutions in the field of agricultural production on the companies' potential to increase market power in the respective food markets (seeds, crop protection products and digital agriculture), came to the conclusion that such a merger creates significant risks to the state of competition in these markets. This merger is a successful example of a qualitative analysis of the market. If the FAS Russia in its analysis focused exclusively on quantitative indicators, it could eventually come to the wrong conclusions.

29. At the same time, the FAS took into account the need to reduce the dependence of the domestic market on foreign selection and genetic materials, associated agrotechnological solutions to develop competition among Russian agricultural enterprises.

30. In this regard, FAS Russia approved the Bayer/Monsanto deal with the issuance of a ruling containing obligations for Bayer AG¹¹, which are aimed at creating conditions for the development of potential competition from Russian companies in the field of selection and digital farming.

31. In accordance with the Ruling of the FAS Russia, Bayer AG undertakes to transfer to the selected Russian companies the molecular selection agents and germplasm necessary for the development of new varieties/hybrids with desired properties, for which, in particular, the greatest dependence of the domestic market on foreign selection material (corn, rapeseed, soybeans and vegetables).

32. In addition, Bayer AG undertakes to provide Russian agricultural software and application development companies non-discriminatory access to digital precision farming platforms, including access to historical data related to the Russian Federation, as well as data which will be assembled by Bayer AG after its commercialization of its software products in the Russian Federation.

33. Access to such data is a key factor for the development and implementation by Russian companies of their IT developments in the field of precision farming. To monitor the implementation of the ruling by the parties to the transaction the candidacy of an independent trustee was approved. The FAS Russia was the first to use this mechanism based on the best world practices, including the approaches of the European Commission and the OECD recommendations.

34. If we talk about the internal structure of FAS Russia, it can be considered that Methodological Council of the FAS and Commission for the analysis of commodity markets of the FAS act as a stand-alone «bureau of economics» within the authority.

35. Methodological Council of the FAS focuses on the following economic issues:

- economic research;

⁹ FAS Decision No. ИА/49910/20 dated 06/11/2020 on blocking the transaction: <https://br.fas.gov.ru/ca/upravlenie-regulirovaniya-svyazi-i-informatsionnyh-tehnologiy/2b16e00b-8fd3-4df7-a551-a46d814248ee/>.

¹⁰ <http://en.fas.gov.ru/documents/documentdetails.html?id=15347>.

¹¹ <https://en.fas.gov.ru/press-center/news/detail.html?id=52952>.

- consideration of drafts methodological recommendations on implementation of legislation elaborated by structural units of the FAS Central Office and the FAS Regional Offices;
- summarization of enforcement practice, provision of methodological support to the FAS experts;
- review and approval of the annual Report on State of Competition in the Russian Federation.

36. FAS experts in the field of economics, heads of Departments of the FAS Central Office, officials of the FAS Regional Offices participate in the Methodological Council. The Council may invite members of the Public Advisory Council and expert councils, established under the FAS, representatives of federal executive authorities, executive authorities of subjects of the Russian Federation to its meetings, engage with business alliances, nonprofit institutions, non-governmental and scientific organizations.

37. Commission for the analysis of commodity markets operates at the FAS since 2012 and includes representatives of the structural units of the FAS Central Office and the FAS Regional Offices, Public Advisory Council and expert councils of the FAS, other government authorities, as well as representatives of business, public associations and scientific organizations. The Commission's functions include consideration of proposals made by representatives of the FAS and drafting plans of the agency's work for the analysis of commodity markets, guidelines for the relevant analyses and their approval, as well as reviewing the materials of the analysis of commodity markets.