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Contents

Antitrust Advisory LLC is an independent Russian law firm specialising in competition/antitrust law, foreign investment, price regulation, advertising, commercial law and related areas. Its team includes three partners and seven lawyers wholly dedicated to competition/antitrust work. The team regularly advises clients on clearing transactions with government authorities, including complex antitrust filings, multi-jurisdictional filings in the CIS countries, and clearance under the Russian law on foreign investment, as well as antitrust aspects of joint ventures and the conclusion of sector-specific and inter-industry agreements. Antitrust Advisory acted as a co-ordinating competition counsel for Yandex in the joint venture between Yandex and Uber combining their ride-sharing businesses in Russia and the CIS countries, which was one of the largest Russian M&A deals in 2017. The firm also advised on clearance of a joint venture between Yandex and Sberbank concerning the Yandex. Market service. In another joint venture, it advised Sibur through clearance of its deal with Gazprom regarding the production of butyl acrylate.

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1. Legislation and Enforcing Authorities

1.1 Merger Control Legislation

Merger control issues in Russia are governed by Federal Law No 135-FZ 'On Protection of Competition' (the 'Competition Law') supplemented by various implementing regulations issued by the Federal Antimonopoly Service (FAS), the federal agency responsible for the implementation and enforcement of the Competition Law.

As mentioned above, the FAS has issued various regulations implementing the merger control procedures envisaged by the Competition Law. In addition, from time to time the FAS issues explanatory letters on specific issues of the application of the Competition Law.

1.2 Legislation Relating to Particular Sectors

There is a special law providing for a separate clearance procedure for foreign investment in certain sectors of Russian economy, namely Federal Law No 57-FZ dated 29 April 2008 'On the Procedure for Making Foreign Investments in the Companies Which Have Strategic Importance for National Defence and State Security' (the 'Strategic Investments Law'). The Strategic Investments Law is applicable to foreign investments in a number of 'strategic' sectors of the Russian economy, such as aerospace, defence, nuclear energy, cryptography, mining, natural monopolies, aquatic resources, etc. Foreign investors acquiring shares in, or control over, Russian entities operating in any of these sectors may be required to obtain prior clearance from a special Governmental Committee or submit a post-closing notification to the FAS, depending on the size of the interest acquired in the respective companies. In addition, certain requirements related to obtaining clearance of the Governmental Committee are set out in Foreign Investment Law No 160-FZ; specifically, the need to obtain prior clearance for the acquisition of more than 25% or blocking rights (whether directly or indirectly) in respect of any Russian company (whether strategic or not) by a foreign investor controlled by a foreign state(s) or international organisation(s). There are also prohibitions on the acquisition by foreign investors of majority stakes in Russian companies in some specific industries, such as auditing, aviation, media, gas transportation, nuclear energy, etc. Finally, there are special clearance procedures for foreign investments in the banking and insurance markets.

1.3 Enforcement Authorities

As mentioned in **1.1 Merger Control Legislation**, above, the FAS is the agency responsible for the enforcement of the Competition Law rules on merger control, as well as for the implementation of the Strategic Investments Law and the Foreign Investment Law, although it does not have decision-making authority in respect of the latter (see **1.2 Legislation Relating to Particular Sectors**, above).

The FAS is the only authority involved in merger control matters under the Competition Law. However, sometimes the FAS sends out information requests to other state authorities regulating the specific industry related to the deal in order to seek their views on competition and other issues that the deal could pose. As for the Strategic Investments Law and the Foreign Investment Law, there is a special Governmental Committee that makes decisions on applications for approval of the relevant transactions (see **1.2 Legislation Relating to Particular Sectors**, above). The approval process under the Strategic Investments Law and the Foreign Investment Law involves the participation of other state agencies, such as the Federal Security Service.

2. Jurisdiction

2.1 Notification

Merger notification is compulsory. It takes the form of pre-closing clearance, which must be obtained by the parties prior to completion of the transaction, or a post-merger notification in some limited cases (see below).

There is an exception for transactions between parties that are part of the same 'group of persons', ie, companies related to each other through some form of control. If such control is exercised through the ownership of more than 50% of the shares of one party by the other (whether directly or indirectly), no notification is required. In all other cases, intra-group transactions require a post-merger notification to the FAS, provided that

- the list of the members of the respective group of persons has been previously disclosed to the FAS according to a special procedure;
- a 30-day waiting period is complied with; and
- the list is up to date as of the date of the transaction.

If these conditions are not met then prior clearance is required, other than in respect of the exempted intra-group transactions.

2.2 Failure to Notify

There are penalties for failure to notify notifiable transactions, in the form of administrative fines imposed on the party which should have made the notification (the acquirer in the case of an acquisition). For a legal entity, the administrative fine would be in the amount of up to RUB500,000 (approximately EUR6,750); its CEO could face an administrative fine in the amount of up to RUB20,000 (approximately EUR270). Administrative fines for failure to obtain merger clearance are routinely imposed by the FAS on both Russian and foreign entities and individuals. Even if the relevant foreign entity does not have cash in bank accounts in Russia, the fine could be levied on the proceeds of a judicial public sale of the shares that the entity holds in Russian entities or its other Russian assets, if any. There is also a possibility of the invalidation of the respective transaction through a court of law, provided the FAS proves that the transaction in question resulted or could result in a restriction of competition in Russia. However, this remedy is rarely applied by the FAS in practice even in respect of domestic transactions (between Russian parties) and would be difficult to enforce in the case of foreign-to-foreign transactions.

In practice, these fines are regularly applied but the remedy of judicial invalidation is very rare. There is no legal requirement to publish information about the imposition of penalties but the FAS usually does so on its website, along with other news about its activities.

2.3 Types of Transactions

Russian merger rules catch the following transactions:

- acquisitions of shares of Russian companies exceeding the thresholds of 25%, 50% and 75% of the voting shares of Russian joint-stock companies and 1/3, 1/2 and 2/3 of the voting interest in Russian limited liability companies ('share deals');
- acquisitions of fixed assets located in Russia (except for land plots and non-production real estate objects) and intangible assets of a company where the value of assets transferred accounts for more than 20% of the book value of such company's assets ('asset deals');
- acquisitions of the rights to determine the terms of business of a Russian entity ('acquisition of control');
- the establishment of an entity, the capital of which is made up of an in-kind contribution of shares or assets of other Russian companies as in the first two points above;
- restructurings of Russian companies by way of their reorganisation under Russian corporate law; and
- joint-venture agreements between competitors related to the Russian market.

In regard to internal restructurings or reorganisations, please see **2.1 Notification**, above.

Shareholders' agreements can be caught if they involve the acquisition by a minority shareholder ('Shareholder A') of the rights to determine the terms of business of the respective target company ('effective control'), for example through a voting arrangement whereby the other shareholders accounting, together with Shareholder A, for more

than 50% of the company's voting shares undertake to follow Shareholder A's instructions in exercising their voting rights. Articles of association (charters) of companies could be caught if they are the means of setting out control rights as decided at the shareholders' meetings. Joint-venture agreements between competitors (whether full-function or non-full-function) also require merger clearance.

2.4 Definition of 'Control'

As mentioned in **2.3 Types of Transactions**, above, control is defined as the right to determine the terms of business of the respective company, which is understood mainly as active control, ie, the ability to cause the company to take action, rather than blocking rights designed to protect minority shareholders' interests.

Acquisitions of minority or other interests less than control are caught, but only in respect of Russian companies. This is the case where there is an acquisition of more than 25% of voting shares of a Russian joint-stock company or 1/3 of voting interest in a Russian limited liability company (see **2.3 Types of Transactions,** above). An acquisition of a minority interest in a foreign company does not trigger merger notifications in Russia unless there is an acquisition of contractual control rights in addition to a minority interest.

2.5 Jurisdictional Thresholds

Russian merger rules have extra-territorial effect, ie, in principle they apply to transactions entered into outside of Russia. The Competition Law sets out specific jurisdictional thresholds in relation to merger control. A transaction (as defined in **2.3 Types of Transactions**, above) may require clearance by the FAS if:

- the shares of a Russian company are acquired directly;
- assets located in Russia are acquired;
- indirect control over a Russian company is acquired;
- a direct or indirect control is acquired in respect of a foreign entity which generated turnover in Russia of more than RUB1 billion (approximately EUR13.5 million) for the last financial year; and/or
- competitors enter into a joint-venture agreement involving a joint activity in Russia.

In relation to the above, turnover is to be calculated on the basis of direct sales of goods and services to Russian customers (ie, turnover from sales to third-party distributors located outside of Russia which in turn re-sell products in different countries, including Russia, does not count). The jurisdictional threshold for joint-venture agreements between competitors is the fact that the joint-venture activity would be conducted in Russia.

In addition to jurisdictional thresholds, there are numerical thresholds for all notifiable transactions, which apply to the parties and their respective groups. If these numerical thresholds are met, the transaction in question requires notification; if not, no notification is required even if the jurisdictional thresholds are met. Notification is required if:

- the combined book value of the parties and their groups' assets exceeds RUB7 billion (approximately EUR93 million) or the combined turnover of the parties and their groups exceeds RUB10 billion (approximately EUR133 million); and
- the book value of the assets of the target entity and its group exceeds RUB400 million (approximately EUR5 million).

The latter threshold only applies to asset deals, share deals and acquisitions of control, ie, transactions where a specific target company or group are involved. The assets and turnover are to be calculated on the worldwide basis for the last financial year.

There are no special jurisdictional thresholds applicable to particular sectors. That said, there are special financial and other merger thresholds in respect of financial organisations and natural monopolies, but the jurisdictional test for them is the same as for other types of organisations.

2.6 Calculations of Jurisdictional Thresholds

Turnover for the purposes of the jurisdictional threshold is calculated on the basis of direct sales of goods and services to Russian customers (ie, turnover from sales to third-party distributors located outside of Russia which in turn re-sell products in different countries, including in Russia, is not to be accounted for). The turnover threshold is calculated on the group-wide basis.

All foreign currency values are converted into RUB at the official Russian Central Bank rate for the respective currency. The typical approach is to apply the exchange rate as of the end of the calendar year preceding the date of the implementation of the transaction.

Asset-based thresholds are applied based on the book value of the respective assets. Otherwise, the seller's assets are to be taken into account.

2.7 Businesses/Corporate Entities Relevant for the Calculation of Jurisdictional Thresholds

Any corporate entities that are considered as legal entities under the laws of the country of their incorporation, as well as groups of such entities (see below), are relevant for the purpose of calculating the jurisdictional thresholds.

A seller's turnover does not need to be included with that of the target if the seller loses control over the target as a result of the transaction being notified.

The Competition Law contains a detailed definition of the group of persons based on the combination of multiple criteria designed to capture any form of 'control' of one person (corporate entity or individual) over another, whether directly or indirectly. This includes:

- ownership of more than 50% of the voting shares of another legal entity;
- performance of the functions of the executive body of another legal entity;
- contractual rights to give binding instructions to another legal entity;
- overlapping majority of members of the governance bodies of another legal entity;
- the nomination of majority of members of a governance body or the sole executive body of another legal entity;
- joint ownership by persons meeting any of the above criteria (or the last criterion below in respect of individuals) of more than 50% of another legal entity; and
- close relatives of an individual (namely parents, children and siblings.

Changes in the business during the reference period are to be taken into account if they have been reported/included in the financial accounts as per the requirements under applicable law.

2.8 Foreign-to-foreign Transactions

Foreign-to-foreign transactions are subject to merger control in certain cases. Please refer to **2.5 Jurisdictional Thresholds**, above.

Local effect for the purpose of filing is presumed when the relevant jurisdictional thresholds are met. The assessment of the local effect is part of the substantive assessment of the transaction notified. Local presence of the acquirer is not required.

If the target is a foreign company with no subsidiaries or sales in Russia, no filing would be required in Russia. If control of a Russian company is acquired (directly or indirectly), the assets of the latter would be taken into account for the purpose of applicable numerical thresholds, irrespective of the location of such assets.

2.9 Market Share Jurisdictional Threshold

There is no market share jurisdictional threshold in Russia.

2.10 Joint Ventures

Joint ventures are subject to merger control in Russia in the following cases:

- if they result in the establishment of a new entity and the transfer of Russian assets/shares of the parties to such entity (regardless of whether the parties are competitors); or
- if the contemplated joint venture is between competitors and relates to Russia.

In the event of the establishment of a joint venture by way of the contribution of shares/assets, the same share/asset thresholds apply as in respect of straightforward acquisitions (see **2.5 Jurisdictional Thresholds**, above). As for joint-ventures between competitors, these require merger clearance if they relate to Russia (the Russian territory) and the combined book value of the parties and their groups' assets exceeds RUB7 billion (about EUR93 million) or the combined turnover of the parties and their groups exceeds RUB10 billion (about EUR133 million). If these criteria are met, the joint venture requires a filing in Russia whether or not it is full-function, ie, whether a new entity is created or the joint venture is contractual in nature.

2.11 Power of Authorities to Investigate a Transaction

If the FAS becomes aware of a transaction that was not notified to it and has reason to believe that it required notification, it has the authority to require provision by the relevant parties of information that would enable the FAS to determine whether or not the transaction required notification and/or to carry out an investigation to determine whether the Russian merger control rules have not been complied with.

Violation of the merger control requirements is an administrative offence, and under Russian rules the statute of limitation for such offences is one year from the date on which the relevant transaction was implemented. While there is no specific statute of limitation for investigations or requests for information, the FAS is unlikely to initiate an investigation after the one-year statute of limitation has lapsed.

2.12 Requirement for Clearance Before Implementation

Implementation of a transaction must be suspended until clearance.

2.13 Penalties for the Implementation of a Transaction Before Clearance

If the parties implement a transaction before clearance, the same penalties apply as in the case of failure to notify (see **2.2 Failure to Notify**, above).

These penalties are applied in practice. They are typically the same as in the case of failure to notify.

As mentioned in **2.2 Failure to Notify**, above, there is no legal requirement to publish information about the imposition of penalties but the FAS usually does so on its website, along with other news about its activities.

Penalties have been imposed in the case of foreign-to-foreign transactions. The FAS regularly imposes penalties regardless of whether the transaction is domestic or foreign-to-foreign (if it becomes aware of the violation).

2.14 Exceptions to Suspensive Effect

There are no general exceptions to the suspensive effect. No possibility to seek a waiver or derogation from the suspensive effect is provided under the Competition Law.

2.15 Circumstances Where Implementation Before Clearance is Permitted

If prior clearance is required, no circumstances are envisaged under the Competition Law where the authorities will permit closing before clearance.

Carving out business or assets in Russia while implementing global closing is possible but requires extra efforts and additional paperwork. Under Russian merger control rules, certain types of intra-group transfers could be made without obtaining prior clearance. This is possible in particular in respect of transfers within a vertical chain of companies, more than 50% of the shares of which are controlled directly or indirectly by the same person. Therefore, Russian companies/assets that are part of the global deal could be carved out and transferred outside of the perimeter of the deal to other companies controlled by the seller(s) and which will remain under its/their control after the completion. This only works if the seller controls the target entity through ownership of more than 50% of shares prior to completion. Other options that might be acceptable in certain jurisdictions (eg, warehousing, standstill agreements, etc) do not work under the Russian merger rules.

If the carve-out itself does not trigger a separate filing in Russia, there is no need to notify the Russian authorities (the FAS) about this before closing of the main deal, unless the filing for the main deal is already being reviewed by the FAS by the time of the carve-out. In this case, the previous filing could be withdrawn and a new filing for the Russian closing (to be implemented after closing of the main deal) could be submitted, or the parties could amend the already filed application by notifying the FAS about the carve-out.

3. Procedure: Notification to Clearance

3.1 Deadlines for Notification

There is no deadline for a clearance filing but it must be made and the clearance must be obtained before the completion of the transaction.

Regarding the practical application and publication of penalties, see **2.2 Failure to Notify**, above.

3.2 Type of Agreement Required Prior to Notification

The filing can be made based on a draft agreement or based on a legally binding agreement, provided that completion of the transaction is expressly conditioned on obtaining prior FAS clearance. Since any changes in the transaction structure and terms prior to clearance will likely have to be disclosed to the FAS and may result in the extension of the review period, it is advisable to file when all the substantive terms and the structure of the transactions have been finally agreed between the parties.

The filing must be made based on written documents. An informal expression of intention to reach an agreement is not sufficient for the purpose of filing, as the filing must include either a draft of the transaction agreement or another written document containing all the substantive terms of the transaction. As explained above, any changes to these terms prior to the clearance will have to be disclosed to the FAS and may delay the clearance.

3.3 Filing Fees

The filing fee is currently set at RUB35,000 (approximately EUR470) per notification.

The filing fee must be paid upfront before the filing. Evidence of the payment must be provided with the filing.

3.4 Parties Responsible for Filing

In the case of an acquisition, the notification must be made by the acquirer(s). In the case of corporate reorganisations and joint-venture agreements between competitors, the filing is to be made by all the respective parties.

3.5 Information Included in a Filing

There is an exhaustive list of information that must be included in the filing. This includes documents on the acquirer, the target and the transaction itself. In particular, information to be provided with the filing includes the group structures of both the acquirer and the target, including information on the ultimate beneficiaries of the acquirer (unless it is a public company that publicly discloses its shareholders), information on economic activities of the parties and their groups in Russia, as well as some other details. See also **3.2 Type of Agreement Required Prior to Notification**, above.

The substantive assessment of the competitive effects of the transaction is not required as part of the filing. It should be made by the FAS itself. The parties could be required by the FAS to submit information about their views as to the market definition, their market shares, etc.

The filing must be submitted in Russian. Any documents in languages other than Russian must be translated into Russian. All the documents issued outside of Russia, or their

copies, must be notarised, apostilled and translated into Russian.

3.6 Penalties/Consequences of Incomplete Notification

There is no penalty if notification is incomplete, but the FAS must return the incomplete application and will not start the review thereof until all the missing documents/information have been provided.

3.7 Penalties/Consequences of Inaccurate or Misleading Information

Provision of materially inaccurate or misleading information to the FAS in the filing can result in the imposition of a fine on the company of up to RUB500,000 (approximately EUR6,750) and on its officers (up to RUB15,000/EUR200). These penalties are applied in practice.

3.8 Review Process

Initially, the FAS has 30 calendar days to review the notified transaction. If the transaction raises competition concerns or additional information is required in order for assessment to take place, the FAS may extend the review period by an additional one to two months. In practice, the FAS tries to keep to the standard period of 30 days unless the transaction raises competition concerns. There are no distinct stages in the merger review process similar to those that exist in the EU and some other countries. In most cases, the FAS issues decisions in relation to transactions raising competition concerns within three months of the submission of the relevant notification. There is a possibility that the FAS could take longer to review the transaction; this could happen, for instance, where the FAS decides to issue remedies that must be complied with prior to closing. In this case, the maximum review period could be up to 13 months, including up to nine months for the parties to comply with pre-closing remedies and one month for the FAS to verify the parties' compliance with them. However, this happens very rarely in practice because the FAS has a clear preference for issuing post-closing rather than pre-closing remedies. There is also a possibility of suspension of the review period if the notified transaction requires clearance under the Strategic Investments Law or the Foreign Investment Law (see **1.2 Legislation Relating to Particular Sectors**, above). In this case, the competition review is suspended until the Governmental Committee issues its decision.

As explained above, the overall timeline for clearance is typically up to three months unless clearance is required under the Strategic Investments Law or the Foreign Investment Law, in which case the clearance process could last up to 12 months.

3.9 Pre-notification Discussions with Authorities

The possibility for parties to engage in pre-notification discussions with the authorities was expressly provided in the changes introduced into the Competition Law in 2015. Among other things, this allows the parties to the proposed transaction to present to the FAS their views on the possible impact of the transaction on competition in Russia and available defences, to elicit potential concerns of the FAS regarding this impact, as well as to propose to and discuss with the FAS potential remedies. This is not discouraged by the FAS and sometimes is done in case of potentially problematic transactions, including horizontal mergers, although the practice is not universal.

The parties can request confidentiality of discussions, although there is no specific statutory requirement for the FAS to keep them confidential (nor is there a requirement to make them public). In any case, the FAS can be requested to ensure the confidentiality of information provided by the parties during these discussions and expressly marked as confidential.

3.10 Requests for Information During Review Process

Requests for additional information are rather common, particularly in the case of transactions giving rise to competition concerns and for that reason requiring closer scrutiny. Normally, such requests are reasonable and not unnecessarily burdensome but sometimes they lack precision, which may cause unnecessary difficulties for the parties. In such cases, it is usually possible to discuss with the FAS the scope of its request and to get it to agree to narrow the request down to capture more specific pieces of information necessary for the assessment. The FAS can extend the period of review in the case of requests for additional information but only if it has determined that the transaction may raise competition concerns. Information requests do not suspend the review period.

3.11 Accelerated Procedure

There are no short-form, fast-track or other types of accelerated procedures. All the formalities must be complied with in full irrespective of the size or complexity of the transaction or whether it raises competition concerns. If the deal raises no issues and the package of documents is in good order, the FAS typically issues clearance decisions within 30 days. Clearance cannot be otherwise expedited.

4. Substance of the Review

4.1 Substantive Test

The substantive test applied by the FAS is whether the notified transaction will or could result in the creation or strengthening of a dominant position or otherwise will or could restrict competition in the relevant market. The FAS has not issued any formal guidelines on the application of this test, so the main source of information is its enforcement practice. A review of the FAS practice in merger con-

trol cases indicates that the FAS prefers to issue conditional clearances (ie, subject to remedies) in respect of transactions raising competition concerns rather than to block them. There have been very few instances of the FAS blocking transactions (ie, denying clearance) and these have only been cases where the transaction resulted in the creation of monopoly or a market share far exceeding 50%.

4.2 Markets Affected by a Transaction

Identification of the relevant market is the necessary part of the assessment of the transaction by the FAS. The FAS identifies the relevant markets based on the information provided in the filing, including the subject matter of the transaction, the types of activities carried out by the parties thereto and the products manufactured and sold by them within the two years prior to the transaction. The FAS distinguishes between primary and secondary markets and could establish the existence of anti-competitive effects not only on the main market but on the secondary/adjacent markets as well.

If the combined market share of the parties resulting from the transaction is less than 35%, competitive concerns are relatively unlikely. If, on the other hand, it is more than 50%, the FAS will inevitably issue remedies as a condition of the clearance or may even deny it, although this is very rare (see **4.1 Substantive Test**, above).

4.3 Case Law from Other Jurisdictions

Reliance on case law from other jurisdictions is rare but could happen in cases of new (emerging) markets that the FAS has not previously analysed, particularly if the parties draw the FAS's attention to relevant precedents in other jurisdictions. EU case law is the most likely source of precedents but is not the exclusive one.

4.4 Competition Concerns

As mentioned in **4.1 Substantive Test**, above, the main concern of the FAS in the context of merger control is the creation or strengthening of a dominant position in the market as a result of the proposed transaction. However, any other anti-competitive effect that can be identified by the FAS (eg, conglomerate effects) may also be relevant.

4.5 Economic Efficiencies

Efficiency considerations are taken into account by the FAS; there have been cases where presumed anti-competitive mergers were cleared because their anti-competitive effects were outweighed by the benefits that the customers were expected to obtain as a result of the merger. In addition to efficiencies, the FAS also takes into account broader economic considerations, such as the need to support Russian companies in their efforts to compete with foreign rivals on a worldwide basis.

4.6 Non-competition Issues

Since the adoption of the Strategic Investment Law in 2008, non-competition issues have not usually been taken into account in the merger assessment by FAS.

As mentioned in **4.5 Economic Efficiencies**, above, the FAS may consider broader economic considerations in the context of merger control decisions but this is still within the scope of the Competition Law. Any other non-competition issues may be considered in practice in the context of the control over foreign investment, but this is not within the FAS's remit (see **1.2 Legislation Relating to Particular Sectors** and **1.3 Enforcement Authorities**, above).

4.7 Special Consideration for Joint Ventures

There is a special clearance procedure for joint ventures between competitors (see **2.10 Joint Ventures**, above). There is also a detailed methodology specifically for the assessment of joint ventures by the FAS, which is publicly available.

The authorities will not normally examine possible co-ordination issues between joint venture parents, unless the information provided to the FAS with the filing suggests that such co-ordination is likely or will be facilitated by the proposed joint venture terms. The FAS typically assesses non-compete arrangements and the like quite thoroughly.

5. Decision: Prohibitions and Remedies

5.1 Authorities' Ability to Prohibit or Interfere with Transactions

In theory the authorities do have the ability to prohibit or interfere with a transaction, but only if the proposed transaction will have a material negative impact on competition in the relevant market which cannot be offset or mitigated by remedies that can be issued by the FAS. In practice, this is very rare and happens only in two cases: monopolisation of the market or provision of inaccurate or false information (see **3.7 Penalties/Consequences of Inaccurate or Misleading Information**, above).

5.2 Parties' Ability to Negotiate Remedies

The parties have a possibility to discuss remedies with the FAS both before and after the filing (see **3.9 Pre-notification Discussions with Authorities**, above) but such discussions are not binding on the FAS and cannot lead to any legally enforceable commitment of the part of the FAS. Even if the parties offer remedies to the FAS, the final decision on whether to accept them is with the FAS.

5.3 Legal Standard

The Competition Law generally defines the types of remedies that can be imposed by the FAS in the merger control context without specifying what types of remedies must be issued in specific situations or to address specific competition law

concerns. There is a general implied principle that remedies should be adequate and executable by the parties (ie, it must be within the parties' power to comply with the remedies). In particular, the remedies may apply only to the parties to the transaction or members of their respective groups.

5.4 Typical Remedies

In general, the FAS has a clear preference for behavioural remedies. These remedies issued by the FAS are typically generic and unspecific. In large part they repeat the requirements that a dominant undertaking must comply with under the general antitrust rules. Structural requirements including divestiture are very rare in the FAS's merger control practice and have only been issued in respect of a limited number of markets (such as oil and gas, electricity, telecommunications, insurance and retail trade). However, those remedies that are issued by the FAS are typically required to be complied with after completion (usually within 12 to 18 months).

In the context of merger control cases, the FAS can only issue remedies aimed at protecting competition in the market.

5.5 Negotiating Remedies with Authorities

See **5.2 Parties' Ability to Negotiate Remedies**, above, regarding when parties can begin negotiating remedies with the authorities.

As mentioned above, the FAS does not have a practice of discussing with the parties the remedies it wishes to issue. In some limited cases such a discussion may take place, but there are no specific rules or detectable patterns in this respect. In any case, the FAS's decision on remedies is always unilateral.

Remedies are usually issued together and simultaneously with the clearance decision except in those rare cases where the FAS issues pre-conditions for the clearance of the merger. In the latter case, the FAS defines the period for the fulfilment of such conditions, which cannot exceed nine months. Upon fulfilment of the conditions, the parties must notify the FAS thereof and provide evidence of the fulfilment and the FAS grants its approval within 30 days after such notification, provided that it is satisfied that the conditions have indeed been fulfilled.

5.6 Conditions and Timing for Divestitures

Divestiture as a remedy is very rarely applied by the FAS in the merger control context. However, where it is applied it is typically required to be complied with within 12 to 18 months after completion. As for behavioural remedies, which are much more common, many of them are ongoing and apply for as long as the acquirer maintains the controlling interest in the target or for such other time period as may be set by the FAS depending on the nature and purpose of the remedy. Neither the Competition Law nor any implementing regulations provide for any specific timeframe for the application of remedies.

Except in the case of pre-clearance remedies (see **3.8 Review Process**, above), when the parties cannot complete the transaction until such remedies have been implemented, remedies usually have to be complied with after the completion of the transaction.

Failure to comply with post-completion remedies can result in the judicial invalidation of the underlying transaction as well as in the imposition of a fine of RUB300,000-500,000 (approximately EUR4,000-6,660) on legal entities and RUB18,000-20,000 (approximately EUR240-270) on individuals (including company's officers) or disqualification for up to three years.

5.7 Issuance of Decisions

A formal decision permitting or prohibiting a transaction is issued to the parties. The FAS is also required to publish its clearance decisions. It usually publishes short notices on its website, which contain only the names of the parties and very basic details on the corporate structure of the transaction in question. Confidential information that was part of the filing is not published in any event.

5.8 Prohibitions and Remedies for Foreign-to-foreign Transactions

As mentioned in **5.1 Authorities' Ability to Prohibit or Interfere with Transactions**, above, the FAS very rarely prohibits transactions and we are not aware of instances where this has been done specifically in the context of foreign-to-foreign transactions. There have been many cases where the FAS has issued remedies together with the clearance decision rather than prohibited deals.

6. Ancillary Restraints and Related Transactions

6.1 Clearance Decisions and Separate Notifications

Normally, the clearance decision does not expressly cover ancillary restraints. Although the FAS insists on receiving the full text of the underlying agreement, it does not closely review ancillary restrictions as part of its merger review. In some rare cases, the FAS has required the parties to substantiate the non-compete obligations or similar restrictions as part of the merger review but even in these cases its clearance decision has not specifically covered such obligations. They could, however, be cleared separately if the parties wish (see below).

No separate notification is required for ancillary restraints but if the parties have doubts about the legality of such provisions, they can submit a separate notification or inquiry in respect of such provisions to the FAS. In the case of a sepa-

rate notification of ancillary restraints, the FAS can either clear them or issue an order for the parties to modify them.

7. Third-party Rights, Confidentiality and Cross-border Co-operation

7.1 Third-party Rights

Third parties are generally allowed to provide their comments on the notified transactions. In respect of transactions that raise competition concerns, the FAS usually publishes information about them on its website, allowing all interested parties to come forward with any comments or objections they may have about the transaction. The FAS also sometimes reaches out to specific third parties (eg, key customers of the parties to a horizontal merger).

As mentioned above, any third parties that have anything to say about the proposed transactions are allowed to make their views known to the FAS. However, there is no special procedure for the third-party intervention into the review process that would set out their rights in any detail. In particular, third parties do not have any right to access and review any documents related to the proposed transaction, particularly if they are marked as confidential.

7.2 Contacting Third Parties

As mentioned in **7.1 Third-party Rights**, above, the FAS does have a practice of contacting specific third parties where it has a reason to believe that they could provide useful input on the potential effect of the proposed transaction. However, there is no formal requirement for the FAS to do so in all cases.

When the FAS contacts third parties in connection with a transaction undergoing merger review, it usually does so in writing by sending a written questionnaire.

The authorities will not typically 'market test' any remedies offered by third parties, except in extreme cases where there is an active intervention from an interested third party.

7.3 Confidentiality

Although there is a legal requirement for the FAS to make public the fact of the notification once it has been submitted, usually it is made public only if the FAS determines that the notified transaction raises competition law concerns and extends the period of review in order to collect additional information required for its assessment. In this case, the transaction is described in very general terms including the nature of the transaction and the parties.

Commercially or otherwise sensitive information must be protected by the FAS. If certain information is marked by the respective party as its commercial secret, special protection measures are applied by the FAS (including restricted access to file), and the FAS must not disclose such information publicly or provide access to it to any third party.

7.4 Co-operation with Other Jurisdictions

The FAS historically has close relationships with competition authorities of the CIS countries that are also members of the Eurasian Economic Union (EEU), primarily Belarus, Kazakhstan, Armenia and Kyrgyzstan. The FAS is also part of the International Competition Network and is actively looking for ways to expand its co-operation with other competition authorities, primarily those of the BRICS countries and the EU and its member states.

Co-operation within the EEC/CIS relates to both general policy matters and specific merger transactions. There have been a few recent merger cases in which the FAS co-operated with other competition authorities, particularly those of the CIS countries and the EU Commission, on the basis of the parties' waivers (see below). In particular, the FAS had reportedly consulted with them about the remedies to be issued to the parties.

In theory, competition authorities of the EEC countries could exchange confidential information between each other based on the existing treaties between them; however, in practice they still ask the parties to provide waivers.

8. Appeals and Judicial Review

8.1 Access to Appeal and Judicial Review

A clearance decision can be appealed to a court by the notifying party or any third party which can show that its legitimate interests are affected by the decision. The decision can be appealed in full or in part, including in relation to the remedies issued. However, appeals against the FAS's merger decisions are rare in practice and are rarely successful.

8.2 Typical Timeline for Appeals

The appeal process is typically concluded within six to nine months.

There are examples of successful appeals, but they are rare and relate mostly to domestic deals.

8.3 Ability of Third Parties to Appeal Clearance Decisions

Third parties can in theory appeal a clearance decision if they can show that the decision affects their rights or legitimate interests (see **8.1 Access to Appeal and Judicial Review**, above).

There has been a limited number of successful appeals. If the court determines that the FAS clearance decision is incorrect, the FAS will be required to conduct a new review taking into account the court's legal position.

9. Recent Developments

9.1 Recent Changes or Impending Legislation

There have been no material changes to the legislation or regulation in the area of merger control in the last two years or so. There are a few proposals in relation to Russian merger control that are currently being debated. The key element of the proposed changes relates to the procedural aspects of the review of mergers, including the requirements for the FAS to issue statements of objections and conduct hearings if the notified transactions raise competition concerns (ie, could restrict competition). The FAS is also advocating the possibility for it to review mergers beyond the three-month period currently set out in the Competition Law. Those proposed changes are still at a relatively early stage of development and the timeframe for their implementation is unclear.

9.2 Recent Enforcement Record

The FAS continues to vigorously enforce the merger control rules in respect of both domestic and foreign-to-foreign transactions, including the imposition of fines in the case of failure to notify and the imposition of remedies if the transaction poses competition law concerns, without any special attention being given to foreign-to-foreign transactions. As noted above, prohibitions are rare and there is no discernible trend towards applying them more regularly.

9.3 Current Competition Concerns

The main concern of the Russian competition authority in the merger control context is about the creation or strengthening of dominant position or other forms of abuse of market power. Accordingly, most of the remedies that the FAS issues in this context are designed to limit the ability of the parties to abuse their market power to the detriment of customers, suppliers or consumers (including in terms of pricing) even in cases where dominance has not strictly speaking been established. The FAS also takes into account vertical and conglomerate effects of the potential deals.

The most recent trend that is still developing is a closer interplay between the strategic/foreign investment review and merger clearance. In 2017, changes were introduced to the Foreign Investment Law that allow any deal related to the acquisition of control over a Russian company by any foreign investor to be referred by the Prime Minister to the Governmental Committee. In this case, the merger review is suspended until the Governmental Committee clears the deal. The FAS, along with other governmental authorities, is currently developing a clearer procedure for implementing this provision. In practice, such a procedure is triggered in a limited number of cases, typically involving the defence, government contracting and similar industries.

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