

Simplified procedure of notification in case of intra-group transactions

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The Russian Federal Law No.135-FZ “On Protection of Competition” dated July 26, 2006 (the ‘Law’) came into force at the end of 2006. This Law has established rules for the state monitoring of economic concentrations and, in particular, their notification requirements.

Articles 27, 28 and 29 of the Law establish which transactions are subject to the obtaining of prior authorisation of the antimonopoly body (the Federal Antimonopoly Service, or FAS), for example, merger of economic undertakings, purchase of shares in the share capital of joint stock companies in excess of the 25%, 50% and 75% thresholds, acquisition of more than 20% of assets of an economic undertaking, acquisition of rights which allow for the determination of the terms of business activity of an economic undertaking, amongst others.

The said transactions are subject to prior notification where specific criteria are met (the aggregate value of assets of the acquirer’s group and the target exceeds R3bn, or the aggregate turnover of the acquirer’s group and the target exceeds R6bn, or any party is entered into the state register of entities holding a 35% market share market position). Unless duly notified and cleared by the FAS a transaction (even if concluded abroad but having as an indirect result a change of control of a Russian company) may be considered null and void and be invalidated in court at the instance of the FAS.

It is important to note that before the enactment of the new Law and pursuant to previous legislation, any transaction satisfying the formal criteria (in principal, similar to the present ones) was subject to prior consent of the antitrust authority, even where it was purely an intra-group restructuring. Such a situation created difficulties for international groups operating in Russia through their direct or indirect subsidiaries, which faced from time to time, a need to adjust their corporate structure.

The Law however, has introduced a notion of a special simplified procedure for notification of transactions concluded within a group of companies (the ‘Group’) which may lead to economic concentration or a change in the corporate holding structure.

By virtue of the Law, transactions concluded by persons who are members of the same Group may be performed either (i) with antimonopoly body’s prior consent (usual notification procedure) or (ii) with subsequent notification (simplified procedure).

Article 9 of the Law defines the cases wherein an individual or a legal entity may be considered as

being part of the same Group. The following are examples of a Group in terms of the legal definitions created by this Law:

- A company and an individual or a legal entity, if such individual or legal entity holds more than 50% of the total number of shares/ownership interest in the share capital of the company;
- A company and an individual or legal entity, if such individual or such legal entity exercises the functions of the sole executive body of the company, as well as companies where the same individual or legal entity functions as the sole executive body;
- A company and a individual or legal entity, if such individual or such legal entity on the basis of the constituent documents of the company or an agreement is entitled to give binding instructions to this company as well as companies where the same individual or the same legal entity is entitled to give binding instructions;
- A company and individual or legal entity, if upon proposal of such individual or legal entity the sole member executive body or more than 50% of the collective executive body and (or) of the board of directors of such company is appointed or elected;
- Companies in which more than 50% of the collective executive body and (or) the board of directors consist of the same individuals;
- Persons participating in the same financial and industrial group;
- An individual, his/her spouse, parents, children, brothers and sisters;
- Parties, each of which pertain to a Group with the same person on one of the grounds specified

above, as well as other parties pertaining to the same Group with each of such parties.

It should be noted that the last of the listed grounds for forming a Group is of an extremely broad scope, and not having any vertical or horizontal limitations, its application may expand the notion of the Group to a very considerable number of companies.

The procedure of a subsequent notification within the simplified procedure is comprised of two stages.

First stage

At least one month prior to the conclusion of the transaction, the party participating in the transaction (the 'Applicant') should provide the FAS with a list of persons constituting the Group in the form approved by Order of FAS N° 293 dated November 20, 2006 (the 'Order'). The list should remain unchanged (i.e. the composition of the Group remain the same) from the moment of its submission to the FAS until the performance of the contemplated transaction.

The list of information to be provided in respect of legal entities belonging to the same group is as follows:

- Name;
- Legal form;
- Legal and mailing address;
- Taxpayer identification number;
- Criteria of the belonging to the same group.

It should be noted that since the concept of the 'Group' as defined in the law is very wide, the disclosure of the full Group may have the result of being a very cumbersome formality for huge multinational corporations. The FAS has demonstrated so far, however, a rather flexible approach to this issue, considering as sufficient the inclusion into the list of the Group only entities relating to the Russian market.

If the list is filed in due form, the FAS will send a notice confirming the receipt of such list and will then disclose the list of the Group on its official website.

Second stage

After complying with the Group's disclosure formality the transaction may be performed. No later than 45 days after the date of the consummation of the transaction, the FAS should be notified of that fact by way of sending a written notification. The list of information accompanying

such notification is rather long (in fact, it is similar to the one established for prior notifications) and includes:

- Certified copies of the Applicant's constituent documents;
- Documents describing the subject matter of the transaction;
- Types of activities exercised by the Applicant within the two years preceding the date of submitting the notification;
- Types of products and volume of products produced and sold by the Applicant within the two years preceding the date of submitting the notification;
- Main types of activities of other parties to the transaction, types and volume of products sold by such parties;
- Accounting balance sheet as of the last reporting date preceding the date of submitting the notification;
- Financial and economic, as well as other, reporting documents submitted to the Central Bank of the Russian Federation and to other federal executive agencies (if applicable);
- List of companies where the Applicant holds more than five per cent of share capital; and
- Information on the parties who are members of the Applicant's Group and on their respective Groups, if available.

On the whole, the advantages of the introduction of the new procedure applicable to intra-group transactions are somewhat diminished by the fact that the scope of information that should accompany both the public disclosure of the Group and the subsequent notification to the antimonopoly authority is actually very extensive.

A number of multinational groups, however, have already availed themselves of this new procedure for the purpose of internal restructurings affecting their Russian subsidiaries.

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