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More documentation related to this discussion can be found at: oe.mcdym.

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Merger Control in Dynamic Markets

- Contribution from the Russian Federation –

1. Introduction

1. Recently there has been a rapid increase in the number and scale of merger transactions all over the world, including Russia, the effects of which influence global markets.
2. In Russia, the creation and reorganization of commercial organizations, inter alia mergers and acquisitions, is regulated by Article 27 of the Federal Law of July 26, 2016 No. 135-FZ “On Protection of Competition” (hereinafter – Law on Protection of Competition), which also sets which transactions require prior consent of the antimonopoly authority.
3. Provisions on mergers are also included in other legal documents of Russian legislation. For example, according to Chapter 4 of the Civil Code of the Russian Federation, in circumstances defined by law, the reorganization of the legal entities in the form of the merger, affiliation or transformation shall be effected only upon the consent of the authorized state bodies (Paragraph 3 Article 57 of the Civil Code of the Russian Federation). In case of the merger of the legal entities, the rights and duties of every one of them shall pass to the newly emerged legal entity in conformity with the transfer deed. (Clause 1 Article 58 of the Civil Code of the Russian Federation).

2. Control over mergers in agricultural markets

4. The introduction of digital farming in agricultural sector should actually complete the formation of modern agriculture based on IT platforms of precise farming that allow you to control agricultural yields and include highly productive biotechnological seeds, related plant protection products, fertilizers and other means of production.
5. It is notable that the development and implementation of innovative technologies in agriculture is accompanied by active structural transformations in the industry, which are characterized by high rates of asset consolidation by global companies that supply the market with high-tech products. For example, from 2016 to 2017, the FAS Russia considered and approved two global transactions: Dow Chemical/DuPont and ChemChina/Syngenta.
6. Thus, such transformations have already led to the creation of a stable oligopoly in this market, which entails certain risks, inter alia for competition: increasing seed prices; reducing the variety of seeds offered and the biodiversity of cultivated crops; control by multinational companies of national seed production, input resources and profitability of agricultural producers.
7. Among the barriers that bias the choice of seed buyers towards imported seeds are their high productivity, seed resistance to certain plant protection products, affordable prices, the possibility of deferred payment, and consultancy services.

8. When evaluating the above transactions, the traditional approach was applied. A prospective analysis of the impact of transactions on the markets of seeds and plant protection products as a result of horizontal integration was carried out. This analysis showed that due to these transactions dominant position will not arise or intensify in the Russian markets with presence of the products of the companies involved in the transaction. This was the basis for their alignment.

9. At the same time, the changing business model, including in the field of seed production, which is based on the implementation of high-tech solutions protected by patents, big data, the creation of closed systems that link under a unified management unrelated horizontal or vertical markets, allowing to maximize profits by using a dominant position in one of them, predetermines the need to change approaches to the evaluation of such transactions.

10. According to the FAS Russia this approach involves:

- consideration of the innovation market in close relationship with the markets of the final product sold to consumers. At the same time, the innovation market is considered as a world market;
- assessment of the technologies and know-how available to companies that allow to significantly increase their market share in the short and medium terms due to the synergistic effect, it is assumed that the assessment of existing technologies in the context of horizontal, vertical and conglomerate integration (for example, the presence of unique technologies, databases that allow for accelerated selection, to create package solutions, including IT solutions that affect the consolidation of end-consumer demand and limit the access of potential competitors to the seed market, as well as related markets);
- assessment of the impact of the proposed transaction on the innovation market both from the point of view of the possibility of limiting the access of potential competitors to innovative products, and from the point of view of the impact on the development of innovations in the national market.

11. This approach was used by the FAS Russia when considering the Bayer/Monsanto transaction.

12. This transaction took place against the backdrop of a significant global transformation of the agricultural industry, when the need to introduce new innovative technologies in agriculture became evident. In this regard, this sector of the economy has become one of the most technologized industries.

13. In 2017-2018, the FAS has considered the merger between “Bayer AG” (Germany) and “Monsanto Company” (USA) and concluded a review of it in two phases: the competition analysis and the imposition of conditions on the merging company (7 November 2017)¹ and the final approval of the merger (20 April 2018)².

14. This merger affects the markets for the products used by agricultural producers including agricultural crops (seeds), certain crop protection products, in particular nonselective herbicides, as well as digital offerings for agriculture.

¹ <https://en.fas.gov.ru/press-center/news/detail.html?id=52417>.

² <https://en.fas.gov.ru/press-center/news/detail.html?id=52952>.

15. Both Bayer and Monsanto are vertically integrated full-cycle agrotechnology companies active in agrotechnology research and development as well as in the distribution and marketing of their products to agricultural producers.

16. The first phase of the review corresponded to the FAS decision to impose conditions on the merging company. The conditions put forward on November 7, 2017, contained requirements to “Bayer AG” aimed at creating conditions for the development of potential competition from Russian companies.

17. In the course of this merger review, the FAS organized a series of consultations with the relevant federal authorities, as well as scientific and business communities, and foreign competition authorities. The FAS also met the parties of the merger in order to discuss the possible negative effects the merger could have on competition as well as remedies helping to eliminate them.

18. Considering that technological transformations, including digitalization worldwide, have become key to understanding competitive dynamics in the agricultural sector, the FAS has applied new methodological approaches to identify potential anticompetitive effects of the merger both in the Russian and global markets developed in cooperation with reputable academic institutions.

19. After conducting an in-depth market analysis (See Section 3.1. of the Report) the FAS Russia has concluded that the merger can cause the following anticompetitive effects:

- creating new and increasing existing barriers to entry in relevant markets (including those generated by introduction of closed digital agronomic platforms to the Russian market);
- enhancing incentives for anticompetitive agreements and concerted practices (considering already high level of concentration in this sector, the merger might substantially reduce a number of market players having all necessary technical and data capacities to effectively compete in the new technological and economic environment);
- increasing possibility of abuse of market power (combining innovative technologies, data, and platform solutions will allow the combined company to rapidly increase its market share up to a dominant position in a short term perspective).

20. Hence, the FAS has concluded that the merger creates substantial risks of restriction of competition, and those risks should be leveled in the course of the merger review.

21. The requirements contained in conditions imposed by the FAS on Bayer AG provide for the transfer to Russian companies of the molecular means of selection and germplasm needed to create new varieties and hybrids, with which the combined company has a strong position in the Russian market.

22. In addition, in order to develop competition in the digital farming markets, the ruling of the FAS also contains obligations to provide Russian companies engaged in the development of agricultural software and applications with non-discriminatory access to digital farming platforms, including access to historical data related to the Russian Federation, as well as to the data that will be collected by Bayer AG after it commercializes its software products on the territory of the Russian Federation. 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.

23. The obligations of Bayer AG also imply the creation of a plant biotechnology research centre in the Russian Federation, which will provide practical training for Russian specialists in the field of accelerated breeding with the involvement of highly qualified specialists with significant experience in this field.

24. On April, 2018, the FAS made a decision to approve the merger.

25. Considering the global nature of this transaction (the transaction is being considered in more than thirty jurisdictions), in preparing its decision, the FAS actively cooperated with foreign competition authorities using waivers, which allow competition authorities to exchange confidential information, with the purpose of developing common approaches and synchronizing requirements for participants in the transaction.

26. Taking into account the fact that in order to monitor the fulfilment by Bayer AG of the requirements contained in the FAS ruling, as well as that special knowledge in the field of selection and IT technologies is required to efficiently transfer molecular breeding tools and germplasm, a mechanism which is new for Russian practice was used entailing the involvement of a third-party organization in the process, on the basis of which the Technology Transfer Centre was established³.

3. Control over mergers in digital markets

27. At present, assessing the impact of competition on innovation markets is one of the most difficult and complex tasks. Both courts and competition authorities have to make decisions in the absence of a common position and a common methodology among economists and industry experts.

28. When considering cases on violation of the antimonopoly legislation and transactions, the FAS Russia analyzes the data that economic entities operate in digital markets, their share in the relevant commodity market, the presence of network effects in these economic entities, the ability to influence commodity markets and related commodity markets as a result of certain anti-competitive actions.

29. For example, in 2017, when considering a transaction on purchasing of the company Mail.Ru the FAS Russia analyzed the data possessed by the parties of the transaction and concluded that data is not unique and can be replaced from the other sources. Thus, the transaction will not lead to strengthening the dominant position and limiting competition.

30. The conduct of these companies was also analyzed when the FAS Russia considered a deal on establishment of a joint venture in the field of electronic trade between Alibaba Group, The Russian Direct Investment Fund (RDIF) and other participants in May 2019. Based on the results of the consideration of this transaction, the FAS Russia issued a ruling with remedies for five years to the parties which aimed at alignment and future formation of competitive conditions in the market of electronic trade of the Russian Federation, as well as related to provision of information on the data collected in the electronic platforms of the transaction parties to the FAS Russia.

31. Besides, in October 2019, the FAS Russia approved the agreement between two major Russian taxi aggregators - Yandex.Taxi and Citymobile, subject to conditions. Thus, under the terms of the agreement, the above-mentioned aggregators exchange impersonal

³ <http://en.fas.gov.ru/press-center/news/detail.html?id=53920>.

information about drivers and the number of working hours spent by drivers in these aggregators. In case of exceeding a certain working time limit on an app of one aggregator, the driver is blocked in this aggregator for a certain rest time, and information on the excess of working time is available to another aggregator (participant of the agreement), which can also block this driver for exceeding the working time. This procedure allows to prevent a situation in which the driver works uncontrollably and exceeds the working time limits, switching from one aggregator to another, which contributes to increasing the safety of road traffic and passenger transportation with the help of aggregators, as well as reducing drivers overtime.

32. Moreover, in reviewing this agreement, the FAS Russia established that the taxi aggregators (the parties) may intentionally turn off drivers that located in certain areas, in order to change the ratio of passengers demand and driver's offer in such a way that the passengers demand in these areas will significantly exceed the driver's offer, which will lead to increasing the cost per trip in this area during this period of time.

33. Therefore, the implementation of the agreement in the wording presented could allow the parties of the agreement to manipulate actually the prices for taxi transportation in certain areas and time period. Besides, such behavior may have negative consequences for drivers and passengers who are also participants of the specified market: unreasonably (mistakenly) disconnected drivers may lose a part of the income, which is not received due to such a disconnection, passengers may pay an unfairly increased price for the trip, formed also because of such a disconnection.

34. Therefore, in order to ensure conditions for competition in the market of taxi aggregators the FAS Russia issued remedies to the parties of the agreement, aimed at reducing the economic benefits of the parties of the agreement due to their possible anti-competitive actions in implementation of the agreement and aimed at raising awareness of drivers of taxi aggregators (parties to the agreement) about the possibility of their disconnection from an aggregator because of overworking, on the possibility of the driver to challenge the actions of the aggregator for unjustified (wrong) disconnecting the driver from the aggregator due to an error in calculating the number of working hours, the possibility of the driver to obtain fair compensation for standby time from the aggregator in case of unjustified (wrong) disconnecting the driver.

4. Conclusion

35. Thus, evaluation of mergers in dynamic markets is complex and multifactorial. At the same time, the current assessment of such mergers, as well as their prospective assessment (in sight of 5-10 years) may be hampered by the lack of the necessary information available to the antimonopoly body on prospective technologies and business practices of the merger parties based on these technologies.

36. In addition, at present, the FAS Russia does not have enough effective tools to ensure control of compliance with remedies by foreign economic entities, which is a necessary element of a balanced system of protection of competition in dynamic markets in the digital economy, which is less affected by state borders.

37. These conclusions served as one of the bases for development of the "Fifth Antimonopoly Package" drafted by the FAS Russia and aimed at adapting the Russian antimonopoly legislation to the changes that the economy undergoes in the process of digitalization and innovative development.

38. The novelties of the Fifth Antimonopoly Package introduced new approaches to control of economic concentration.

39. Under conditions of the modern "digital" markets, approaches to controlling transactions of economic concentration should change as traditional criteria based on the amount availed or operations and value of their assets may not reflect the real impact on the economic conditions of a transaction carried out as part of economic concentration and related to the regulation of intellectual property rights.

40. Considering the above, a new condition should be introduced in the first place to control transactions of economic concentration - if the volume of the transaction exceeds seven billion rubles.

41. Taking account of successful foreign practice, it is proposed to specify in the Law on Protection of Competition the rules for involving trustee for the purpose of monitoring and facilitating the execution of a ruling issued under economic concentration, which includes the transfer of rights to intellectual property and technology, as well as to define clearly the role and responsibilities of external experts in the process of examination of violation of competition law and economic concentration cases.

42. In order to protect the interests of market participants, the draft law proposes to determine additional consequences of failure to comply with the ruling of the competition authority issued as part of monitoring economic concentration and associated with the use and transfer of intellectual property rights.