

# Kluwer Competition Law Blog

## **Bayer/Monsanto Transaction: Brand New Approach of FAS Russia to Merger Control**

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Throughout the last year, the topics of globalization in the markets and digitalization of economy were extensively discussed within the governmental authorities and business community in Russia. One of the major concerns of the authorities and business community was development of competition in “digital era”.

The Federal Antimonopoly Service (‘FAS Russia’) has found its pivotal role in the development of new regulation, geared towards the digital economy and jumped in with two feet into the examination and the elaboration of new mechanisms. The primary focus was on regulation of the inherent elements of modern digital markets, such as digital platforms, network effects and big data.

The multijurisdictional transaction in the acquisition of Monsanto Company (American multinational agrochemical and agricultural biotechnology corporation) by Bayer AG (German multinational company active in pharmaceuticals, consumer health, crop science, and animal health), which closed on June 07, 2018, became a testing ground for FAS Russia for formulating new rules for merger control clearance.

The importance and significance of the Bayer/Monsanto transaction reflected in its impact on socially-important markets defining food security of the state, had a global character (the transaction was considered in more than in 30 jurisdictions) and was characterized by a radical transformation of agro-industrial complex (transfer of patents, IT technologies; also, “big data” was in the scope of the transaction). The competition authority should have taken all those factors into account within the consideration process to elaborate its new approach to the analysis of similar global transactions in future.

Assessing a company’s position is a comprehensive exercise, within which the competition authority should take a variety of factors (such as the amount of R&D investments, companies’ shares in the relative markets, technological completeness, volume of accumulated data, etc.) into account. Thus, the competition authority had to deviate from its conventional approach to dominance and market power, based on only the existing overlaps of the parties and market shares, and lean toward the new one, based on assessment of digital platforms and big data effects.

FAS Russia applied a new concept of “network effects” while working on the market assessment of the Bayer/Monsanto transaction. It stressed several times that the transaction had actually

nothing to do with the seeds, nor even crop protection products, where the parties did have overlaps in Russia (as in the “traditional” approach) and even on a global scale, but it was about knowledge, innovations, platforms, algorithms and technologies, possessed by both of the companies, enabling them to influence the market conditions, create entrance barriers to other participants and dictate terms for further development of the agro-industrial complex for future decades.

FAS Russia believed that trends on the global agro-industrial market can be translated to the Russian market, in view of its high degree of integration in the world market and that devising remedies, goals of protecting competition and innovative market development should be taken into account.

Though the parties were not even close to have the dominant position in the “traditional” relevant Russian markets, FAS Russia, having analyzed the “digital” impact of the transaction, revealed the following concerns: (i) risk of creation of a closed digital platform, which could block launching new competitive digital solutions into the market, (ii) decrease of innovative activities of the other market players in the field of digital agriculture, (iii) new entry barriers and strengthening of the existing ones to the markets, (iv) increasing probability for the combined company to abuse its market powers and (v) reinforcement incentives for anti-competitive concerted actions and agreements etc.<sup>[1]</sup>

To mitigate the revealed concerns, the competition authority decided to use a set of entirely new legal mechanisms such as (i) transfer of technologies, instead of traditional behavioral or structural remedies, issued in most of the cases with the competition concerns and (ii) creating the institution of independent trustees to monitor the transfer of technologies and obligations imposed on the parties.

However, the use of those mechanisms was not enough to resolve all practical problems revealed by FAS Russia during the consideration process, which, as the competition authority believes, are incidental to modern large-scale merger transactions. The most remarkable practical issues faced by FAS Russia were the following:

**a) A relatively short term for consideration of complex transactions**

The Competition Law provides for three-month consideration period in total for both Phases I (30 days) and II (extension for two additional months). The consideration of large-scale transactions, due to complexity of their analysis, takes much more time in other jurisdictions. For instance, it took about two years for the US Department of Justice and a shade less time for the EU Commission to consider the specified transaction from its announcement.

During the consideration process, FAS Russia issued conditions, upon fulfillment of which the transaction could be cleared. That mechanism allowed the competition authority to gain up to 3 months for further negotiations and elaboration of the effective commitments and determination of the technologies to be transferred.

At the same time, the practice of issuance of conditions shows that the competition authority should consider the transaction, analyze the market, reveal the competition concerns to determine those conditions that should eliminate potential restrictions of the competition in the markets. Such a procedure does not allow prolongation of the term to make proper assessment of the market, that

method only enabled FAS Russia to impose temporary obligations on parties.

Thus, it is necessary to extend the period of consideration, for those mergers that can have adverse consequences for competition, to ensure the required level of expertise and itemization of the market analysis are conducted.

#### **b) Lack of specific knowledge and the necessity to invite experts**

With the markets becoming digital, the economic relations and business structures are becoming more complicated. For the competition authority, it means that the knowledge requirements for comprehensive analysis are growing exponentially. Therefore, FAS Russia has either to expand its staff significantly, so that the specialists could work on the variety of issues, or to involve experts in very specific areas, on a case-by-case basis.

In the Bayer/Monsanto case, a number of experts from different governmental and non-governmental institutions were actively involved into the discussion of the transaction and elaboration of commitments, satisfying the needs of the Russian market participants and ensuring innovative growth in Russia.

After analysis of the transaction, FAS Russia concluded that involvement of experts in complex cases is essential and proposed the relevant amendments to the current legislation.

#### **c) Exchange of confidential information and tightening of the liability for the breach of competition legislation**

Such large-scale transactions may require exchange of confidential information with foreign competition authorities and governmental authorities within the country. One could hardly imagine large transactions notified only in one particular jurisdiction. Thus, the competition authorities need to have legal mechanisms to cooperate and exchange of information between them to assess the possible impacts of complex transactions not only on a national, but also on an international level.

In order to perform the information exchange in Bayer/Monsanto case, FAS Russia asked the parties to provide waivers of confidentiality, which is a widely-used mechanism by competition authorities around the globe, to cooperate with the competition authorities of the BRICS countries, EU Commission and also Russian government institutes, such as the Ministry of Agriculture of the Russian Federation etc.

Currently, FAS Russia is considering the proper mechanism for securing waivers and ensuring exchange of information and cooperation between the competition authorities worldwide and for granting access to the interested executive authorities and experts to the confidential information, even without the consent of the parties to a merger.

Moreover, while assessing the Bayer/Monsanto transaction FAS Russia also revealed a problem of insufficiency of existing level of liability to prevent closing of the transactions without the prior approval of FAS Russia, in breach of the Competition Law, or not complying with the remedies issued along with the decision. De lege lata, violation of procedure for obtaining merger clearance might result in an administrative fine, which amounts to RUB 500 000 (approx. USD 8 000/EUR 6 800), and invalidation of the transaction. FAS Russia presumes that neither amount of the fine, nor the risk of invalidation of the transaction in Russia might actually prevent companies from

violations related to merger clearance and, thus, the competition authority is thinking about significant changes related to liabilities such as, for example, turnover fines for non-compliance with the remedies issued. However, these changes are still under discussion

The approach applied by FAS Russia to the analysis of the Bayer/Monsanto transaction, the remedies issued and the problems revealed, have been accepted as a basis for forthcoming significant changes in legislation – so called the “Fifth Antimonopoly Package”.

ALRUD Law Firm consulted Bayer with respect to the Russian part of the transaction and assisted the acquirer in obtaining clearance from FAS Russia, providing legal support during the consideration process, developing strategy, representing the acquirer in negotiations with FAS Russia, drafting remedies and concluding agreement with the National Research Institute Higher School of Economics. ALRUD specialists worked on a number of complex issues arisen during the pre-notification and consideration process, including various competition, corporate and IP issues in order to negotiate with FAS Russia on Bayer’s obligations with respect to the technology transfer.

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