

FAS Russia Guidelines on Merger Control and Antimonopoly Compliance—Part 1

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In summer 2021, the Federal Antimonopoly Service of the Russian Federation (the “FAS”) issued two guidelines that will have material significance for a range of issues relevant to the enforcement of Russian merger control and antimonopoly compliance, including in respect of:

- transactions and actions subject to antitrust control, including special requirements for intra-group transactions;
- grounds on which transactions and their related terms and conditions may be deemed ancillary and permissible;
- procedures for considering applications and making decisions by the FAS;
- consequences of the failure to obtain antimonopoly approval for transactions;
- FAS decision-making procedures as to whether internal antitrust compliance policies comply with the requirements of the antimonopoly laws;
- recommendations for arranging antimonopoly compliance; and
- measures for arranging antimonopoly compliance that FAS may take into account when determining whether antitrust laws were breached.

Despite the guidelines being non-binding on FAS, they should be taken into account when considering whether transactions require clearance, the drafting of applications and the preparation of antimonopoly compliance policies since FAS enforcement practice is likely to follow the positions described in those Guidelines.

This part of our overview discusses Guidance No. 19 on Special Requirements for State Merger Control dated 11 June 2021 (the “MC Guidance”) relating to antitrust clearance of joint venture agreements; the approach to the evaluation of non-compete agreements; circumstances where obtaining negative control, acquiring shares/interests other than

as a result of a transaction or pledging shares/interests requires antitrust clearance and cases when intragroup transactions are not subject to antitrust control. All these issues are relevant for M&A and joint venture transactions, including those that require additional financing and prior group restructuring.

The second part of our overview will focus on Guidance No. 20 on the System of Internal Compliance with the Requirements of Antimonopoly Laws dated 2 July 2021 (the “AL Guidance”).

Joint Venture Agreements

Prior Approval

According to the MC Guidance, the analysis of whether prior approval of the joint venture agreement is required should essentially focus on whether the following criteria are met simultaneously:

- the agreement constitutes a “joint venture agreement”;
- the agreement is concluded by business entities that are competitors; and
- the agreement is concluded in respect of joint activities in the Russian Federation.

Joint Venture Agreements

According to the MC Guidance, joint venture agreements can include Russian or foreign law-governed agreements that contemplate that the parties to such agreement will combine their resources and/or will make joint investments for the purposes of achieving the goals of the joint activity; the parties will jointly bear the risks associated with the joint activity. The information on the joint activity or the creation of the joint venture being public knowledge is an additional rather than a decisive criterion for the existence of the joint venture agreement. The joint venture agreement must directly regulate the activities of the parties to the agreement on the market for the promotion of goods, works or services. Therefore, corporate agreements governing corporate matters only (voting, making contributions to the company by its shareholders/members, etc.), syndicated loan facilities and pledge management

agreements¹ are not treated as joint venture agreements and should not be subject to antitrust approval for this reason.

Parties to Joint Venture Agreements That Are Competitors

Joint venture agreements will be subject to antitrust control only if they are concluded between competitors. The existence or absence of competition between parties to the agreement is primarily determined in respect of the product market that is the subject matter of the agreement in the Russian Federation (the “affected market”). The FAS may also take into account the activities of the parties to the agreement on the global market (if it is determined that the geographic scope of the affected market goes beyond the territory of the Russian Federation) and on the product markets that are “neighbouring”² markets to the affected product market (if the parties to the joint venture agreement are able to eliminate or restrict competition).

Antitrust clearance is required for a joint venture agreement between both actual and potential competitors. However, if the parties to the agreement compete on foreign markets or on markets in the Russian Federation other than the affected markets or otherwise not related to the scope of the joint venture agreement, this will not automatically lead to their treatment as potential competitors.

The determination of competition between the parties to the joint venture agreement is based on both their activities and those of their groups.

Joint Activities in the Russian Federation

Joint activities occur in the Russian Federation where, in particular, the parties to the joint venture agreement:

- create a joint venture in the Russian Federation or acquire shares/interests in an existing Russian company;
- create a foreign company that has a subsidiary in the Russian Federation operating in the affected market, provided that such company is engaged in the joint activities of

¹ However, such agreements may require antimonopoly clearance on other grounds, in particular, if the rights provided by such agreements to any party permit to determine the conditions of conducting commercial activity.

² Neighbouring markets in relation to the affected product market are those markets of goods/works/services that are, in particular: (a) used for production and transportation of goods/performance of works/provision of services constituting product boundaries of the affected commodity market or (b) produced/performed/provided with the use of goods/works/services constituting product boundaries of the affected commodity market or (c) complementary to the goods/works/services constituting product boundaries of the affected commodity market in their consumption.

the parties in some manner (or acquires shares/interests in such existing foreign company);

- create a foreign company that does not have a subsidiary in the Russian Federation but will primarily conduct its business in the Russian Federation pursuant to the express terms and conditions of the agreement (or acquire shares/interests in such existing foreign company); or
- do not create a joint venture but join forces for the promotion of goods or services in the market (e.g., by implementing joint marketing programmes in the Russian Federation).

Time to Obtain Antitrust Clearance

According to the MC Guidance, antitrust clearance for the joint venture agreement must be obtained either prior to its execution or prior to accrual of any rights and obligations under the joint venture agreement if it was conditional upon obtaining the FAS's approval for the execution of the agreement. However, if the joint venture agreement contemplates the creation of a new legal entity, FAS approval shall be received prior to its establishment.

Non-Competition Provisions

Approach to Approval of Non-Compete

A non-compete in a transaction for the purchase of shares, interests, rights or assets will be approved as ancillary to the FAS clearance of the transaction itself.

If the transaction is not subject to clearance pursuant to the requirements of Articles 27-29 of the Competition Law, and it is not manifestly clear whether the non-compete condition contemplated by it is justified, the buyer may voluntarily file it with the FAS for review.

Non-Compete

According to the MC Guidance, non-compete provisions between the parties to an agreement can be permissible if all of the following cumulative criteria are met:

- the non-compete provisions are consistent with the purposes of the agreement for the purchase of shares, interests, rights or assets (e.g., they relate to the business of the target and are intended to ensure its efficient and profitable operation to protect the investment being made by the buyer);

- the non-compete conditions do not apply to product markets other than those where the target/acquired company/business operates;
- the non-compete period is no longer than necessary to ensure the return on investment, i.e., the investment project payback period (as a rule, approximately five years) and period required to derive profits (one to two years upon cost recovery under the investment project); and
- there is no exchange of information provided by the non-compete provision that may facilitate the formation of a cartel or enable concerted action limiting competition or promote other anticompetitive arrangements.

FAS or parties to the transaction may use these criteria to evaluate permissibility of non-compete provisions by themselves if the transaction is not subject to clearance with FAS.

Negative Control as Right to Determine Conditions of Conducting Commercial Activity

Negative Control

The key element of the right to determine conditions of conducting commercial activity is control exercised by the buyer over the target. According to the MC Guidance, in certain circumstances, the acquisition of the right to block certain decisions of the target can by itself give rise to negative control.

Negative control rights require antitrust clearance only where the buyer can exercise a dominant influence on the decisions taken by the target of economic concentration, provided that no other shareholders have such rights, e.g., to block any decisions, in particular on significant issues such as:

- appointment/early termination of the powers of the chief executive officer;
- adoption and modification of the business plan and business strategy of the company; or
- consummation/variation of material terms/termination of commercial transactions conducted by the company in the ordinary course of business, etc.

The FAS emphasises that the list of significant issues largely depends on the type of activity of the business entity: for an investment company, it may include decisions on

participation in the capital of other companies; for an IT company, it may include the granting of a license for software developed by it.

Minority Protections

According to the MC Guidance, matters related to standard protections of minority shareholders do not give rise to negative control and, consequently, any rights to determine the conditions of conducting commercial activity of the business entity. Such matters include, in particular, protection from dilution, sale of the core business, reorganisation and winding-up, amendments to incorporation documents, appointment of the auditor and transactions outside the ordinary course of business, including those where the value significantly exceeds the ordinary value of transactions of such entity.

Acquiring Shares/Interests Other Than As a Result of Transaction

In its MC Guidance, the FAS responded to a frequently asked question about whether prior approval is required for the acquisition of shares/interests beyond the purchaser's direct control (e.g., if the member's shareholding increases due to a redemption by the company of the shares of another member or if the exit of a member from the company or share buy-back alters the proportion of votes held by the remaining members).

The FAS clarified that the acquisition of shares/interests as a result of such events would require antitrust clearance if the acquirer obtains the right to determine the conditions of carrying out the commercial activity of the target, and the thresholds set forth by the Competition Law are exceeded (the "thresholds"). The acquirer must file for antimonopoly approval immediately after such acquirer learns or should have learned that it obtained the right to determine the conditions of commercial activity.

If upon the review of such filing, the FAS determines that the acquisition is likely to restrict competition, and such restriction cannot be remedied by issuing a compliance order, the FAS may order the acquirer or the target to dispose of their shares/interests such that the acquirer would not have control over the target. The period for completion of such disposition will be set forth in the FAS's decision.

Pledge of Shares/Interests

The FAS clarified the circumstances in which an agreement of pledge of shares or interest in a limited liability company would require antitrust clearance if the thresholds

are exceeded. The key factor is whether the pledgee can exercise voting rights attaching to the pledged shares/interests:

- generally, the share pledge agreement will not require antimonopoly approval since, by default, the pledgor exercises the voting rights attaching to the pledged shares;³ and
- generally, the pledge agreement in respect of an interest in a limited liability company will require antimonopoly approval since, by default, the pledgee exercises the voting rights attaching to such interest in the charter capital of a limited liability company.⁴

The conclusion may differ based on the specific terms and conditions of the pledge agreement (e.g., if the parties did not rely on the default rules and agreed otherwise).

In addition, exceeding the thresholds may require the FAS's prior approval if:

- the pledgee exercises its right under the agreement to grant prior consent for voting by the pledgor on certain matters relating to the business of the target of economic concentration, for example, upon the breach of the secured obligation if the pledgee acquires negative control over the company as a result; or
- the pledgee acquires shares/interests as a result of enforcement of the pledge in the event of default or improper performance of the secured obligation.

Transactions Not Subject to Antitrust Control

The FAS clarified that Articles 27-29 of the Competition Law exemption for group transactions would apply to both the transactions between the parent company and its subsidiary where the parent company directly holds more than 50% of the voting shares/interests and to the following transactions:

- between the parent company and an indirect subsidiary where the parent company holds more than 50% of the voting shares/interests through one or more legal entities;
- between sister companies where the same parent company holds more than 50% of the total votes attaching to the voting shares/interests; and

³ Article 358.15(2) of the Russian Civil Code.

⁴ Paragraph 2 of Article 358.15(2) of the Russian Civil Code.

- between companies where the same controlling person has the right to indirect (through one or more legal entities) voting by more than 50% of the voting shares/interest.

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Please do not hesitate to contact us with any questions.

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