

# FAS Russia Guidelines on Merger Control and Antimonopoly Compliance—Part 2

29 September 2021

The [first part](#) of our overview of guidelines issued by the Federal Antimonopoly Service of the Russian Federation (the “FAS”) in summer 2021 focused on the key positions of the FAS in respect of merger control. In the second part of our overview, we will discuss the principal provisions of Guidance No. 20 on the System of Internal Compliance with the Requirements of Antimonopoly Laws dated 2 July 2021 (the “AL Guidance”).

The AL Guidance relates to the status of antimonopoly compliance policies, special requirements for their adoption, their recommended contents and incentives for the introduction of antimonopoly compliance.

The AL Guidance serves only as a guide and should be applied in practice bearing in mind the size, structure, industry specifics, nature of business and other factors relating to the specific business entity.

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## Status and Significance of Antimonopoly Compliance

The AL Guidance emphasises that an antimonopoly compliance policy should be adopted by the business voluntarily and at its discretion. The decision on its adoption and its specific contents should be driven by the needs of the business and the specific risks it faces in the context of its commercial dealings.

The adoption of an antimonopoly compliance policy is encouraged for a number of reasons. First, as a preventative measure to reduce the risks of breaching antitrust laws. Second, to ensure the availability of defences to administrative liability or grounds for its reduction.<sup>1</sup> Third, to increase the period of FAS-scheduled inspections from three to five years or to avoid such inspections by the FAS entirely.

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<sup>1</sup> For example, pursuant to the note to Article 14.32 of the Code of Administrative Offences of the Russian Federation (the “Russian CAO”), the person that was the first to voluntarily report its anti-competitive agreement to the FAS if the FAS was not aware of it, discontinue its participation or further participation in

A business may voluntarily submit either its draft or final antimonopoly compliance policy to the FAS for review. If the business has obtained a letter of approval from the FAS in respect of its antimonopoly compliance policy, it cannot subsequently be found to be in breach of the antitrust laws if it acted pursuant to such an agreed policy.

However, if a business chooses not to submit its policy to the FAS for review, it will not affect the evaluation of the antimonopoly compliance policy later, and the lack of any FAS approval letter in respect of such policy will not prevent the business from providing evidence that it undertook all possible measures to ensure antimonopoly compliance.

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## Adoption of Antimonopoly Compliance Policy

The antimonopoly compliance policy may comprise one or more documents (e.g., the policy itself, job description of the antimonopoly compliance officer, antitrust risks profiling, antitrust risks mitigation roadmap, etc.).

The antimonopoly compliance policy and related software tools, training materials and other documents may be in a foreign language if the employees of the business are proficient enough in such language to understand their contents. A full or partial translation may be made for internal purposes at the discretion of the business. However, the antimonopoly compliance policy submitted to the FAS must be translated into Russian.

Pursuant to Article 9.1(4) of Federal Law No. 135-FZ on Protection of Competition dated 26 July 2006, information on the adoption/application of the antimonopoly compliance policy must be made available on the website of the business in Russian. According to the AL Guidance, it is sufficient to indicate the details of the document (its number (if any), title and date of adoption) to comply with this requirement. The publication of the antimonopoly compliance policy is voluntary.

The antimonopoly compliance policy may be adopted both at the level of the business and at the group level. The policy may be applied to the group in a number of ways, for example, by separately adopting a general policy at the level of each company of the group or by adopting a decision on adherence to the general policy. In addition, the group can use uniform software and training practices relating to antitrust compliance issues.

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such agreement and provide information and documents sufficient to establish that the breach will be released from administrative liability. The persons that were the second and the third to do so will be subject to a minimum penalty.

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## Mandatory Elements of Antimonopoly Compliance Policy

The antimonopoly compliance policy must contain the following mandatory elements:

- procedures for evaluating the risk of antitrust law breaches associated with the operations of the business;
- measures aimed at the mitigation of the risk of antitrust law breaches by the business associated with its operations;
- measures aimed at monitoring how well antitrust compliance is working;
- procedures for making the employees aware of the antimonopoly compliance policy; and
- details of an officer responsible for the implementation of the antimonopoly compliance policy.

Failure to include any of the mandatory elements indicates that the antimonopoly compliance policy is not consistent with the law. The business may choose to include other elements in the policy at its discretion.

### Evaluation of Antitrust Risks

The procedure for evaluating antitrust risks should include a description of the risk identification and evaluation process, including a description of the relevant activities, their frequency and timing, the persons involved, their communication, the procedure for documenting the results of the risk evaluation and any necessary adjustments to the process. The results of a risk assessment may be documented in any format.

Existing antitrust risks should be identified by comparing the applicable requirements with the internal business processes. They can be evaluated from the point of view of their likelihood or the severity of their consequences (penalties, losses, damage to reputation, legal fees, invalidation of transactions, liability of officers, etc.).

The identified risks should later be periodically re-evaluated, and newly arising risks should be identified. An unscheduled risk assessment may be required, for example, upon the modification of business processes, the entering of a new product market or the exiting of an existing one, a change of the organisational/management structure or strategy/goals/directions of the business, significant changes in the market, regulatory changes or the identification of breaches of applicable requirements in the course of the business entity's operations.

### **Measures Aimed at Mitigation of Antitrust Risks (Corrective Action)**

Any corrective action must be consistent with the antitrust risks identified at the evaluation stage. It can be documented in any form, including as a roadmap. In addition, the business entity may set compliance goals for a certain period, e.g., to reach a certain percentage of employees who have successfully completed antimonopoly compliance training or a certain number of antitrust law breaches discovered by FAS, etc.

Such corrective action may include, among other things:

- preventive measures (for example, obtaining prior approval of certain transactions and actions by the antimonopoly compliance officer, undertaking prior analysis of proposed actions, including with the involvement of advisers, obtaining approval by voluntarily filing draft agreements with FAS, etc.);
- adoption of local policies regulating certain activities where antitrust risks arise;
- process automation to prevent wrongdoing;
- training of employees on antimonopoly compliance issues and regular assessment of knowledge; and
- measures aimed at ensuring compliance by employees, including incorporation of respective duties in the job description and determining the consequences of any failure to comply (including disciplinary liability and requirement to undergo additional training).

### **Measures of Monitoring How Antitrust Compliance Works**

Antimonopoly compliance can be controlled by monitoring. Information for monitoring purposes may be received, inter alia, through a hotline for reporting breaches. In addition, the business entity may conduct internal investigations to verify whether the information about a breach of antitrust laws or antimonopoly compliance requirements is true.

Upon the discovery of any breach, action is required to cure the breach and its consequences, identify its causes and eliminate them, evaluate the results of corrective action and make changes to the existing system of antimonopoly compliance if necessary. Furthermore, the business entity may file a voluntary report with the FAS on the breach of antitrust laws, including any breach identified as a result of measures to

monitor the antimonopoly compliance policy,<sup>2</sup> and take additional preventive measures, for example, ensuring the retention of documents and electronic media relating to the breach, documenting its decision to discontinue its participation or further participation in the anti-competitive agreement, etc.

The results of monitoring and other control activities may be recorded in reports that may be presented at regular intervals for consideration by the management in making decisions on any changes to the antimonopoly compliance policy or taking other measures.

### **Procedure for Ensuring Awareness of the Antimonopoly Compliance Policy**

The antimonopoly compliance policy may identify the scope of employees who must be made aware of it and the procedure for documenting the results of making them aware. They can be made aware, among other things, through the use of information technology, including the corporate intranet system, by sending the policy by corporate e-mail with read notifications and/or by making acknowledgement lists for signing by digital signatures.

Employees can be made aware of the antimonopoly compliance policy upon hiring, upon the identification of any policy breaches, when any changes are made to it or in the course of their training.

The antimonopoly compliance officer or human resources are responsible for making all concerned aware of the antimonopoly compliance policy.

### **Antimonopoly Compliance Officer**

The antimonopoly compliance officer or a respective structural subdivision must report directly to the management of the business and have sufficient authority and resources to pursue their objectives. The functions of the officer/structural subdivision responsible for antimonopoly compliance may be performed by both a specially designated employee/separate subdivision or by an employee/subdivision performing other functions. However, they must remain independent.

The remit of the officer responsible for antimonopoly compliance may include the following functions:

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<sup>2</sup> In certain circumstances, for example, in the event of abuses of a dominant position, a voluntary report on the breach of antitrust laws may be treated as a mitigating factor when administrative proceedings are brought (see note 2 to Article 14.31 of the Russian Code of Administrative Offences).

- developing the antimonopoly compliance policy and preparing proposals for its amendment;
- arranging the identification of antitrust risks and their evaluation;
- advising employees on compliance with antitrust laws and the antimonopoly compliance policy;
- developing measures for the mitigation of antitrust risks;
- conducting internal investigations and arranging for acceptance and consideration of reports from employees and other persons regarding possible breaches of applicable requirements (including anonymous reports to the hotline);
- liaising with the FAS in the course of inspections (on their own or with the engagement of employees from other structural subdivisions if necessary); and
- informing the management of any breach of antitrust laws and the antimonopoly compliance policy and preparing proposals on liability for the breaches.

In addition, the functions associated with the organisation of antimonopoly compliance may be performed by the senior management of the business to the extent that they ensure the operation of the antimonopoly compliance system and that other employees remain within the scope of their duties and authority.

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Please do not hesitate to contact us with any questions.

**MOSCOW**



Alyona N. Kucher  
ankucher@debevoise.com



Anna V. Maximenko  
avmaximenko@debevoise.com



Elena Klutchareva  
emklutchareva@debevoise.com

**LONDON**



Timothy McIver  
tmciver@debevoise.com