

FEDERAL ANTIMONOPOLY SERVICE (FAS RUSSIA)

RECOMMENDATIONS of the FAS Russia Presidium

on the application of a waiver of confidentiality in the process of considering global mergers and acquisitions

The model recommendations on the application of a waiver of confidentiality in the process of considering global mergers and acquisitions (further referred to as the M&As) are aimed at developing the unified practice of using this mechanism by the FAS Russia when interacting with the competition authorities of other countries and the parties to the M&A (hereinafter referred to as the Parties).

The national and international practices of controlling M&As show the growth in the number of cross-border M&As, i.e. performed by global companies (groups of individuals), as a result of which such M&As have affected or may affect the state of competition in several jurisdictions at once. In this regard, in order to increase the efficiency of the process of considering applications (hereinafter referred to as the Applications) and reducing the costs of their consideration, it seems advisable to expand interaction between the competition authorities of the countries the state of competition of which may be affected by the M&A. The purpose of such cooperation of the competition authorities is to obtain uniform and (or) non-contradictory results of the consideration of the M&A in various jurisdictions, taking into account the interests of the states.

The national legislation on the protection of confidential information in different jurisdictions significantly limits the ability to exchange information and documents between the competition authorities when considering M&As.

In case when the M&A is considered by competition authorities in two or more jurisdictions, the Parties may voluntarily abandon the confidentiality regime if they consider that such a waiver of confidentiality is in their interests facilitating an objective review of the M&A and allowing the competition authorities considering this M&A to make uniform and/or non-contradictory decisions.

The waiver allows the competition authorities of different countries to exchange information and conduct a comprehensive and qualitative analysis of the impact of the M&A on the state of competition in the respective jurisdictions. The exchange of information between the competition authorities of different countries helps to obtain the information and analytical data they need without sending duplicate requests, which allows to establish the actual state of competition in the analyzed market in the optimal

time and make uniform and (or) reasonable decisions that do not contradict each other. This, inter alia, will allow the Parties to fully implement such decisions.

The procedure for obtaining a waiver can be initiated both by the competition authority that received the application for approval of the M&A, and by the Parties to the M&A.

Such a mutual exchange, based on the voluntary refusal of the Parties to provide a waiver for relevant information, is also possible in cases where the M&A has already been considered and agreed upon by any competition authority.

Principles for the use of the waiver by the competition authorities

The use of the waiver is recommended for interaction between the competition authority and the agency (in case the competition authority interacts with several agencies, the waivers are issued for each of the relevant agencies separately) based on the following principles, unless otherwise provided by law on protection of confidential information of the relevant state:

1. The competition authority, prior to sending a waiver request to the Parties, needs to make sure that the relevant agency is considering the same M&A.
2. The competition authority, requesting a waiver from the Parties, should be interested in conducting consultations and (or) negotiations on the M&A under consideration with the relevant agency.
3. The competition authority, requesting a waiver from the Parties, needs to make sure that there is a logistic and technical opportunity to conduct consultations and (or) negotiations on the M&A under consideration with the relevant agency (the availability of safety and protection of information from unauthorized access by special means of communication, lack of an insurmountable linguistic barrier, etc.).
4. The competition authority, prior to sending a waiver request to the Parties, needs to make sure that the national legislation of the state of the relevant agency provides for a sufficient degree of protection of confidential information.

Based on the principles mentioned, **the following nature and conditions for providing a waiver of confidentiality may be proposed**, unless otherwise provided by the legislation of the relevant states.

1. Voluntary nature of a waiver

The decision to grant a waiver is taken solely at the discretion of the Parties and may be withdrawn by them at any time. At the same time, the competition authority can not exert pressure on the Parties in order to obtain a waiver or to annul a decision on its withdrawal.

A waiver is provided by the Parties based on their own decision for the purpose of considering the M&A or in connection with the receipt of a reasoned request from the competition authority, which should clearly and consistently indicate the M&A, for which a waiver is requested.

The refusal of the Party (Parties) to provide a waiver or its withdrawal cannot be interpreted by the competition authority to the detriment of the Parties during further consideration of the M&A. In particular, the refusal to provide a waiver or its withdrawal cannot be the basis for refusing to satisfy the application for approval of the M&A in connection with the failure to provide the requested information.

2. List of information subject to a waiver

Considering the M&A, the competition authority is recommended to determine the list of information, regarding which the Parties are requested to provide a waiver. At the same time, the list of information subject to a waiver is determined by the Parties at their own discretion.

The Parties may provide either a partial waiver, limiting the amount and nature of information that the competition authority and the agency can exchange during consultations and (or) negotiations, and a complete waiver with respect to any documents, statements and information that the Parties transmit to competition authorities when submitting applications for approval of the M&A.

The list of information subject to a waiver of confidentiality can be changed by the issuing Parties at any time before the expiration of the waiver.

3. Validity of a waiver

The validity period of the waiver can be determined by the Parties directly in the text of the waiver.

In accordance with international law enforcement practice, the waiver is provided for the period of consideration of the relevant M&A (until a final decision on it is made by both the competition authority and the agency).

If there is no definite validity period in the waiver, it is considered to be granted until the final decision on the M&A is made by both the competition authority and the agency participating in consultations and (or) negotiations on the M&A.

4. Protection of confidentiality beyond the list of information subject to a waiver

When applying the waiver, the competition authority is advised to take into account that the Parties are entitled to provide the waiver only to the extent indicated in the waiver.

The waiver does not mean the consent of the Parties to the disclosure of information to other competition authorities/agencies and/or the third parties not expressly indicated by the Parties.

The competition authority is not entitled to disclose and (or) transfer to the third parties information received in the framework of consultations and (or) negotiations with the agency without the special consent of the Parties, with the exception of cases provided for by national legislation on protection of confidential information of the relevant state. A request for consent to the transfer of information by the competition authority to the third parties is sent to the Parties by the agencies on the basis of the relevant appeal of the competition authority.

Violation by the competition authority of the confidentiality regime of the information received in the framework of consultations and (or) negotiations with the agency, for which a waiver was provided, entails liability in accordance with national legislation on the protection of confidential information of the state of the competition authority.

Information obtained in the course of the violation of the established confidentiality regime cannot be used in analyzing the impact of the M&A on the state of competition and making decisions on the M&A.

A waiver may contain formulations reflecting the understanding of the refusing Party that the competition authority can and will protect the confidentiality of information it receives from the agency in accordance with the legislation on the protection of confidential information of the state of the competition authority, including providing for liability of its employees that violated the confidentiality regime. The absence of such formulations does not preclude the need for the competition authority to protect confidential information that it will receive from the agency, in accordance with the legislation on the protection of confidential information of its state, as well as the onset of responsibility of employees of the competition authority who have violated the confidentiality regime.

5. Term of a waiver

When applying for a waiver, the competition authority is recommended to proceed the following.

A waiver may be applied no earlier than the date of its receipt by both the competition authority and the agency, unless otherwise expressly provided by the waiver.

The application of the waiver is terminated by the competition authority in the following cases:

1. Expiration of the waiver;

2. Decision on the M&A by both the competition authority and the agency participating in consultations and (or) negotiations on the M&A;
3. Withdrawal of the waiver by any of the Parties;
4. Any other condition for the termination of its application directly provided for by the waiver.

6. Terms and conditions

The Parties may, at their discretion, include in the waiver the terms and conditions regarding the handling of information for which the waiver is provided.

When the Parties make a decision on withdrawing a waiver, the competition authority and (or) the agency are entitled to use the information received earlier for the purpose of further consideration of the M&A, unless the decision on the withdrawal of the waiver provides otherwise (in particular, the Parties may reasonably prohibit the use of this information fully or partially).

In order to formulate common approaches, **the following mechanism of waiver can be proposed:**

1. A waiver is requested by the competition authority for a specific M&A with an indication of a specific agency with which consultations and (or) negotiations are planned to be held.
2. In case it is planned to hold consultations and (or) negotiations with several agencies one should take into account the need to send to the Parties a request for a waiver for all agencies participating in consultations and (or) negotiations.
3. A waiver is requested from each Party separately. The competition authority may initiate consultations and (or) negotiations with other agencies in accordance with the conditions specified in the text of waivers, only in case of receipt of waivers from each of the Parties.
4. The Parties are entitled to provide a waiver without prior receipt of requests from the competition authority or the agency. This waiver will be effective from the date of receipt of the waiver by both the national competition authority and the relevant agency.
5. Consultations and (or) negotiations or the transfer of information in a different form in accordance with the receipt of the relevant requests by the competition authority and the agency can be carried out solely and exclusively in accordance with the interaction with the principles of using the waiver mechanism which is specified in the Model Recommendations.
6. A sample request form for a waiver can be found in **Appendix 1**.
7. A sample form of a waiver can be found in **Appendix 2**.

Appendix 1 to the Model
Recommendations

To: name, address of the
company/legal entity

Request for waiver on the M&A [name]

[Name of the competition authority] is currently considering an application of the company [name] on the acquisition of rights to determine the conditions for entrepreneurial activity by companies [name] filed on [date] in accordance with article [article number] of the Law.

In order to consider the application [name of the competition authority], it is necessary to conduct consultations with [name of the agency], which was filed with an application on the same M&A.

In this regard, let us kindly ask you to send the official letters to the [name of the competition authority] with the consent to provide waivers for negotiations with [name of the agency] to consider this application

[signature]

Appendix 2 to
the Model Recommendations

[Name of the competition
authority receiving a waiver]

[Address of the competition
authority receiving a waiver]

[Name of the legal entity issuing a
waiver]

[Contact information (name of
responsible representatives,
phone, fax for communication,
email address)]

*Details of the M&A, within
the framework of which a waiver is required*

[Date of issue of the waiver]

[Validity of the waiver]

1. WAIVER

1.1. On behalf of [Name of the company/legal entity], I hereby confirm that [Name of legal entity] agrees to provide the [Name of the competition authority receiving the waiver] with a waiver of confidentiality in accordance with [Details of

the regulatory act regulating the obligation of the competition not to disclose information of confidential nature] and other applicable laws (hereinafter referred to as the "waiver"), to the extent that it is necessary for the [Name of competition authority – recipient of the waiver] to have the possibility to discuss with [Name of the agency for interaction with which the waiver is issued].

1.2. The waiver was or will be sent to [Name of the agency, with which a waiver is issued], so that this agency has the opportunity to discuss with [Name of the competition authority – recipient of the waiver] the information received from [Name of the legal entity] in the period [consideration of the M&A], which, in the absence of such a waiver, would be subject to the confidentiality rules established in relation to [Name of the agency, for interaction with which a waiver is issued].

1.3 [Name of the legal entity] agrees that employees of the [Name of the competition authority receiving the waiver] can discuss with [Name of the agency, for consultation with which a waiver is issued] the statements, data and information provided by [Name of the legal entity], as well as the results of the analysis of M&A conducted by [Name of the competition authority receiving the waiver], which contain or refer to materials [Name of the legal entity], which, in the absence of refusal, would be subject to confidentiality rules.

2. CLAUSES

2.1. By this letter, the [Name of the legal entity] does not refuse the rights granted to it by the confidentiality rules, according to which [Name of the competition authority receiving the waiver] is not entitled to disclose, transfer or otherwise provide the [Name of the agency, interaction with which is refused under the waiver] with any documents, emails and other materials or messages that have been or will be sent by [Name of legal entity] to [Name of the competition authority receiving the waiver].

2.2. Notwithstanding the abovementioned, [Name of the legal entity] refuses confidentiality restrictions associated with documents if they relate to: [A list of documents and materials the disclosure of which is permissible within the framework the waiver provided]. The aforementioned documents and materials may be transferred [Name of the competition authority receiving the waiver] in accordance with the terms of this waiver.

2.3. This letter hereby confirms that [Name of the legal entity] does not waive the rights granted to this legal entity provided for in the requirements for ensuring and protecting data confidentiality with respect to the protection provided by [Name of the legal entity] from direct or indirect disclosure of information relating to the [merger under consideration], to any third party, in addition to [Name of the competition authority receiving the waiver]. This waiver applies only to information received by [Name of the competition authority receiving the waiver] in connection with [merger under consideration], and does not apply to information received during the consideration of any other present or future case.

3. TERMS AND CONDITIONS

3.1 Use of data [Name of the agency, for interaction with which a waiver is issued]

3.1.1 For the avoidance of any doubt, the information transmitted on the basis of this waiver may be used by [Name of the agency, for interaction with which a waiver is issued] solely for the purposes of [merger under consideration] and for no other purpose. Disclosure is carried out under the strict condition that for the [Name of the competition authority receiving the waiver] such information is still confidential and cannot be transferred to any third parties. At the same time, [Name of the legal entity] acknowledges and agrees that failure to comply with the [Name of the agency, for interaction with which a waiver is issued] of the above condition does not give rise to any liability for [Name of the competition authority receiving the waiver], which does not exclude liability [Name of the agency, for interaction with which a waiver is issued] for violation of the confidentiality regime established by applicable law of the country where this agency is located.

3.2 Use of data [Name of the competition authority receiving the waiver]

3.2.1 The refusal specified in paragraph 1 of this letter is provided on the following conditions:

- A. [Name of the competition authority receiving the waiver] is obliged to maintain confidentiality of the information provided by [Name of the legal entity] and information that will subsequently be received from [Name of the agency, for interaction with which a waiver is issued], and is obliged to handle this information in the same way as if it were received directly from [Name of legal entity];
- B. [Name of the competition authority receiving the waiver] is obliged to consider any information received from [Name of the agency, for interaction with which a waiver is issued] in accordance with this waiver, as confidential information or trade secret, except when such information will clearly indicate that they are obtained from open sources;
- C. [Name of the competition authority receiving the waiver] is not entitled to provide any information received from [Name of the agency, for interaction with which a waiver is issued] to any third party, including (but not limited to) competitors, customers and suppliers of [Name of legal entity];
- D. any information received from [Name of the agency, for interaction with which a waiver is issued] may be used solely for the purpose of [merger under consideration] [Name of the competition authority receiving the waiver] in accordance with the [Details of the regulatory legal act governing the merger review procedure], and for no other purpose;
- E. the employees of the [Name of the competition authority receiving the waiver] can transfer to the [Name of the agency, for interaction with which a waiver is issued] any documents, statements, data and other information

received from the [Name of the legal entity] in writing, electronic or verbal forms only in case of approval of merging parties;

F. the [Name of the competition authority receiving the waiver] will not disclose the [Name of the agency, for interaction with which a waiver is issued] any information received from the [Name of the legal entity] that is protected by the [Name of the legal entity] secrecy of law, and which are clearly marked as being protected by such bar of law in their respective jurisdictions. At the same time, [Name of the legal entity] acknowledges and agrees that [Name of the legal entity] is obliged to inform the [Name of the competition authority receiving the waiver] about the availability of such information protected by lawyer secrecy.

You may contact the following list of persons on all issues related to this waiver:

[Name, position, email address of representatives of the legal entity]

A copy of this letter was also sent to *[Name of the agency, for interaction with which a waiver is issued]*.

[Name, position, email address of representatives of the agency, for interaction with which a waiver is issued]

Signed by a duly authorized representative *[Name of the legal entity]*

Yours faithfully