

**FEDERAL ANTIMONOPOLY SERVICE OF RUSSIA**  
**RECOMMENDATIONS**

**of Presidium of the Federal Antimonopoly Service**  
**“On applying waivers of confidentiality when considering merger control transactions”**

Recommendations regarding the implementation of waivers of confidentiality when considering merger control transactions (hereinafter - the “**Transactions**”) are aimed at ensuring the consistent implementation of such mechanism for communications between FAS Russia (hereinafter - the “**Antimonopoly Authority**”) and the competition authorities of other countries exercising control over the competition law compliance (hereinafter - the “**Competition Authorities**”) and the parties to the Transaction (hereinafter - the “**Parties**”).

When preparing current Recommendations ICN Working Paper Waiver of Confidentiality in Merger Investigations: Model Waiver of Confidentiality, regulatory acts governing the functioning of the European Commission; practices of implementation of waivers of confidentiality by foreign competition authorities and also experience of using such mechanism when considering the Transactions by the Antimonopoly Authority in Russia were analyzed.

The international and national merger control practices confirm the increase in a number of trans-border Transactions, i.e., those implemented by global companies (groups of persons), as a result of which such Transactions affect or may affect the competition in more than one jurisdiction. In this regard, for the purposes

of improving the efficiency of notifications consideration and reducing the costs for such considerations, cooperation and interaction between the Competition Authorities of the countries where the Transaction may have impact on the competition shall be organized. The purpose of cooperation is to obtain consistent and/or non-contradicting results of consideration of the Transaction in different jurisdictions.

The national legislation on protection of confidential information, trade or other secrets protected by law, and the legislation of various countries significantly restrict the scope of data that may be provided by the Competition Authorities when conducting consultations or negotiations regarding certain Transactions.

When Transaction is considered by the Competition Authorities in two or more jurisdictions, the Parties may voluntarily waive confidentiality in case they believe that such confidentiality waiver meets their interests, in particular, that it will facilitate the objective consideration of the Transaction and will enable the Antimonopoly Authority and the Competition Authorities to issue consistent and/or non-contradicting decisions unless otherwise provided in the legislation of the affected countries.

Waiver of confidentiality allows the Competition Authorities to mutually exchange information and perform a comprehensive and qualitative analysis of the Transaction influence on the competition in the relevant jurisdictions. The exchange of information between the Competition Authorities ensures obtaining all necessary information or analytics without issuing any duplicate requests that enables the Competition Authorities to identify actual state of competition in the analyzed market and issue consistent and reasonable decisions that, *inter alia*, will make it possible to practically comply with them.

Such a mutual exchange of information is also possible when the Antimonopoly Authority reviews the Transaction which was previously approved by the other Competition Authorities.

## **Principles of usage of waivers of confidentiality by the Antimonopoly Authority**

The usage of waivers of confidentiality is recommended for the interactions between the Antimonopoly Authority and relevant Competition Authority (interaction between the Antimonopoly Authority with a number of Competition Authorities is performed based on waivers issued to each Competition Authority separately) based on the following principles unless otherwise regulated by the legislation on protection of confidential information, trade or other secrets protected by the law of the relevant country:

1. Antimonopoly Authority requesting waivers from the Parties shall make sure that the Antimonopoly Authority and the relevant Competition Authority consider the same Transaction or if the Antimonopoly Authority has previously considered this Transaction;

2. When requesting the waivers from the Parties, the Antimonopoly Authority shall be interested in conducting consultations and/or negotiations regarding the Transaction with the relevant Competition Authority;

3. Antimonopoly Authority requesting the waivers from the Parties shall make sure that there is financial and technical possibility to perform consultations and/or negotiations regarding the Transaction with the relevant Competition Authority (existence of special communication equipment ensuring the safe usage and protection of information from unauthorized access, absence of impassable linguistic barrier, etc.);

4. Antimonopoly Authority requesting the waivers from the Parties shall make sure that the national legislation of the Competition Authority-recipient of such waivers provides for a sufficient level of protection of confidential information, as well as trade or other secrets protected by law.

Based on the above-mentioned principles the following **nature and terms for provision of waivers** may be proposed unless otherwise provided in the legislation of the relevant countries.

### **1. Voluntary nature of provision of waivers**

The decision on provision of waivers is made at the sole discretion of the Parties and may be revoked by the Parties at any time. That said, the Antimonopoly Authority shall not exert pressure on the Parties in order to obtain the waivers or annul the decision to revoke it.

The waiver shall be provided by the Parties exclusively upon their own decision on the necessity of a waiver for the purposes of considering the Transaction or subject to receipt of a motivated request of the Antimonopoly Authority specifying in an accurate and consistent manner in connection with consideration of what Transaction such waiver is requested.

Non-provision or revocation of waiver of confidentiality shall not be interpreted by the Antimonopoly Authority with prejudice to the Parties in further consideration of the Transaction. *Inter alia*, non-provision or revocation of the waiver may not serve as the grounds for not clearing the Transaction due to non-provision of the requested information.

### **2. The list of information with regard to which the waiver of confidentiality is applied**

It is recommended to the Antimonopoly Authority considering the Transaction to define the list of information with regard to which the waiver is requested from the Parties. Herewith, the list of information with regard to which the waiver is applied shall be determined by the Parties at their sole discretion.

The Parties may provide partial waiver, restricting the scope and nature of information which may be exchanged within the course of mutual consultations and/or negotiations by and between the Antimonopoly Authority and the

Competition Authority considering the Transaction, as well as full waiver with regard to any documents, statements and information that the Parties submit to the Competition Authorities.

The list of information with regard to which the Parties to the Transaction waive confidentiality might be amended by the Parties issuing such waiver at any time prior to the expiration of the term of validity of such waiver.

### **3. Term of validity of waiver of confidentiality**

The Parties to the Transaction may directly determine the term of validity of waiver of confidentiality in the text of such confidentiality waiver.

In accordance with the international law enforcement practice of usage of waivers is provided for the term of consideration of the relevant Transaction (until the issuance of the final decision by the Antimonopoly Authority or other Competition Authority-recipient of the waiver).

The Parties may specify a different term within which the waiver could be used, which may not exceed the term for consideration of the Transaction (i.e., until issuance of the final decision upon the results of its consideration by both the Antimonopoly Authority and other Competition Authority).

In absence of a determined or determinable term specified in the waiver, such waiver is considered as provided for the term up to issuance of the final decision on the Transaction by the Antimonopoly Authority and the Competition Authority participating in consultations and/or negotiations on the Transaction.

### **4. Preservation of confidentiality beyond the list of information with regard to which the waiver is granted**

When using the waivers, it is recommended to the Antimonopoly Authority to take into account that the Parties may waive the confidentiality of information to the extent that such waiver allows the Antimonopoly Authority having the to-be-

provided information to exchange it with the other Competition Authority expressly stated in such waiver.

The considered waiver shall not imply that the Parties have agreed to disclose information subject to such waiver of confidentiality to any other Competition Authority and/or third parties.

The Antimonopoly Authority may not disclose or provide the information received during the consultations and/or negotiations with the other Competition Authority with regard to which waiver has been provided to third parties, without the express consent of the Parties, except for the cases provided for in the national legislation on the confidentiality of information, protection of trade or other secrets protected by law. The Competition Authority providing such information under the relevant application of the Antitrust Authority shall submit the request for consent to the disclosure or provision of information to the third parties received from the Parties.

Breach of confidentiality with regard to any information received during the consultations and/or negotiations with the other Competition Authority, which information is covered by the issued waiver of confidentiality, shall cause liability under the national legislation on the confidentiality of information, protection of trade or other secrets protected by law.

No information received in violation of the prescribed confidentiality treatment might be used when analyzing the impacts of the Transactions on the competition and issuing a decision upon the results of consideration of the Transaction.

Waiver of confidentiality may contain wordings reflecting the understanding of a waiving Party that the Antimonopoly Authority may and will keep the confidentiality of information which it may receive from the Competition Authority in accordance with the national legislation on the confidentiality of information, protection of trade or other secrets protected by law. The absence of such wording

shall not relieve the Antimonopoly Authority from liability for any breach of confidentiality.

## **5. Validity of waiver of confidentiality**

When using waivers of confidentiality the Antimonopoly Authority is declared to rely on the following.

The waiver of confidentiality may not be implemented before the date of its receipt by Antimonopoly Authority and the relevant Competition Authority, unless otherwise expressly indicated in such waiver.

The Antimonopoly Authority shall terminate usage of waivers in the following cases:

- 1) Expiration of the term of validity of waiver;
- 2) Issuance of a decision upon the results of consideration of the Transaction by the Antimonopoly Authority and the Competition Authority involved into consultations and/or negotiations in relation to the Transaction;
- 3) Revocation of waiver of confidentiality by any Party;
- 4) In other cases expressly defined in the body of the waiver.

## **6. Conditions and warranties**

At their discretion, the Parties may indicate in the waivers any other conditions or warranties with regard to handling the information with regard to which the waiver is granted. In particular, the Parties may find it necessary to be notified of the intent of the Antimonopoly Authority or the Competition Authority to request or disclose any particular documents or information.

When the Parties decide to withdraw the waiver, the Antimonopoly Authority and the Competition Authority may use previously received information for the purposes of further consideration of the Transaction, unless otherwise provided by

the decision to withdraw the waiver (in particular, the Parties acting in good faith may reasonably prohibit the use of this information fully or in part).

In order to develop consistent approaches the following **mechanism of usage of waivers of confidentiality** may be offered:

1. Waiver of confidentiality shall be requested by the Antimonopoly Authority with regard to certain Transaction with indication of a specific Competition Authority with which the consultations and/or negotiations are planned to be conducted. In case the consultations and/or negotiations with several Competition Authorities are planned, separate requests for waivers of confidentiality shall be submitted separately with regard to each Competition Authority.

2. In case the consultations and/or negotiations with several Competition Authorities are planned, the necessity of sending the requests for waivers of confidentiality to the Parties by all the Competition Authorities involved into the consultations and/or negotiations shall be required.

3. Waiver of confidentiality shall be separately requested from each of the Party to the Transaction. The Antimonopoly Authority may hold consultations and/or negotiations with other Competition Authorities subject to the conditions provided in waivers of confidentiality provided that such waivers are provided by each Party.

4. The Parties are entitled to provide a waiver of confidentiality without first receiving requests from the Antimonopoly Authority and Competition Authorities. This waiver of confidentiality will be legally binding from the date of receipt of the waiver of confidentiality by both the Antimonopoly Authority and the relevant Competition Authority. Consultations, negotiations or transfer of information in another form in accordance with the Antimonopoly Authority and the Competition Authority received prior to sending the relevant requests can be carried out only if this interaction complies with the principles of using the waiver of confidentiality mechanism specified in these Recommendations.



5. Model form of request for waiver of confidentiality is provided in **Annex 1** hereto.

6. Model waiver of confidentiality is provided in **Annex 2** hereto.