

*Russian Federation*  
*Common Ownership by Institutional Investors and its Impact on*  
*Competition*  
*Competition Committee*  
*December 6, 2017*

***Common ownership as a subject of consideration when approving economic concentration deals***

In accordance with Article 28 of the Federal Law dated July 26, 2006 No. 135-FZ “On Protection of Competition” (hereinafter – Law on Protection of Competition) (Transactions with Shares, the Property of Commercial Organizations, or Rights in respect of Commercial Organizations Subject to the antimonopoly body’s Prior Consent) the following transactions are conducted with prior consent of the Federal Antimonopoly Service (the FAS Russia):

- acquisition of more than 25%, 50% or 75% of voting shares of a joint-stock company;

- acquisition of 1/3, 50% or 2/3 of shares of authorized capital of LLC.

Acquisition of stocks (shares) within the mentioned thresholds could be conducted without prior consent of competition authority.

Thus, deals for acquisition of shares held by minority shareholders, as a rule, are outside the scope of antimonopoly regulation. However, recently consideration of transactions of economic concentration, the acquirer of which is an institutional investor, has become more frequent for the FAS Russia.

For example, the FAS Russia agreed on 4 petitions of the “Vnesheconombank Investment Company LLC” for acquisition of shares of companies engaged in poultry farming. The purpose of the transactions was the implementation, together with the state corporation “Bank for Development and Foreign Economic Affairs (Vnesheconombank)” of investment projects related to the production and distribution of poultry.

In accordance with the findings of the FAS Russia, these transactions do not lead to restriction of competition, as the poultry market in the Russian Federation is highly competitive and the price increase on it, as a consequence of the transaction, is hardly possible. The share of companies also does not increase, because even before the transaction they belonged to one group of persons.

As the practice of the FAS Russia shows, many transactions with institutional investors are global, represent horizontal and (or) vertical mergers that require the approval of the Competition Authorities in a number of jurisdictions, including Russia.

As an example, we could pay attention to the market of equipment for debarking and processing of logs, which can be characterized as oligopolistic, since the number of producers/suppliers of debarking equipment in the world market is limited.

Thus, in 2015 the largest producers/suppliers on this commodity market were the following companies:

- Kadant Inc (USA);
- Nicholson (USA);
- Valon Kone (Finland);
- Söderhamn Eriksson (Sweden);
- USNR (USA);
- Eno Sangyo Co., Ltd (Japan).

Analysis of M&As on this market allows to say that the tendency of consolidation of assets is having place in the middle-term perspective.

In the period 2015-2017 two global deals were conducted on the mentioned market:

- In 2015 USNR (USA), one of the largest suppliers of equipment and technologies for the sawn timber industry, acquired Swedish company Söderhamn Eriksson, specialized in production of wood-sawing lines, debarking and cutting machines<sup>1</sup>;
- In 2017 Kadant Inc (USA) acquired Finnish company Valon Kone, specialized in development and production of rotatory technologies for debarking<sup>2</sup>.

Thus, in the middle-term perspective a number of economic entities on this market, not belonging to one group, is decreasing that could be one of the signs of

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<sup>1</sup> <http://www.se-saws.com/en/usnr-acquires-soderhamn-eriksson>

<sup>2</sup> <https://www.euwid-wood-products.com/news/miscellaneous/single/Artikel/kadant-acquires-nicholson-and-valon-kone.html>

restriction of competition.

Analysis of structure of shareholders of producers/suppliers of debarking equipment shows that institutional investors exercise common ownership of stocks in competing companies (Pic.1)<sup>3</sup>

Pic. 1

Institutional Investor	Shares of ownership by institutional investors in competing companies:			
	Kadant Inc (USA)	Nicholson (USA)	Valon Kone (Finland)	USNR (USA)
BlackRock Inc. (incl. BlackRock Fund Advisors, BlackRock Investment Management)	6,68%	-	3,1%	Volume of share is missing in open sources
The Vanguard Group, Inc.	4,36%	2,68%	2,04%	-
Norges Bank Investment Management	1,59%	3,02%	-	-

At the same time, in the process of considering this deal the FAS Russia did not have sufficient data to unequivocally answer the question of whether common ownership leads to negative consequences, such as price increase in the industries under consideration. One of the objective reasons hindering the comprehensive analysis of the transactions, should be mentioned the weak interaction between Competition Authorities in different jurisdictions, as well as the lack of mechanisms to fully monitor the relevant transactions.

*Issues of consideration of deals with institutional investors to strategic entities*

<sup>3</sup> <http://www.4-traders.com/KADANT-INC-13227/company/>; <http://www.4-traders.com/KONE-OYJ-1412480/company/>; <http://www.debarking.com/>

In addition to antimonopoly control, the FAS Russia is a federal executive body empowered to control over implementation of foreign investment in business entities of strategic importance for the country's national defense and state security (hereinafter - strategic entities).

On a regular basis the FAS Russia considers foreign institutional investors' deals to strategic entities.

The advantage of attracting investment from institutional investors, in terms of assessing the degree of common ownership of shares, can be the accumulating significant financial resources obtained from smaller investors and distributing them for various investment objects by purchasing minority stakes of business entities with the aim of diversifying risks.

According to the FAS Russia, attracting institutional investors allows increasing the flow of investment into Russian economy and increasing the competitiveness of Russian products that have a positive effect on the economic development of the Russian Federation.

Institutional investors often choose infrastructure facilities, such as airports, seaports, healthcare facilities, agriculture, etc as objects for investments to Russia.

As a rule, foreign institutional investors make portfolio investments that do not lead to the establishment of control over strategic entities. At the same time, there are cases of obtaining by institutional investors of possibility to block decisions of management bodies of strategic entities in order to ensure the protection of investments.

For example, in 2017 the FAS Russia considered the transaction of the company "CPPIB Monroe Canada Inc." (Canada), a Canadian public pension fund, with respect to Grain Terminal Taman LLC (the Russian Federation), which was approved by the Governmental Commission on Monitoring Foreign Investment of the Russian Federation.

As for the control of transactions of institutional investors that entail the acquisition of minority owners, in accordance with the provisions of the Federal Law No. 57-FZ of April 29, 2008 "On the Procedure for Foreign Investment in Business Entities of Strategic Importance for the National Defense and State Security" in case of acquisition of more than 5% of a strategic company, a foreign investor shall notify the transaction. This mechanism allows the FAS Russia to monitor corporate

changes taking place in the structure of management of strategic entities, related, inter alia, to the acquisition of minority owners.

We note that in the FAS Russia's activity there have not been any violations by institutional investors, as well as the risks associated with the acquisition of shares (stakes) of strategic entities by institutional investors.

### ***Competition Issues on Financial Markets***

In July 2017 the Federal Law No. 233-FZ of July 29, 2017 "On Amendments to the Federal Law" On Joint Stock Companies" and Article 50 of the Federal Law "On Limited Liability Companies" came into force. It aimed at clarifying the procedure for exercising the shareholders' right to access to information of the economic entity.

In particular, the Law "On Limited Liability Companies" specifies the list of documents to be disclosed to shareholders of the company, in particular, at the request of shareholders owning at least 1% of the company's voting shares or owning not less than 25% of the company's voting shares. It is established that the request for the submission of documents and information, made by the shareholder (shareholders) owning less than 25% of voting shares of the company, should include a business purpose with which documents are requested.

Clause 8 of Article 91 of the Federal Law "On Limited Liability Companies" establishes the conditions, in presence of at least one of which the company has the right to refuse to shareholders in access to documents and information, in particular, if a business purpose indicated in the request is not reasonable.

However, according to Part 3 of Clause 7 of Article 91 of the mentioned Law, a business purpose cannot be considered reasonable if the shareholder is a competitor of the company or an affiliate of a competitor and the requested documents contain confidential information relating to the competitive sphere and its disclosure may affect the commercial interests of the company.

According to the FAS Russia, the introduction of this provision can prevent violations of the antimonopoly legislation, inter alia, concerning unfair competition of relevant economic entities.

At the same time, it should be noted that in accordance with Article 76.2 of the Federal Law of July 10, 2002 No. 86-FZ "On the Central Bank of the Russian Federation (Bank of Russia)", the Bank of Russia is the body that regulates, controls and supervises compliance by issuers with the requirements of the legislation of the

Russian Federation on joint-stock companies and securities, as well as regulates, controls and supervises corporate relations in joint-stock companies in order to protect the rights and legitimate interests of shareholders and investors.

According to the Bank of Russia, a significant number of applications to the Service for the Protection of Consumer Rights and Financial Inclusion (hereinafter referred to as the Service) concerns possible violations of the requirements of Russian legislation when the joint-stock companies provide information and documents requested by shareholders in accordance with Federal Law of December 26, 1995 No. 208-FZ "On Joint Stock Companies".

To the opinion of the Bank of Russia, for the purpose of objective consideration of applications on the legitimacy of the company's refusal to provide the documents requested by the "competitor" shareholder, it is necessary to establish the fact of the existence/absence of competitive relations between the economic entity and its shareholder who is requesting information.

In this regard, the Bank of Russia and the FAS Russia are currently considering the issue of establishing cooperation when the Service considers these applications, including the procedure and forms for sending information on the existence of competitive relations between economic entities and its shareholders.

### ***Conclusion***

The practice of the FAS Russia of considering transactions between companies, shareholders in which are institutional investors, shows that in case of pre-notification for approval of the deal by the antimonopoly authority, the applicants often provide with arguments of positive aspects that will be achieved as a result of the transaction, while the evaluation of negative consequences is granted to the "buy-out" of the Competition Authority.

Assessing the impact on competition of common ownership by institutional investors should take into account not only positive effects of the transaction, but also the occurrence of possible negative consequences.

Proceeding from the point that transactions involving institutional investors are of a global nature, the lack of real opportunity to gather information about the market (for example, if individual producers are located outside the Russian Federation and their activities are not carried out on the territory of the Russian Federation) is an impassable barrier to conducting objective and comprehensive market analysis.

The FAS Russia supposes that possible solutions of the mentioned problems

are the strengthening communications between Competition Authorities in different jurisdictions, the development of a standard definitions for institutional investors, the development of new approaches to consideration of global mergers (for example, compulsory consideration of remedies or decisions made in other jurisdictions on the same case (deal) when making decision by Competition Authority).