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# **FEDERAL ANTIMONOPOLY SERVICE**

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## **Guidelines**

**“On the specifics of state antimonopoly control  
over economic concentration”**

**No. 19**

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## **INTRODUCTION**

Control over economic concentration (merger control) is one of major areas of antimonopoly regulation along with investigating cases on violating the antimonopoly legislation and issuing warnings and admonitions by the antimonopoly authority. The economic science understands market (economic) concentration as a build-up of economically significant attributes or characteristics in the hands of a particular number of economic entities (units or information carriers). It can be defined as a parameter or an indicator of a state of the market.

Economic concentration actions and transactions (mergers) presume changes in the state of a competitive environment on a goods market as well as cause-and-effect relations between such a change and actions or transactions undertaken by an economic entity.

Changing the level of economic concentration on the markets can take place due to various factors and conditions: particular actions or transactions by economic entities, changes in demand, introduction of new substitute goods, and market segmentation, etc. Concentration changes can also be associated with lawful actions (omissions) by market participants as well as be an outcome of monopolistic activities: concluding anticompetitive agreements and abusing dominance.

It should be pointed out that the mere fact of increasing the level of economic concentration on a market is not considered a violation of the antimonopoly law and entails no liability.

It is monopolistic activity caused by an intention to lead to (or potentially leading to) extreme changes in economic concentration, which is subject to suppression.

At the same time, increasing the concentration level even as a result of a lawful conduct of economic entities can create conditions for monopolistic activity in the form of developing dominance on the market or strengthening dominance of particular economic entities.

Thereupon, pre-emptive machinery aimed at preventing violations and exposing and exercising control over abuse-facilitating conditions is essential.

In accord with the above-described logic, and in view of Article 4 of Federal Law No.135-FZ “On Protection of Competition” of 26.07.2006 (further on referred to as the Competition Law), economic concentration is defined as transactions, other actions that influence or can influence the state of competition.

The main tool to control economic concentration by the antimonopoly authority is the powers to approve or reject a particular transaction (merger) as well as imposing additional structural or conduct conditions (injunctions) upon the merger parties.

That being said, control over economic concentration can be defined as preventative antimonopoly control aimed at avoiding monopolistic activity.

The purpose of the Guidelines is to describe the main approaches and summarize the practice of the antimonopoly bodies under such a line of control.

It should be noted that, taking into account changes in economic relations and the active development of digitalization processes, FAS Russia at the time of approval of these Clarifications, has drafted laws ("the fifth antimonopoly package") aimed, inter alia, at improving antimonopoly control over economic concentration, including exercising control over digital markets. In particular, the draft laws propose a new condition for the control of economic concentration transactions - if the transaction price exceeds seven billion rubles, they determine the rules for attracting experts for the purpose of monitoring the execution of orders by the antimonopoly body, the procedure and grounds for in-person consideration of the application. After the entry into force of the changes related to the implementation of antimonopoly control over economic concentration, these clarifications will be applied subject to such changes.

The Guidelines serve as guidelines and are not meant to change the existing regulation.

## **SECTION I. TRANSACTIONS (ACTIONS) SUBJECT TO ANTIMONOPOLY CONTROL**

### **1.1. Calculating financial indicators of parties to a transaction and a merger target.**

Articles 27-28 of the Competition Law specify the thresholds for asset values and total revenue of the parties to a transaction, other action, exceeding which a transaction, other action can become subject to antimonopoly control.

Thus, the preliminary consent of the antimonopoly authority to take actions on the merger of commercial organizations (excluding financial organizations), as well as the merger of one or several commercial organizations to another commercial organization (excluding financial organizations) will be required if the following threshold values are exceeded:

- the total value of assets of commercial organizations participating in the merger or acquisition (and members of their groups of persons), according to the latest balances, exceeds 7 billion rubles, or
- the total revenue of these persons from the sale of goods for the calendar year preceding the year of merger (acquisition) exceeds 10 billion rubles.

Similar thresholds for the value of assets or revenue are established for the conclusion of an agreement between competing economic entities on joint activities on the territory of the Russian Federation (clause 8 of part 1 of article 27 of the Competition Law).

Establishment of a commercial organization will require the prior consent of the antimonopoly authority if:

- the authorized capital of a commercial organization being created is paid for with shares (shares) or property (fixed production assets or intangible assets, but not cash) of another commercial organization;
- the created commercial organization acquires certain rights in relation to the shares (stakes) or property transferred to it, provided for in Article 28 of the Competition Law.

At the same time, the threshold values for actions taken in relation to financial organizations are established by the Decree of the Government of the Russian Federation dated October 18, 2014 No. 1072 "On establishing the values of assets of financial organizations supervised by the Central Bank of the Russian Federation in order to exercise antimonopoly control".

If financial organizations are participating in the reorganization, the need for preliminary approval is determined based on the value of the assets of such financial organizations participating in the reorganization, excluding the assets of organizations in their groups of persons.

In accordance with part 1 of Article 28 of the Competition Law for the transactions specified in this Article, the prior consent of the antimonopoly authority is required if:

- the total value of assets according to the latest balance sheets of the person acquiring shares (shares), rights and (or) property, and his group of persons, and the person who is the object of economic concentration, and his group of persons exceeds 7 billion rubles. and at the same time, the value of assets according to the last balance sheet of the entity being the object of economic concentration and its group of entities exceeds 400 million rubles; or
- the total revenue of these persons from the sale of goods for the last calendar year exceeds 10 billion rubles and at the same time, the value of the assets of the entity being the subject of economic concentration and its group of entities exceeds 400 million rubles.

Thus, Article 28 of the Competition Law provides for two conditions under which transactions will require the prior consent of the antimonopoly authority, while, in conjunction with one of the above conditions, the value of the assets of the person

being the object of economic concentration and his group of persons (size this cost should exceed 400 million rubles).

For the purposes of state control over mergers, acquisitions and other transactions (actions) on economic concentration listed in Articles 27-28 of the Competition Law, the total value of assets of participants in transactions, other actions (and participants in their groups of persons) is determined according to accounting data for reporting year.

In this regard, Article 32 of the Competition Law requires that a pre-merger notification should contain balance sheets confirming the total asset value according to recent balance sheets of a person acquiring shares (stakes), rights and (or) property, as well as exercising other actions, listed in the relevant Articles, and its group of person, and a person that is the merger target, and its group of persons.

The recent balance sheet should be understood as an accounting form (balance sheet) provided for by the tax legislation, as of the latest reporting date, preceding the date of submission. Thereof, an annual report for the calendar years preceding a transaction should be submitted, i.e., for the period from January 01 to December 31 inclusive (except cases of establishing, reorganizing or liquidating a legal entity), or an interim report, if an economic entity has an obligation to draw it up according to the current legislation (in particular, insurance entities and securities issuers are obligated to prepare quarterly accounting reports) or in-house regulations of a particular economic entity (for example, based on an in-house accounting policy).

It should be taken into consideration that there are cases when economic entities – members of the same group of persons with a notifier or a merger target draw up their financial records covering different reporting periods. To achieve the most adequate representation and a unified approach to estimating financial indicators in such cases, data can be presented for a common reporting period, for example, a full calendar year (from January 01 to December 31 inclusive).

The latest accounting (financing) reports drawn up in accord with the Russian Accounting Standards (RAS) are used to determine **separate (non-consolidated)** asset (total revenue) value of Russian companies – merger parties. Separate (non-consolidated) accounting (financial) reports are used for foreign companies; they should be drawn up in accord with the International Accounting Standards (IAS) and if absent – in accord with the applicable legislation of the jurisdiction where a company in question is incorporated.

At the same time, keeping accounts does not apply to physical persons, except when a physical person has a sole trader status (*an individual entrepreneur*). Personal assets not related to business operations of a physical person should not be considered when estimating assets of that physical person. Assets of economic entities controlled by a notifying party – physical person as well as his/her group of persons, however, should be considered in such cases to estimate assets.

For the merger control purposes in accordance with Articles 27-28 of the Competition Law, and total asset value of the merger parties, other actions (and members of their group of persons) is determined on the basis of accounting data for **the most recent reporting period** (annual or interim balance sheets are submitted). At the same time, the reporting period should be determined in accord with the applicable tax legislation of the jurisdiction where an economic entity is incorporated. For instance, the relevant period for a Russian company is determined under Article 285 of the Tax Code of the Russian Federation.

Therewith, to calculate consolidated assets or revenue, the asset value of **all participants – members of a relevant group of persons, particularly, incorporated outside the Russian Federation**, as at the most recent accounting date, should be considered. It must be noted that the applicable reporting period for foreign companies is determined in accord with the legislation of the jurisdictions where they are incorporated.

To calculate the **total** asset value (total revenue) of a group of persons of a merger party, IAS consolidated financials should be used drawn up at the most recent reporting late preceding the date of filing a pre-merger notification. If a group of persons does not keep ISO consolidated financial statements, then consolidated accounting (financial) reports prepared in accord with the applicable legislation of **the jurisdiction** where the parent entity of the group **is incorporated** should be used.

In a real-case scenario, a group of persons may not necessarily keep consolidated financial statements. To determine the total figures for such a group of persons, an asset value (revenue) of each member of the group are summed up, defined in accord with separate accounting (financial) reporting documents as of the most recent reporting date for each particular company.

Meanwhile, within the guidelines of the law, for example, in accordance with Part 3 Article 28 of the Competition Law, if following a merger the seller and its group of persons lose the rights enabling to direct the conduct-of-business conditions for a person that is a merger target, the asset value of the selling group of persons (the person alienating shares (stakes) of a merger target, rights or property, and the persons that continue being members of the same group of persons with this person upon performing the expected transaction, other action) must not be considered when calculating the total financials of a group of persons of the merger target.

The Competition Law, and equally by-laws (regarding financial organizations) set the thresholds for approving transactions (other actions) in Russian Rubles. Thereby, to calculate financials of the parties to a transaction if accounting (financial) reports of merger party (their groups of persons) are in foreign currency, **the indicators in a foreign currency** should be converted in Russian Rubles. In such cases, asset value of the parties to a transaction (their groups of persons) is

calculated based on the exchange rate set by the Central Bank of the Russian Federation (hereinafter – the Central Bank of the Russian Federation) for a particular foreign currency **as of the reporting date** for the accounting (financial) reports submitted to the antimonopoly authority.

At the same time, please be advised that if it is necessary to sum up financials of several companies from the same group of persons in order to determine the total asset value (revenue) and accounting (financial) reports for each of them are drawn in different currencies, such financials should be converted into Russian Rubles based on the above-given rules prior to totaling them.

Currently, the FAS Russia is working on amending the Competition Law, providing, inter alia, an increase in the threshold values of the total value of assets for the last balance sheet of a person being an object of economic concentration and its group of persons, from four hundred million rubles to eight hundred million rubles. In connection to this, after the entry of the relevant provisions into force, it is necessary to consider the specified changes in the threshold values when applying the provisions of part 1 of Article 28 of the Competition Law.

## **1.2. Types of transactions, other actions subject to antimonopoly control**

### **1) Establishing (particularly, following reorganization) and reorganizing in the cases listed in Article 27 of the Competition Law;**

#### *A) Establishing commercial entities*

Under Article 27 of the Competition Law, a mandatory condition for preliminary approval of establishing a commercial entity is reaching the financial thresholds and acquiring the rights, specified in Article 27 to the extent provided for by Articles 28 or 29 of the Competition Law.

In particular, paragraph 4 of part 1 of Article 27 of the Competition Law provides that with the prior consent of the antimonopoly authority, a commercial organization is created if its authorized capital is paid for with shares (shares) and (or) property, which are the main production assets and (or) intangible assets of another commercial organization (with the exception of a financial organization), including on the basis of a transfer act or separation balance sheet, and in relation to these shares (stakes) and (or) property, the commercial organization being created acquires the rights provided for in Article 28 of this Federal Law (upon reaching the threshold values provided for by the specified norm).

However, having considered a notification for approving formation of a limited liability company, FAS ascertained that the registered capital of the new entity is

fully paid in cash. Thus, in its decision following the notification consideration, FAS stated that there had been no need to file the notification<sup>1</sup>.

Approvals from the antimonopoly authority are required for both establishing commercial entities by initially organizing and reorganizing a company through splitting or spinning off, which is confirmed by judicial practice<sup>2</sup>.

It should be also kept in mind that an approval to form a legal entity should be obtained from the antimonopoly authority prior to entering a record about establishing a company in the Unified Public Register of Companies (UPRC), which follows from Clause 2 Article 51 of the Civil Code (CC) of the Russian Federation, Clause 3 Article 2 of Federal Law No. 14-FZ “On limited liability companies [OOO]” of 08.02.1998 (further on referred to as the Law on OOO) and Clause 2 Article 11 of Federal Law No. 129-FZ “On public registration of legal entities and sole traders [*individual entrepreneurs*]” of 08.08.2001.

For instance, FAS made a decision to hold a legal entity administratively liable under Part 3 Article 19.8 of the Code of Administrative Offences of the Russian Federation due to establishing a legal entity without a pre-approval since the notification for approving this action was filed to FAS after a record on formation of a new company had been entered in UPRC<sup>3</sup>.

#### *B) Reorganizing commercial companies*

Based on Clauses 1 and 2 Part 1 Article 27 of the Federal Law “On Protection of Competition”, the following actions are exercised with a pre-approval from the antimonopoly authority if assets or revenue threshold values are exceeded:

- Merger of commercial companies;
- Acquisition of one or several commercial entities by another commercial entity.

The norms of Article 27 of the Competition Law on pre-approving reorganization through a merger or an acquisition do not apply to mergers or acquisitions of foreign entities. At the same time, Chapter 7 of the Competition Law may apply to such reorganization of foreign legal entities if, as a result, shares (stakes), property or rights listed in Articles 28-29 of the Competition Law are acquired.

Under Clause 4 Article 57 of the Russian Civil Code, in case of a reorganization in the form of a merger, a legal entity is considered reorganized from the date of an official registration of newly formed legal entities; and in case of a reorganization through acquiring a legal entity by another legal entity, the former is considered

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<sup>1</sup> FAS decision of 09.08.2010 No. AK/25552

<sup>2</sup> Ruling of the Arbitration Court of the East Siberian District of 07.05.2007 on No. A78-5847/06-C2-27/308 case.

<sup>3</sup> FAS order of 02.04.2018 to impose a fine (No. 4-19.8-1935/00-18-17 case).

reorganized from the date of entering a record in the Register (UPRC) on termination of operations of the acquired legal entity.

Hence, an approval of a merger or an acquisition should be obtained from the antimonopoly authority prior to entering a relevant record in UPRC (on establishing new legal entities or on termination of operations of an acquired legal entity accordingly).

For instance, a notifier was held liable under Part 3 Article 19.8 of Russian Code of Administrative Offences since it had filed a notification on reorganization in the form of an acquisition already upon entering data about termination of operations of the acquired person in the Register (UPRC)<sup>4</sup>.

## **2) Concluding agreements on joint operations with a prior approval from the antimonopoly authority**

Under Clause 8 Part 1 Article 27 of the Competition Law, “concluding an agreement between economic entities – competitors about joint operations in the Russian Federation” requires FAS pre-approval if the relevant assets or revenue thresholds are exceeded.

Based on the above-mentioned norm of the Competition Law, it seems essential to ascertain fulfillment of the following three conditions in their totality for the purposes of analyzing whether a pre-approval is necessary:

1. An agreement constitutes an “agreement about joint operations”;
2. An agreement is concluded between economic entities – competitors;
3. An agreement is made with regard to joint operations in the Russian Federation.

The Russian legislation does not have a definition of “agreement on joint operations”, except a definition of simple partnership agreement in Chapter 55 of the Russian Civil Code (according to Article 1041 of the Russian Civil Code, simple partnership agreement (agreement on joint operations) is an agreement, under which two or more persons (partners) undertake to combine their contributions and act jointly without establishing a legal entity to generate profit or to achieve any other legitimate goal).

At the same time, for the purposes of applying the concerned norm of Article 27 of the Competition Law, elements of an agreement on joint operations should be taken into consideration, as outlined in the Guidelines of FAS Presidium about the

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<sup>4</sup> FAS Order of 09.07.2015 on imposing a fine in No. 4-19.8-444/00-05-15 case (upheld by Ruling of the 9<sup>th</sup> Arbitration Appeal Court on 28.12.2015 No. 09AII-54568/2015 on No.A40-151980/2015 case).

analytical procedure and the methods for analyzing such agreements (hereinafter – Guidelines on JV).<sup>5</sup>

For instance, according to Article 2 Chapter I of the Guidelines, agreements on joint operations are agreements between economic entities made under Russian or foreign legislation, including agreements that provide for establishing a new legal entity or joint participation of the parties in the existing legal entity (further on such a legal entity is referred to as “joint venture” or “JV”), and other agreements concerning joint operations of the parties, and presuming that:

- The parties to such an agreement combine resources to achieve the goals of their joint operations and / or make mutual investments in order to achieve the goals of their joint operations;- The parties jointly bear the risks associated with joint operations;
- Information about joint operations or establishing a JV is public.

The Guidelines describe in detail, under which conditions each of the above criteria are observed.

In terms of the criterion about publicity of a joint operations agreement, it should be pointed out that this is an additional rather than a crucial criterion for the purposes of analyzing whether a particular agreement shall be considered a joint operations agreement under the legislation of the Russian Federation.

In most cases, JV parties publically announce their plans to form a JV through various press-releases, Letters of Intent and other information published on the official web-sites of the JV parties. At the same time, if it has not been done because of some sensible reasons (for example, due to the applicable foreign legislation), a relevant agreement, nevertheless, shall be considered a joint operations agreement, if it meets other criteria listed in the Guidelines on JV.

The purposes of joint operations, according to the Guidelines on JV, may include, for instance: joint manufacture or sale, combining efforts to promote goods or services on the market (joint marketing) or creating a common logistic system, in other words, due to joint operations of the parties to such an agreement *on the market*.

In this regard, corporate contracts on exercising the rights of parties as company members to vote within a company, including a range of issues for such voting and the applicable vote thresholds, as well as other agreements regulating financial aspects of shareholders or company members paying their contributions to a

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<sup>5</sup> See the Guidelines on the procedure and the methods of analyzing agreements on joint operations (2013, published on the FAS official web-site - [http://fas.gov.ru/netcat\\_files/File/razyasneniya\\_SP.pdf](http://fas.gov.ru/netcat_files/File/razyasneniya_SP.pdf); <https://fas.gov.ru/documents/575737> (Russian version only)

company, in the absence of provisions that directly concern activities of the parties to an agreement *on the market to promote goods, works, or services*, do not constitute joint operations agreements. Therefore, corporate issues of expressing the parties' will and / or dividing votes alone cannot be considered as a joint operations agreement within the meaning of the Competition Law.

For example, having considered a notification, FAS indicated, simultaneously with approving shares acquisition, that the draft share-holding agreement accompanying the notification could not be considered as an agreement between economic entities – competitors about joint operations in the Russian Federation within the meaning of Clause 8 Part 1 Article 27 of the Competition Law<sup>6</sup>.

Similarly, syndicated loan agreements (in the part of regulating creditors' mutual rights and obligations) and pledge management agreements<sup>7</sup> do not intermediate parties' activities *on the market*. These agreements do not meet other criteria for joint operations agreements, outlined in the Guidelines on JV; particularly, they do not provide for *mutual investments of the parties to agreements in the assets (production capacities, technologies, etc.) of each other or a JV created by them* (which is simply absent in such agreements). Having regard to the above, such contracts, as well as other agreements that do not meet the criteria of joint operations agreements listed in the Guidelines, cannot be considered as joint operations agreements subject to FAS pre-approval under Clause 8 Part 1 Article 27 of the Competition Law.

At the same time, the above agreements that do not fall under the concept of joint operations agreements may require approvals due to other grounds outlined in Articles 28-29 of the Competition Law, depending on the subject matter of a transaction. For example, entering into a corporate agreement can entail acquisition of rights that enable to determine the conditions for conducting business, acquire shares (stakes) and so on.

It is essential in the course of an analysis to ascertain the fact whether a joint operations agreement is concluded between economic entities - competitors. It also seems correct here to be guided by the Guidelines in conjunction with Article 4 of the Competition Law that defines such fundamental concepts as “competition”, “goods” and “goods market”.

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<sup>6</sup> FAS decision of November 9, 2018 No. PII/90854/18

<sup>7</sup> According to the legislation, the standards of simple partnership agreements apply to such agreements: for example, Part 6 Article 356 of the Russian Civil Code, “in the part, not regulated by the present Article, unless otherwise requires from the nature of the parties' obligations, the rules on agency contracts apply to the obligations of a manager that is not a pledge holder, under a pledge management agreement, while *the rules on simple partnership agreements, concluded to conduct business, apply to the pledge holders' rights and obligations against each other*”

Pursuant to the above-mentioned Article 4 of the Competition Law, “competition” between economic entities can be present if they operate on the same “goods market”.

Under Sections II and III of the Guidelines on JV it is stated that, for the purposes of analyzing JV agreements, FAS analyses, first of all, a market “that is the subject matter” of a joint operations agreement (or, as specified in the Guidelines, the “affected goods market”).

Other goods markets where parties can operate (beyond an established JV) may also be the subject of analysis since the fact of their competition on other markets in the Russian Federation can influence an analysis of the impact of a particular new JV on the “affected” market in Russia (for example, if these markets are “adjacent” to the affected market). For example, at the first stage of analysis FAS assesses market shares of the parties to an agreement on the affected market (it is also reflected in Paragraph 7 Section II of the Guidelines on JV).

As it follows from the Guidelines, for the purposes of analyzing a joint operations agreement, FAS assesses a goods market in line with the Procedure for the analysis of the state of competition in the goods market, approved by No.220 FAS Order of April 28, 2010 (further on referred to as No.220 FAS Order). In this case, in terms of the geographic market boundaries, it is presumed that to analyze the necessity of pre-approving a joint operations agreement, it is essential to ascertain, first of all, whether the parties to an agreement are competitors on the affected goods market in the Russian Federation. Competition on the global market can be taken in consideration to the extent that market analysis has established that the geographic boundaries of a relevant market extend beyond Russia, and, as a consequence, the market is global.

In order to assess if the parties to an agreement have a possibility to eliminate or restrict competition, FAS, if necessary, also assesses characteristics of adjacent markets (the same follows from Paragraph 1 Section III of the Guidelines).

Markets *adjacent* to an affected goods market are the markets of goods (works, services) that, in particular: (a) are used to produce and transport goods (carry out works, provide services), which constitute the product boundaries of an affected market; or (b) are produced (carried out, provided) using goods (works, services), which constitute the product boundaries of the affected goods market; or (c) are complementary to the goods (works, services), which constitute the product boundaries of an affected market, in their consumption. Regarding parties, it seems essential to evaluate activities of the entire group of persons of a party to an agreement on an “affected” goods market in the Russian Federation, rather than only of a party to an agreement, especially because formally it can be a holding company of a group that does not pursue activities on a goods market by itself.

Under the Guidelines on JV, a joint operations agreement can be concluded between actual as well as *potential* competitors. It should be pointed out that the fact of competition between parties on a relevant goods markets in other jurisdictions or other markets in Russia, that do not relate to the subject matter of agreements on joint operations and are not affected markets, does not automatically make the parties potential competitors for the purposes of analyzing whether a joint operations agreement should be agreed upon with the regulator. In this case potential competition between parties can be evaluated in line with No.220 Order, taking into account, particularly, market entry barriers, import barriers and other characteristics of an affected market.

Finally, regarding the condition about joint operations *in the Russian Federation*, it takes place, for example, when:

- According to a joint operations agreement, a JV is formed in Russia or shares (stakes) of a Russian company are acquired (for instance, owned by a party to an agreement at the time of an acquisition);
- The parties to a joint operations agreement form (or acquire shares (stakes) of an existing) foreign company that has a subsidiary in the Russian Federation operating on the market where an agreement is expected, provided that this company will one way or another participate in joint activities of the parties to the agreement (will be their JV or will interact with their JV);
- The parties to a joint operations agreement form (or acquire shares (stakes) in an existing) foreign company that does not have a subsidiary in Russia, but for which operations in the Russian Federation, in accord with the terms and conditions of the agreement, shall constitute its core activity (for example, when established, such a company can plan to supply goods to Russia (that are the result of joint operations / production by the parties to a JV) or fulfill joint projects in Russia, given that such activity is directly specified in the joint operations agreement as expected active operations of a foreign JV in the Russian Federation or an intention of the parties to enter the Russian market is defined otherwise);
- The parties to a joint operations agreement do not form a JV but combine efforts to promote goods or services on the market (for instance, through joint marketing programs in Russia, joint infrastructure development in the Russian Federation, or building-up a common logistical system to sell goods in Russia).

For example, FAS approved a joint operation agreement on the market of services for information exchange between taxi drivers and passengers in the Russian Federation. The agreement was allowed under Part 1 Article 13 of the Competition Law and an injunction was given to the parties to support competition, particularly,

do not prohibit drivers and passengers from using mobile applications of other providers of taxi-passenger information exchange services<sup>8</sup>.

It stands to mention separately the notion of *the point of time of concluding a joint operations agreement*, before which a pre-approval should be obtained from the antimonopoly body. Under a general rule, an approval from the antimonopoly authority should be obtained prior to concluding an agreement (obtaining acceptance by the person who sent an offer in accord with Article 432 of the Russian Civil Code).

At the same time, the parties can conclude a joint operation agreement and, based on Article 157 of the Russian Civil Code, make acquisition of the rights and obligations under such an agreement dependent on legally significant circumstances. In particular, obtaining consent of the antimonopoly body for entering into an agreement can be as given as such a circumstance. In this case, an approval from the antimonopoly authority must be obtained prior to the point of time when the rights and obligations of the parties emerge under an agreement (i.e., before all suspensive conditions are fulfilled). An exception from this approach can be cases when a joint operation agreement implies establishing a new legal entity. Then an approval from the antimonopoly body must be obtained before establishing it if the relevant threshold values are exceeded.

It should also be taken into account that parties bear all the risks of non-occurrence of the relevant circumstances, with which they associate occurrence of particular circumstances, including the risks of losses.

Having considered a notification on approving joint operation agreements, the antimonopoly authority can issue an injunction to exercise actions aimed at competition support, if established that an agreement can lead to restriction of competition that cannot be allowed in accord with the antimonopoly legislation and the Guidelines on JV.

### **3) Specifics of control in case of transferring rights for shares (stake) without a transaction (redistribution of voting rights as a result of a participant's withdrawal from a company, inheritance, etc.)**

Situations are possible when the rights that determine the conditions for conduct of business, can be acquired without a directing will (intent) of an acquirer. Such cases, in particular, can take place when one of the participants of a merger target withdraws from a limited liability company (under the procedure specified in Article 26 of Law on OOO or when shareholders present company shares for buying-out by the company (for example, under Article 75 of Federal Law No.208-FZ "On shareholding companies" of December 26, 1995 (further on referred to as the "**Law**

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<sup>8</sup> FAS decision of November 24, 2017 No.АГ/82030/17

on AO”)). A vote balance can also change when shares (stake) that belong to a company are distributed among shareholders (participants), preference shares are converted into ordinary shares, and so on.

For instance, as a result of a participant’s withdrawal from a limited liability company, the company must buy-out the shares of the withdrawing participant regardless of consent of other participants or the company itself, if it is provided for by its Articles of Association (Part 1 Article 26 of the Law on OOO).

At the same time, shares owned by a company are not accounted for in the voting results at a General Members Meeting (Part 1 Article 24 of the Law on OOO). Therefore, a person that owns less than 50% company’s shares can, under particular circumstances as a result of other participant’s withdrawal, obtain the right to determine the conditions for company’s conduct of business through shaping decisions of a company’s General Members Meeting.

Similarly, redistribution without prior expression of will of a right acquirer can occur when shareholders present company shares for buying back by the company (for example, as specified in Article 75 of the Law on AO, if shares (stake) owned by the company are distributed among shareholders (participants), preference shares are converted into ordinary shares, and so on.

The Competition Law does not specify the point of time when FAS should be approached in such situations in order to agree upon the possibility to determine the conditions for company’s conduct of business, as a result of changing the balance of votes emerged due to actions of third parties. In its turn, Federal Law No. 57-FZ “On procedure for foreign investments in economic entities of strategic importance for national defence and state security” of April 29, 2008 (further on referred to as Federal Law No. 57) directly obligates to file a notification within three months following such circumstances.

Accordingly, in the cases in question, an acquirer cannot approach the antimonopoly authority in advance as the Competition Law stipulates, since objectively an acquirer cannot know that such circumstances would emerge, because they depend on will expression and actions of third parties.

At the same time, acquiring the rights to determine the conditions for company’s conduct of business falls under the Competition Law in compliance with threshold values and it is subject to mandatory assessment by the antimonopoly authority. A person shall be held administratively liable for failure to file a notification (Part 3 Article 19.8 of the Russian Code of Administrative Offences), which is confirmed by enforcement practice<sup>9</sup>.

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<sup>9</sup> FAS ruling on 05/04/19.8-2/2019 case

In view of the above, an acquirer should immediately, from the time when the acquirer learnt or should have learnt about acquiring the rights to determine the conditions of company's conduct of business as a result of changes in the vote balance, file a notification to the antimonopoly authority seeking its approval.

Having considered such notification, the antimonopoly authority makes one of the decisions outlined in Clauses 1, 2, 3.1 and 4 Part 2 Article 33 of the Competition Law.

If the antimonopoly authority ascertains that an acquisition of rights can restrict competition and possible conduct or structural requirements cannot eliminate substantial adverse consequences for the state of competition, the antimonopoly authority, particularly, may, guided by Clause 4 Part 2 Article 33 of the Competition Law, request an acquirer or a company (a merger target) to alienate shares (stake) owned by the acquirer or the company accordingly, in such a manner that forecloses a possibility for the acquirer to control over 50% votes at a General Shareholders (Participants) Meeting, within the deadline set and reasoned by the antimonopoly body.

In practice, transfer of shares (stake) can also happen due to inheritance.

For instance, under Clause 1 Article 1110 of the Russian Civil Code, decedent's estate (inheritance, inherited property) devolves to other persons by way of universal succession, i.e., intact as a unit and at the same point of time, unless the Code requires otherwise.

Under Article 1112 of the Russian Civil Code, inheritance comprises chattels, other property, including property rights and obligations, owned by an estate-leaver on the date of opening of an inheritance.

Thus, inheritance can include, in particular, shares and stakes of economic entities.

Clause 1 Article 1152 of the Russian Civil Code states that in order to acquire inheritance, an inheritor must accept it.

Defining the legal nature of inheritance, the Judicial Chamber for Civil Cases of the Supreme Court of the Russian Federation pointed out that as follows from Article 1152 of the Russian Civil Code, accepting inheritance is, by its legal nature, a unilateral transaction, through which an inheritor that succeeds the deceased person, accepts the duly inherited property and becomes its owner.

Thus, general provisions about obligations and contracts apply to inheritance acceptance as a unilateral transaction, since it does not contradict the law and the unilateral nature and matter of the case<sup>10</sup>.

In this context, acquiring shares (stake) of economic entities through inheriting such property is subject to control by the antimonopoly authority.

If there is kinship between an estate leaver and an inheritor, then based on Clause 7

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<sup>10</sup> Ruling of the Judicial Chamber for Civil Cases of the Supreme Court of the Russian Federation of 25.04.2017 No. 33-КГ17-6

Part 1 Article 9 of the Competition Law these persons can be members of the same group of persons, the consequence of which is obligation of the inheritor to notify about a transaction, observing the conditions listed in Article 31 of the Competition Law, and pursuant to Article 32 of the Competition Law.

If an estate leaver and an inheritor are not members of a group of persons, then in accord with Clause 3 Part 1 Article 32 of the Competition Law, persons acquiring shares (stake), property, assets of economic entities, rights for economic entities as a result of transactions under Articles 28, 29 of the Competition Law approach the antimonopoly body to obtain a pre-approval in the cases listed in Articles 27-29 of the Competition Law.

#### **4) Transferring shares (stake) to trust management, investment funds, pledging**

##### **A. Transferring shares (stake) to trust management**

Under Articles 28 and 29 of the Competition Law, acquisitions of voting shares (stake) in the registered capital of financial and commercial organizations are made upon pre-approval from the antimonopoly authority if the thresholds specified in these Articles are exceeded.

In accord with Clause 16 Article 4 of the Competition Law, acquisition of shares (stake) of economic entities means buying as well as obtaining other opportunity to exercise the voting power vested in shares (stake) of economic entities on the basis of property trust agreements, agreements on joint operations, agency agreements, other transactions or under other grounds.

Therefore, for the purposes of antimonopoly control, it is an important fact when a person obtains a possibility to independently exercise the voting rights, embodied in shares (stake) of an economic entity.

In this context, an owner of voting shares of an economic entity that assigned trustees the right to independently dispose of such voting shares without consent of the owner, particularly, make decisions on all items on the agenda of general shareholders meetings, loses the right to dispose of voting shares, namely, the right of control over the economic entity, for the period when a trust agreement is in effect, and, therefore, shall not be in the same group of persons with this economic entity, within this period and provided the above rights are transferred, in the meaning of Clause 1 Part 1 Article 9 of the Competition Law.

Accordingly, obtaining shares (stake) in trust management in the above cases is subject to pre-approval from the antimonopoly authority if the thresholds set in Article 28 or 29 of the Competition Law are exceeded.

At the same time, if the conditions of trust management agreements provide for issuing binding directives to a trustee by an attorney (stock owner) in the part of the

disposal procedure with regard the transferred voting shares of the economic entity, the trustee is not assigned independent rights to dispose of the stock. Therefore, legal relations on the form of disposing of shares of a particular company, emerging due to entering in a trust management agreement under the above conditions, do not entail the need for a pre-approval from the antimonopoly authority by implication of Articles 28, 29 of the Competition Law.

## **B. Transferring shares (stake), property to investment funds**

Under Article 1 of Federal Law No. 156-FZ “On investment funds” of 29.11.2001 (further on referred to as the Law on investment funds), investment fund is a property portfolio owned by a shareholding company (a shareholding investment fund) or held under shared ownership of physical and legal persons (mutual funds), used and dispose of by a management company exclusively in the interest of the shareholders of this shareholding company or trustors.

Property of an investment fund can include shares and stakes as well as property that constitutes the fixed production assets and (or) intangible assets (in case of financial organizations – assets).

One should separate cases of transferring property to a shareholding investment fund and a mutual fund.

1. Under Part 1 Article 2 of the Law on investment funds, a shareholding investment fund is established as a legal entity (a shareholding company). Accordingly, paying for the shares issued by the fund with shares, stake or property of other persons, the right of ownership for such property is acquired directly by the shareholding investment fund.

At the same time, the following should be taken into consideration.

In accord with Part 3 Article 3 of the Law on investment funds, property of a shareholding investment fund is broken down into property intended for investing (investment resources) and property aimed to support the work of corporate bodies and other bodies of a shareholding investment fund in the ratio, determined in the Statutes of the shareholding investment fund. At the same time, in line with Part 4 Article 3, investment reserves of a shareholding investment fund must be placed into trust to a managing company.

Thus, if the relevant shares (stake) or property, acquired by a shareholding investment fund when it was formed, are classified as investment reserves, then although the fund becomes a formal owner of such property, all the rights for managing it are acquired by a managing company on the basis of a trust agreement.

Under Article 1012 of the Russian Civil Code, a trustee can perform any legal and physical acts with this property in accord with a trust agreement in the interests of the beneficiary. It means that unless provided otherwise under a trust agreement, a

trustee, for example, obtains a possibility to exercise the voting rights over the shares (stake) that form the investment reserves of a fund.

Therefore, acquiring the rights by a management company for shares (stake) or fixed production assets, paid-in for shares of a shareholding investment fund and falling into investment reserves, shall be subject to FAS approval if the threshold values set in Articles 28 or 29 of the Competition Law are exceeded and provided a trust agreement has no provisions on binding directives to a trustee from an attorney (stock owner) in the part of the disposal procedure for the transferred voting shares of the economic entity.

2. The following should be taken into consideration for a mutual fund.

Under Article 10 of the Law on investment funds, a mutual fund is a separate property complex comprising property, placed in trust to a managing company by a trustor (trustors) under the condition to combine this property with property of other trustors, and property obtained as a result of such management and ownership interest in it is attached to securities issued by a managing company. Mutual fund is not a legal entity.

Under Part 3 Article 11 of the Law on investment funds, a managing company is a trustee of a mutual fund by means of any legal and physical actions with regard to its property, and exercises all the rights attached to securities that constitute the mutual fund, including the voting authority over voting securities.

Thus, since a managing company acting on property trust of a mutual fund, obtains the voting right over shares (stake) of economic entities, as well as the rights of ownership and use for fixed production assets and (or) intangible assets, assets (in case of financial organizations), that are part of the fund property, obtaining such rights by a managing company of a mutual fund is subject to FAS approval, if the threshold values set in Articles 28 and 29 of the Competition Law are exceeded.

### **C. Pledging shares and stakes of economic entities**

Under Articles 28 and 29 of the Competition Law, voting shares (stake) in the registered capital of financial and commercial organizations are acquired with FAS pre-approval if the threshold values set in these Articles are exceeded.

In accord with Clause 16 Article 4 of the Competition Law, acquiring shares (stake) of economic entities means buying as well as obtaining other possibility to exercise the voting right attached to shares (stake) of an economic entity on the basis of a property trust agreement, agreements on joint operations, agency agreements, other transactions or under other grounds.

Therefore, for the purposes of antimonopoly control, an important fact is when a person (a group of persons) obtains a possibility to exercise voting rights over the acquired shares (stake) of an economic entity as a result of a transaction.

It means that if an agreement for pledging shares (stake) is concluded, the key condition in terms of the need to pre-approve the transaction by the antimonopoly authority will be the fact of obtaining voting rights by a pledge holder over the encumbered shares (stake).

Under Clause 2 Article 358.15 of the Russian Civil Code, pledging shares, the rights attached to them are exercised by a pledger (a shareholder), unless provided otherwise in a share pledge agreement. Thus, as a general rule, concluding a share pledge agreement does not require approval from the antimonopoly body; however, such consent can be necessary if a share pledge agreement provides for transferring the voting right over shares to a pledger.

In accord with Paragraph 2 Clause 2 Article 358.15 of the Russian Civil Code, pledging interest in the registered (charter) capital of a limited liability company, the rights of a company participant (including the voting right) are exercised by a pledger, unless provided otherwise in a pledge agreement. Therefore, unlike a share pledge agreement, a stake pledge agreement requires a pre-approval of the antimonopoly body if the relevant thresholds are exceeded, and if a pledge agreement does not specify that the voting power over the stake is exercised by a pledger. FAS consent also may be required when an economic entity obtains the stake rights in the case outlined in Clause 5 Article 334 of the Russian Civil Code.

It should be noted that share (stake) pledge agreements that do not transfer the voting rights over them to a pledge holder, in practice often obligate a pledger to obtain a pre-approval of the pledge holder to vote on particular items concerning corporate activity, — for example, after breaching the conditions of secured obligations in case of any event of non-executing the obligations outlined in the conditions of the main (secured) obligation. At the same time, breaching this obligation can entail considerable adverse consequences for a pledger and / or a debtor under the main obligation (for example, filing a claim on acceleration of debt under a loan agreement).

Since when a pledging agreement is in effect, a pledge holder can acquire the rights enabling to obstruct particular decisions of the management bodies of an economic entity (the blocking rights), exercising the above rights by a pledge holder may require a FAS pre-approval in some circumstances.

It should be also pointed out that under Clause 1 Article 348 of the Russian Civil Code, failure to fulfill or improper fulfillment of a secured obligation over pledged property by a debtor can lead to forfeiture in order to satisfy the requirements of a pledge holder. Since forfeiture of shares (stake) in the registered (charter) capital provides for acquiring them within the meaning of the Competition Law (through tendering), a transaction would require FAS pre-approval if the threshold values set in Articles 28 and 29 of the Competition Law are exceeded.

## **5) Specifics related to acquiring the rights that can determine the conditions for conduct of business (including negative control)**

Under Clause 8 Part 1 Article 28 of the Competition Law, regulatory control over mergers applies, inter alia, to acquiring **the rights** by a person (a group of persons) that **determine the conditions for conduct of business** for a merger target.

Unlike other grounds for pre-merger approvals that set particular thresholds on the percentage of acquirable voting shares (stake, assets), in this case the need to obtain an approval depends on the scope and content of the rights obtained by an acquirer and / or its group of persons (further on referred to as an acquirer) with regard to a merger target. At the same time, the scope and content of the acquirable rights must definitively show that an acquirer develops a possibility **to control decisions** made by a merger target in the course of conducting business.

Pre-approvals due to this ground may also be necessary in the mergers directly targeting a Russian company. In most cases, however, the fact of acquiring the rights that determine the conditions for conduct of business is evaluated in transactions concluded by foreign companies outside the Russian Federation when an acquired foreign company has a subsidiary in Russia, and the purpose of analysis is to ascertain whether an acquirer obtains (indirectly) particular rights of control over such a subsidiary and, accordingly, a transaction should be approved in the Russian Federation.

Under the definition of control in Clause 8 Article 11 of the Competition Law, an acquirer obtains a univocal right to determine the conditions for conduct of business of a merger target, if as a result of a transaction an acquirer gets:

1. The right to dispose of more than 50% shares (stock) of a merger target;
2. The right to exercise the functions of the executive body of a merger target.

For example, FAS dismissed without consideration a notification from a Russian firm seeking approval for acquiring shares of a foreign company registered in the Republic of Cyprus<sup>11</sup>. FAS decision states that the foreign company is not involved in any operations in Russia so direct purchase of its shares does not require an approval from the antimonopoly authority.

There are, however, several companies registered in Russia, over 50% shares (stock) of which belong to this foreign company directly or indirectly. Therefore, the transaction, nevertheless, is subject to approval, but under Clause 8 Part 1 Article 28 of the Competition Law as the notifier acquires the rights enabling to determine the conditions of conduct of business for Russian subsidiaries of the Cyprus company.

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<sup>11</sup> No. AK/42173/14 FAS decision of 17.10.2014.

In practice, a typical clear-cut evidence of acquisition of rights that determine the conditions of conduct of business, can be **obtaining the right by an acquirer to appoint a single executive body or more than 50% of a collegial executive body** of a merger target (provided that the main issues of company's operations can be resolved by a single majority vote).

Besides, charter documents, corporate or other contracts regarding a merger target or the persons that control it can provide explicitly that following a merger, an acquirer obtains the right to give **binding directives** to the merger target at its own discretion. In particular, the above documents can state that conduct of business is determined by a particular person. In this case, acquiring the rights (powers) of this person would also mean that an acquirer obtains the right enabling to determine the conditions of conduct of business of a merger target and, as a consequence, control operations of the merger target.

Any of the detailed-above grounds suffices to receive the rights in question. For instance, the right to determine the conditions of conduct of business is gained through direct or indirect acquisition of minority (less than 50%) share (stake) of a merger target if an acquirer **simultaneously** obtains an(other) right(s) enabling to control decisions of the merger target (for example, the right to appoint a single executive body).

Therefore, the key element in gaining the right to determine the conditions of conduct of business is **creating control relations** between an acquirer and a merger target **as a result of a transaction**.

In certain cases the rights determining the conditions of conduct of business can be gained through acquisition of the **rights to block** particular decisions of a merger target if such blocking leads to the so-called **negative control**. In particular, negative control arises when shareholder A possesses 50% shares of an economic entity and has the right to veto strategic decisions, while the remaining 50% shares are distributed among other shareholders in such a way that shareholder A does not have actual sole control (for example, with a small number of shareholders and their active involvement in company management).

For instance, FAS considered and approved a notification on acquiring the right to block particular decisions of corporate management bodies of a shareholding company<sup>12</sup>.

At the same time, the mere fact of simply acquiring a blocking stake (more than 25% but less than 50%) in a foreign company that has a subsidiary in Russia cannot lead to an acquirer gaining the right to determine the conditions of conduct of business for such a subsidiary. To ascertain such right, conditions may be evaluated

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<sup>12</sup> FAS decision of 02.03.2012 No. AII/6310

when, particularly with additional rights, indirect negative control of an acquirer over a subsidiary can develop.

*For example, in its decision on a notification about acquiring the rights that determine the conditions of conduct of business for a Russian shareholding company, through acquiring more than 25% but less than 50% shares of a foreign legal entity, FAS stated that the transaction did not require an approval from the antimonopoly authority<sup>13</sup>. FAS based this conclusion on an analysis of a framework agreement between the person that filed the notification and the foreign legal entity, submitted with the notification where no conditions were revealed enabling the notifier to block decisions of the corporate management bodies of the foreign legal entity or the Russian shareholding company.*

Negative control emerges when a shareholder gains a possibility to exercise **decisive influence upon conduct of business** of a merger target, which is typically possessed by a **majority shareholder, provided there are no other persons with similar rights and / or a person exercising these rights with jointly the shareholder.**

The right to block decisions can be fulfilled through corporate and / or contractual blocking.

- Corporate blocking implies blocking decisions of a General Shareholders (Members) Meeting due to possessing shares (stake) of an economic entity. The current legislation<sup>14</sup>, as well as charter documents of an economic entity may set requirements for making particular decisions of a General Shareholders (Members) Meeting by qualified majority or unanimously. Thus, acquiring a particular package of shares (stake), an acquirer can gain a possibility to block company's decision-making due to sole or qualified majority for decision-making, including the vote of an acquirer or acquirer's nominees in corporate management bodies. Such kind of right, exercised **solely** by a particular shareholder (member) of a company can result in the right of negative control.
- Contractual blocking implies that a particular shareholder (member) has the right to veto **the key issues** of company management set in its corporate or other agreements. In many cases, the right of veto may not be directly associated with possessing a particular holding of shares (stake). At the same time, the **sole** possibility to exercise decisive influence upon decision-making through fulfilling the right of veto can also lead to development of negative control rights.

Evaluating the need to approve acquiring the rights that determine the conditions of conduct of business for a merger target, it should be considered whether following a

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<sup>13</sup> No. AK/22631 FAS decision of 15.06.2011.

<sup>14</sup> For instance, Para. 2 Clause 1 Article 20, Clause 2 Article 79 of the Federal Law "On shareholding companies", Sub-Clause. 11 Clause 2 Article 33 of the Federal Law "On limited liability companies" and other norms of the law.

transaction an acquirer can exercise **decisive influence** upon decisions of a merger target.

For example, having considered a pre-merger notification on acquiring the rights that determine conditions for conduct of business of a Russian shareholding company as a result of acquiring 25.29% voting shares in a foreign legal entity, giving the acquirer the right to veto a number of issues regarding operations of a Russian shareholding company, the antimonopoly body ascertained that it did not constitute acquiring the rights that determine the conditions of conduct of business in the meaning of Clause 8 Part 1 Article 28 the Competition Law, and stated that the notifier had not acquired any additional rights that had not been used by other shareholder at the time of considering the notification <sup>15</sup>.

Therefore, it is necessary to pre-approve negative control rights by the antimonopoly authority only when an acquirer can exercise decisive influence over decisions of a merger target, provided that other shareholders do not have this right.

For instance, the rights that determine the conditions for conduct of business can rise if an acquirer obtains the **sole possibility** (i.e., provided there are no other persons with similar rights and / or a person exercising these rights jointly with an acquirer) to block decisions, particularly, on such substantial issues as:

- Appointing / early terminating the powers of a sole executive body;
- Adopting and changing a business-plan and a business strategy of a company;
- Making / changing essential conditions / terminating business transactions customary for a company.

Such items are often put on a list for **exclusive competence** of an economic entity. Also, a list of such essential items can strongly depend on the type of company activities. For an investment company it can also include decisions on participating in the capital of other companies; while for an IT firm – granting a license for developed software products.

At the same time issues that fall under the standard methods of protecting minority shareholders do not **lead** to negative control of an acquirer over an economic entity and, accordingly, the rights that determine the conditions for conduct of business of that economic entity. Such items include, in particular:

- Anti-dilution protection;
- Selling the core part of business;
- Reorganization and liquidation;
- Changing charter documents;

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<sup>15</sup> FAS decision of 20.08.2013 No.ИА/32374/13. A similar logic can be seen in FAS decision of 20.08.2013 No.ИА/32376/13.

- Appointing an auditor;
- Transactions beyond the normal course of business, particularly, exceeding the cash threshold that is significantly higher than the usual transaction value for the company.

Rights enabling to determine the conditions for conduct of business can be gained **regardless of a transaction type**. For example, such rights can be obtained not only as a result of an agreement on acquiring shares but also an agreement of shareholders / members with regard to a merger target, agency contract, property trust agreement, an agreement with a managing company and other agreements. At the same time, concluding an employment agreement with General Director of a Russian company **is not a transaction**, as a result of which the above rights are acquired, and, accordingly, it **does not require a pre-approval of the antimonopoly authority**.

Therefore, due to a variety of corporate relations developing between economic entities, the scope of rights acquired with regard to a merger target should be evaluated on a case-by-case basis from the perspective of an acquirer having a **univocal possibility to control decisions**, made by a merger target, or the **sole possibility to exercise a decisive influence** on such decision-making.

It should be noted that the rights enabling to determine the conditions for conduct of business, including negative control, do not constitute control in the meaning of Part 8 Article 11 of the Competition Law; thus, do not fall under the exceptions of applying Article 11 of the Competition Law, set in Part 7 Article 11 of the Federal Law.

#### **6) Transactions regarding foreign legal entities, particularly, the procedure for calculating amount of supplies to the Russian Federation**

Under Article 26.1 of the Competition Law, a pre-approval from the antimonopoly authority is required for transactions, other actions with regard to foreign persons and (or) organizations that supply goods (works, services) to the Russian Federation for **over one billion RUB** in total during the year, preceding the date of a transaction, other action subject to government control.

In this context, three main questions should be answered in order to identify a foreign person as a merger target: 1) what supplies of goods (works, services) by a foreign person do take place in Russia, 2) how is 1 billion RUB calculated i.e., what supplies should be accounted for and included for calculations, and how is the calculation period defined.

##### *1) Supplies of goods (works, services) to Russia.*

There can be cases when a company ships goods, provides services or carries out works for a foreign customer in the Russian Federation, and vice versa - for a

Russian customer outside Russia. The basic test to classify goods (works, services) as supplied to Russia can be the goods shipping point (providing services, carrying out works) or the registration jurisdiction of a buyer (client / customer).

From a practical standpoint, goods should be considered **delivered to the Russian Federation** when the place of their delivery is the Russian Federation; otherwise the goods should be considered as delivered outside the Russian Federation.

Article 148 of the Tax Code can be similarly applied **to works and services**, since it sets the rules for defining the place of carrying out works (providing services). Therefore, the place of executing works (services) is the Russian Federation if these works (services) are directly related to movable and immovable assets in the Russian Federation; or are actually provided in the Russian Federation, and if a buyer of works (services) operates in the Russian Federation.

Financial lease (leasing) agreement should be remarked separately as having several distinctive execution characteristics caused by its investment nature. Due to the specifics of the agreement stemming from Federal Law No. 164-FZ “On financial lease (leasing)” of October 29, 1998, it seems that the place of executing such an agreement should be the place of transferring a facility into lease.

## *2) Specifics of defining and calculating supplies for 1 billion RUB.*

In practice, there are cases when a foreign company does not supply for 1 billion RUB and more on its own due to using diverse forms and schemes of goods delivery in different countries (particularly, because of the specifics of goods circulation and manufacturing, etc.); yet, the target foreign company can actually have an impact upon the economy of the Russian Federation, so a merger is subject to analysis by the antimonopoly authority of Russia.

The volume of supplies from a foreign company to Russia should be defined for the last financial year preceding the merger date, in accord with the most recent account (financial) reports at the end of the financial year preceding the merger date.

Since accounting (financial) reports of foreign companies are drawn up in a foreign currency and the threshold for approving transactions under Article 26.1 of the Competition Law is set in Russian Rubles, to check whether approval is necessary, the volume of goods supplied to Russia should be converted from a foreign currency into Rubles. In order to avoid incorrect treatment of financials upon conversion due to exchange rate fluctuations, conversion should be based on the exchange rate set by the Central Bank of the Russian Federation for a relevant foreign currency as on the reporting date for the accounting (financial) reports used to define the volume of supplies.

It should also be pointed out that calculating 1 billion RUB it is necessary to take into account for not only the actual revenue from supplies to Russia but also the

contractual value of the delivered but unpaid goods, as well as contracted but undelivered goods.

*A) Merger with a foreign company and its group of persons that supply to the Russian Federation*

There are cases when several foreign companies – members of the same group of persons - supplied to Russia for less than 1 billion RUB each but at the same time the cumulative supplies exceeded the threshold.

For example, a buyer company plans to gain control over a foreign company X, which has three foreign subsidiaries - A, B and C that are members of the same group of persons according to the rules set in Article 9 of the Competition Law. In a year preceding the merger, company X supplied products to Russia for 500 million RUB, company A – for 300 million RUB, company B – for 150 million RUB, and company C – for 100 million RUB.

In view of Part 2 Article 9 of the Competition Law, for the purposes of applying Part 1 Article 26.1 of the Competition Law, the volume of goods supplied by a foreign company to Russia should be calculated considering **the total** goods supplied to the Russian Federation by entities that are members of the same group of persons. Thus, the described case is subject to FAS approval since companies X, A, B and C - members of the same group of persons - **in total** supplied products to Russia for **over one billion RUB** in the year preceding the merger year.

As for approving the transaction by FAS and collecting documents on merger target(s), only company X can be specified as a merger target and documents on company X should be submitted to FAS. At the same time, it is necessary to submit data about companies A, B and C that are required under Part 5 Article 32 of the Competition Law.

*B) Acquiring a foreign company that sells goods through distributors (a distribution network).*

A company is not always aware how its products are sold when supplies are organized directly through **independent distributors**. Distributors act as standalone economic entities that make independent decisions, to whom and where supply products purchased from a company, and gain profit by themselves from their operations. A company does not always manage to trace how and to whom its products are actually resold and how company products enter the Russian market.

In a situation, however, when a distributor and a company-producer have coordination and coherence in terms of the goods sale conditions, particularly, in the part of the conditions for supplying to Russia, such supplies from distributors should be taken into account in order to calculate the threshold in the following cases:

- Distributor(s) are members of the same group of persons with the acquirable foreign company;
- Distributor(s) are members of the same group of persons with the end buyer of the goods in Russia and goods supplied by a merger target to the distributor are aimed for resale in the Russian Federation.

The criteria for including physical and legal persons in the same group of persons are given in Part 1 Article 9 of the Competition Law.

At the same time, supplies made through distributors, **that are not members of the same group** of persons with foreign persons and (or) entities supplying goods to Russia, **should not be taken into account** for the purposes of defining supplies for 1 billion RUB as set in Article 26.1 of the Competition Law.

In this case, tables with data about the core activities, products (works, services) (in the form approved by FAS – Order No. 129 “On approving the Form for submitting data to the antimonopoly authority with pre- and post-merger notifications under Articles 27 - 31 of the Federal Competition Law” of 17.04.2008 (further on referred to as No.129 FAS Order), should be submitted only **about distributors – members of the same group of persons with a merger target** that have actually supplied products to the Russian Federation.

It should be also noted that if goods are not acquired and the business of production / delivery of such goods is maintained by the seller’s group, such goods should not be taken into account to calculate 1 billion RUB supplies of the target foreign company to Russia (similarly to Part 3 Article 28 of the Competition Law).

#### **7) The specifics of control over transactions on acquiring fixed production assets and intangible assets**

Pre-approvals from the antimonopoly authority in the analyzed cases are necessary for two categories of transactions: 1) concerning fixed production assets and 2) concerning intangible assets. At the same time, the law indicates that these items must be present in the Russian Federation.

Under Clause 5 ПБУ 6/01 (Order of the Ministry of Finances of the Russian Federation No. 26Н “On approving the Accounting Regulations “Fixed Assets Accounting” ПБУ 6/01”) of 30.03.2001), fixed assets include: buildings, constructions, plant and equipment, measuring and control instruments and devices, computer facilities, means of transport, tools, production implements and maintenance accessories, work animals, productive and breeding livestock, perennial plantings, on-site roads and other relevant facilities and items.

For example, FAS approved a notification on obtaining fixed production assets (38338 units of rolling stock (cars)) for use<sup>16</sup>.

In another case, FAS held an economic entity administratively liable for taking a gasoline filling station on lease without a pre-approval from the antimonopoly authority under Clause 7 Part 1 Article 27 of the Competition Law<sup>17</sup>.

Capital investments in fundamental land improvement (draining, irrigation and other melioration works); capital investments in fixed assets taken on lease; land plots, sites for the use of natural resources (water, subsoil and other natural resources) are also accounted as fixed assets.

It should be kept in mind that ПБУ 6/01 does not apply to:

- Machinery, equipment and other similar items registered as finished products in warehouses of corporate manufacturers, as goods – in warehouses of the entities involved in trading activities;
- Items in assembling or subject to assembly, items en route;
- Capital and financial investments.

Treatment as fixed assets in corporate accounting records and reports is the determinant for classifying assets as fixed production assets for the purposes of applying the Competition Law.

It should be pointed out that the Competition Law excludes from antimonopoly control transactions concerning land plots and buildings, constructs, premises and part of premises, which do not have industrial purpose, facilities under construction that formally can be treated as fixed assets. For instance, buildings and facilities that do not have industrial significance include, in particular, office complexes and premises, business-centres, entertainment centres wholesale and retail outlets, including shopping malls and retail-and-leisure complexes.

Under Clause 4 ПБУ 14/2007 (Order of the Ministry of Finances of the Russian Federation No. 153Н “On approving the Accounting Regulations “Intangible Assets Accounting” (ПБУ 14/2007)”) of 27.12.2007, intangible assets include, in particular, scientific, literary and artistic works; computer programs; inventions; utility models; selection achievements; trade secrets (know-how); trademarks and service marks. Business reputation and goodwill developed through acquiring an enterprise as a property portfolio (in total or its part) are also regarded as intangible assets. At the same time, the list is not exhaustive and ПБУ 14/2007 allows treating other objects as intangible assets if they meet the criteria of intangible assets.

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<sup>16</sup> FAS decision of 28.03.2016 No. ИА/20187/16

<sup>17</sup> FAS order of 13.04.2016 No. 09/24922/16

The determinant for regarding an item as intangible assets for the purposes of applying the Competition Law is its treatment as fixed assets in corporate accounting records and reports rather than its appearance.

For instance, ПБҮ 14/2007 allows treating an intellectual property item as intangible assets of an entity only if the entity is its right-holder. Granting the rights to use such an item under a licensing agreement does not constitute the grounds to treat the item or the right to use it as intangible assets.

The type of transactions concerning the transfer of rights for fixed production assets and intangible assets does not matter for the purposes of Applying Clause 7 Part 1 Article 28 of the Competition Law.

Acquiring fixed production assets, it is necessary to ascertain that as a result of a transaction the ownership right or part of the proprietary rights are transferred to a person (acquirer): possession and use. Such rights can be transferred as a result of purchase / sale agreements, lease agreements, property trust, simple partnership and other agreements, which subject matter is property-related.

In some cases, however, transactions where the subject matter is related to fixed production assets do not require pre-approvals from the antimonopoly authority. For instance, in pledge agreements, an approval of the antimonopoly body can be necessary only if under Article 346 of the Russian Civil Code and the agreement conditions, a pledge holder obtains the right to use the pledged item or actually disposes of the pledged item by transferring it to third parties for temporary possession or use. For enforcement of pledge, for which the pledge-holder did not have the above rights, an approval will be needed for acquiring the pledged property through sale in accord with the procedure set in Articles 350 and 350.1 of the Russian Civil Code rather than for entering in a pledge agreement.

Acquiring rights for intangible assets, the specifics of legal regulation of their turnover must be taken into account. For example, the Russian Civil Code directly specifies only two forms of disposition of the exclusive right: 1) alienating it to another person by agreement (an agreement on the alienation of the exclusive right) or 2) granting another person the right to use particular intellectual property items or means of identification within the limits set by an agreement (a licensing agreement). Although the list for disposition of the exclusive right is not limited, it is the above-described forms that have become widespread.

Under an agreement on the alienation of the exclusive right, a party (the right-holder) transfers or undertakes to transfer its exclusive right for an intellectual property item or a means of identification in full to the other party (acquirer).

Under a licensing agreement, a party – holder of the exclusive right for an intellectual property item or a means of identification (licenser) grants or undertakes

to grant the other party (licensee) the right to use such an item or means within the limits of the agreement.

At the same time, the right to use intangible assets can be also transferred through other transactions (for example, franchise, simple partnership agreements); however, the conditions of such agreements typically are defined either in the form of alienating the exclusive right or in the form of transferring the right for use of an intellectual property item.

The above-described transactions require pre-approval from the antimonopoly authority if the subject matter of an agreement concerns transfer of rights for fixed production assets and intangible assets, the balance-sheet value of which exceeds 20% of the total balance-sheet value of fixed production assets and intangible assets of their owner and / or the right-holder.

To define this criterion, one should be guided by the following formula:  $A\%=(X/Y)\times 100\%$ , where:

A% – balance-sheet value of acquirable fixed production assets and intangible assets, in percentage;

X – balance-sheet value of acquirable fixed production assets and intangible assets, in Rubles;

Y – total book value of fixed production assets and intangible assets of a person that transfers the relevant rights (without taking into account the group of persons), in Rubles.

X and Y are defined under the most recent balance sheet statement submitted to the tax authorities by a company in accord with the norms of the existing legislation. The current balance-sheet value of acquirable fixed production assets and intangible assets does not matter in this case.

To define X, corporate accounting data are used, i.e., the value of acquirable fixed production assets and intangible assets in accounting reports. The contractual value of acquirable fixed production assets and intangible assets, determined by the parties to a transaction, does not count in this case. At the same time, to define X, fixed production assets and intangible assets, acquired at a time of a single transaction as well as a result of interrelated transactions (the concept and signs of interrelated transactions are described below in Clause 1.4 Section I of the Guidelines), should be taken into account.

Y is defined by adding the book value of all items treated in accounting records as fixed assets and intangible assets of a person that transfers the relevant rights (without taking into consideration the group of persons). In this case, the exemption set in Clause 7 Part 1 Article 28 of the Competition Law for land plots and buildings, structures and constructions, premises and parts of premises, facilities

under construction that do not have industrial significance, and the value of these items also is not considered. It should be kept in mind that to define Y, the balance currency (the book value of assets defined to ascertain the basic criteria under Article 28 of the Competition Law) does not matter.

The threshold value, set in Clause 7 Part 1 Article 28 of the Competition Law for acquirable fixed production assets and intangible assets at 20%, means, first of all, that an approval from the antimonopoly authority is not necessary if the subject matter of the transactions concerns assets, the balance sheet value of which does not exceed 20% of the total balance sheet value of fixed production assets and intangible assets. Second, if a person concluded a transaction upon consent of the antimonopoly authority and as a result of the transaction gained the rights for part of assets, there will be no need to get an approval from the antimonopoly authority for a subsequent transaction, as a result of which the person (or its group of persons) will obtain the rights concerning other part of assets, the book value of which will not exceed 20 % of the balance sheet value of fixed production assets and intangible assets. In particular, if upon FAS approval a person acquired the rights for assets, which balance sheet value exceeds 80% of the balance sheet value of fixed production assets and intangible assets, subsequent acquisition of assets of this person within the same reporting period does not require an approval from the antimonopoly body.

Therefore, transaction approval is required if the value of acquirable assets exceeds 20% of the balance sheet value of fixed production assets and intangible assets as of the most recent reporting date.

Since the existing legislation does not establish the notification form to seek FAS approval of transactions, a person that files such a notification may identify the subject matter of a transaction, fixed production assets and intangible assets related to the subject matter of a transaction, in any format, particularly, indicating their general purpose, the balance sheet value in Rubles and in percentage terms. At the same time, in the absence of instructions, the antimonopoly body is guided by information provided simultaneously with a notification in accord with FAS Order No. 129.

### **1.3. Specifics of control over transactions, other actions involving financial organizations.**

#### **1.3.1. General conditions for control over transactions, other actions involving financial organizations**

Government control over transactions and other actions concerning financial organizations is based on special norms of the Competition Law, given in Clauses 3, 5 - 8 Part 1 Article 27 and in Part 1 Article 29 of the Competition Law.

These norms of the Competition Law apply if the following **conditions** are observed:

- Parties (one of the parties) to / a merger target in the considered transactions and actions are exclusively financial organizations listed in Clause 6 Part 4 of the Competition Law, that operate in the Russian Federation in accord with the legislation of the Russian Federation;
- Asset value under the most recent balance sheet of financial organizations that are parties (one of the parties) / a merger target in transactions or actions in question exceeds the threshold set by the Government of the Russian Federation.

Financial organization is considered as conducting activities in the following instances:

- Lending company, professional securities trader, trading organizer, clearing company, insurance company, insurance broker, mutual insurance company, private pension fund, managing company of investment funds, mutual investment funds, private pension funds, specialized depository for investment funds, mutual funds, private pension funds – from the date of obtaining a license for relevant financial operations;
- Microfinance organization – from the date of entering information about an organization in the Public Register of Microfinance Organizations;
- Leasing company – from the date of starting leasing operations (concluding a leasing agreement). Indicating the right to exercise such operations in the company's charter documents as well as a record in the Unified State Register of Legal Entities about assigning an OKVED leasing activity code [Russian National Classifier of Types of Economic Activity] to the company does not constitute exercising leasing operations by a company;
- Consumer credit cooperative, pawnshop – from the date of entering in a relevant Register.

### **1.3.2. Specifics of control over transactions aimed at acquiring assets of a financial organization**

*Specifics of control over establishing and reorganizing financial organizations or with their participation*

Government control over establishing or reorganizing financial organizations or with their participation is based on special norms of the Competition Law, particularly, Clauses 3, 5-7 Part 1 Article 27 of the Competition Law.

Asset values of financial organizations, exceeding which a pre-approval from the antimonopoly authority is required for transactions, other actions listed in Article 27 of the Competition Law, are set in Decree of the Government of the Russian

Federation No. 1072 “On asset values of financial organizations regulated by the Central Bank of the Russian Federation, for the purposes of antimonopoly control” of 18.10.2014. These acts of Russian Government also set the 10% threshold asset value of a financial organization, exceeding which a transaction must be preapproved.

Under Clause 7 Part 1 Article 29 of the Competition Law, preapproval from the antimonopoly authority is necessary for acquiring assets of a financial organization (except monetary funds) by a person (a group of persons) as a result of a single or several transactions when the asset value exceeds the threshold set by the Government of the Russian Federation.

Applying this norm, the following must be borne in mind.

*A) Concept of assets.*

Transactions that require pre-approvals from the antimonopoly body include purchasing any assets of a financial organization, except monetary funds. Classifying property and ownership rights as assets is regulated by the accounting rules applicable to a particular economic entity.

This way, assets include, in particular, fixed assets, intangible assets, inventories, net investments in securities, net receivables, investments in businesses and organizations, investment property.

Therefore, transactions that require pre- (post) approvals from the antimonopoly body can include not only agreements on transfer of the rights of ownership (other rights of disposal of property), but also agreements on assignment of receivables, agreements on alienating the exclusive rights for intellectual property items, etc.

*B) Calculating asset value*

To calculate the value of acquirable assets, for which an approval from the antimonopoly authority is necessary, the value of such assets must be recognized according to the accounting records of a financial organization as of the most recent reporting data, preceding the date of filing a petition.

Calculating asset value for the purposes of obtaining a transaction preapproval from the antimonopoly body, assets obtained as a result of a single or several transactions should be factored in. In this case, the concept is similar to the concept of interrelated transactions given in Clause 7 Part 1 Article 28 of the Competition Law.

At the same time, preapproval is necessary for transactions with assets of financial organizations if the values of the assets acquirable within the reporting

period for the relevant accounting statements exceeds 10% of the assets value in the most recent balance sheet statement of a financial organization.

*C) Only the rights for disposal of assets of a financial organization are subject to approval.*

Unlike Clause 7 Part 1 Article 28 of the Competition Law, which focuses on approval from the antimonopoly body necessary for an economic entity in order to get fixed production assets and (or) intangible assets of another economic entity by right of ownership, use or in possession, Clause 7 Part 1 Article 29 of the Competition Law concerns approvals for **acquiring** assets of a financial organization.

Based on a complex interpretation of Article 29 of the Competition Law, **acquiring assets** of a financial organization should be meant as acquiring the ownership right or powers to dispose of property on other grounds, for example, under a property trust agreement.

At the same time, obtaining assets on the basis of an agreement that transfers only the powers of **possession and use**, for example, leasehold, leasing, gratuitous use agreements, etc., do not require an approval from the antimonopoly authority.

### **1.3.3. Specifics of control over transactions for acquiring assets in leasing companies**

If a company exercises several types of activities, one of which is leasing, such a company is financial in the meaning of the antimonopoly legislation and, therefore, purchasing its assets may require a pre-approval from the antimonopoly body under Article 29 of the Competition Law.

If acquirable assets as well as assets of a leasing company (lessor) exceed the threshold values set by the Government of the Russian Federation, such transactions are subject to approval in accord with Clause 7 Part 1 Article 29 of the Competition Law.

A notification filed with regard to such a company should include data listed in No.4 Appendix to the Form for submitting pre- and post merger data to the antimonopoly authority, approved by No.129 FAS Order.

If a company does not have valid leasing agreements at the time of completing a transaction, it is not a leasing company for the purposes of antimonopoly control.

### **1.4 Interrelated transactions**

In practice there are cases when planned individual transactions do not reach the thresholds for acquiring shares, stake or property, which require pre-approvals from the antimonopoly authority in accord with Articles 28-29 of the Competition Law.

These transactions, however, can be interrelated and as a result of completing them in their totality, the threshold will be reached. Such transactions need pre-approval from the antimonopoly body under a single notification.

The existing legislation does not give any common criteria of interrelated transactions. Interrelation between transactions is determined on a case-by-case basis in view of the circumstances and conditions of a particular transaction. For example, transactions that meet the following criteria in their totality should be considered interrelated:

- Transactions are completed simultaneously or the time interval between transactions is insignificant;
- Each transactions is aimed at achieving the same result or pursues the same goal;
- Transactions concern homogenous property, or heterogeneous property that will be used for the same intended purpose;
- The acquirer of rights in transactions is the same economic entity (a group of persons);
- Person that alienates rights or transfers the property right in transactions is the same economic entity;
- Subject mater of transactions;
- Transactions are of the same type.

### **1.5 Analysis of the circumstances excluding pre-merger control.**

Part 2 Articles 27-29 of the Competition Law sets exceptions, according to which the norms of Part 1 Article 27-29 of the Competition Law on transaction pre-approval from the antimonopoly authority do not apply, if transactions listed in Part 1 of these Articles are completed by persons – members of the same group of persons on the grounds outlined in Clause 1 Part 1 Article 9 of the Competition Law, or if transactions listed in Part 1 Article 27-29 of the Competition Law observe the conditions of Article 31 of the Competition Law, or if provided for by acts of the President of the Russian Federation or acts of the Government of the Russian Federation.

As for an exception for companies – members of the same group of persons under the grounds given in Clause 1 Part 1 Article 9 of the Competition Law, it should be taken into account that this exception also applies to the cases when transactions are completed between persons - members of the same group of persons indirectly through other group members, associated with each other on this grounds, rather than directly (as mother - daughter companies). In particular, the following transactions are not subject to FAS approval:

- 1) Between a parent company and its indirect subsidiary (where over 50% voting shares (stake) are owned through a legal entity or several legal entities);

- 2) Between subsidiaries where the same parent company holds more than 50% of the total votes attached to voting shares (stake);
- 3) Between companies, where the same controlling person has the right to indirectly (through a legal entity or several legal entities) dispose of more than 50% voting shares (stake).

Based on the purpose of the above exception, transactions completed by companies - members of the same group of persons (both directly and indirectly) on the grounds given in Clause 1 Part 1 Article 9 of the Competition Law also do not need FAS approval.

For example, having considered a notification to approve purchasing 100% voting shares of a shareholding company, FAS concluded that a pre-approval from the antimonopoly body was not necessary since the acquirer and the merger target were already indirect members of the same group of persons with each other and the seller of the voting shares under Clause 1 Part 1 Article 9 of the Competition Law<sup>18</sup>.

For applying the exception in accord with Article 31 of the Competition Law to other transactions within a group of persons, see Clause 2.6 of the present Guidelines.

According to Part 2 Article 27-29 of the Competition Law, transactions provided for by acts of the President of the Russian Federation or the Government of the Russian Federation also do not require pre-approvals<sup>19</sup>.

At the same time, the exception applies if an act of the President of the Russian Federation or the Government of the Russian Federation specifies a particular transaction, other action, and only in the part provided for by these acts.

For instance, Order of the Russian Government of 10.10.2016 No. 2130-p provided for alienating 50.0755% federal-owned shares of an oil company. Upon completing the transaction, the purchaser nevertheless notified FAS to seek approval of the acquisition of the remaining holding of shares of the merger target in accord with Clause 6 Part 1 Article 28 of the Competition Law<sup>20</sup>.

In another case, Order of the Russian Government of 28.07.2011 No. 1315-p allowed sale of 75% minus 2 shares of a railway operator, indirectly owned by the state, at an open auction without indicating a particular buyer. The transaction did not fall under the exception in question due to absence of direct indication of the

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<sup>18</sup> FAS decision of 11.09.2017 No. ИА/61719/17

<sup>19</sup> Transactions on reorganization or transfer of shares (stake), property of commercial organizations were provided for, in particular, by No. 596 Order of the Russian President "On asset contribution of the Russian Federation to Rostec State Corporation for the Promotion of the Development, Manufacture and Export of High Tech Products" of 24.10.2018, No.197 Order of the RF President "On "Kazan Precision Engineering Works" Research-and-Production Association -Federal State-Owned Enterprise" of 25.04.2019, etc.

<sup>20</sup> FAS decision of 25.11.2016 No. ИА/82240/16

buyer in the act of the Russian Government, so the acquirer obtained FAS approval to complete the deal<sup>21</sup>.

## **1.6 The procedure on informing FAS about a forthcoming transaction.**

Part 10 Article 32 of the Competition Law allows approaching the antimonopoly body in order to inform about a forthcoming transaction or action prior to filing a notification. Informing the antimonopoly authority can be useful, first of all, when, according to an opinion of the notifier, the announced transaction or action can potentially restrict competition.

This norm does not set any requirements about data subject to submission, so the scope of data presented at that stage is determined at the discretion of the notifier. At the same time, to enable fully-fledged consideration of a notification, it is advisable to include the following data as well as documents corroborating these data:

- Structure and the purpose of a transaction;
- Description of the goods market where a transaction takes place, and other markets affected by a transaction, including information about economic entities – competitors and their market shares;
- Operations of the notifier and the merger target on the goods markets, including economic performance of the parties on the market, particularly, volumes of supplies and revenue, the capacity loading level, main consumers and raw materials suppliers;
- Arguments showing that a transaction can be allowed under the criteria given in Part 1 Article 13 of the Competition Law.

It seems that the above data can be sufficient for the antimonopoly authority to develop preliminary understanding about a transaction and its impact upon the state of competition on the market. At the same time, based on the results of analyzing the submitted data, the antimonopoly body can request additional Guidelines and information, necessary for an analysis, from the notifier. In its turn, the notifier also can file additional data on one's own initiative after the procedure for informing the antimonopoly body is initiated.

It should be pointed out that the notifier also is given the right to offer one's conditions to the antimonopoly body that are designed to support competition, if the notifier sees the need for discussing such conditions prior to filing a notification. This right can facilitate development of the most efficient mechanisms to eliminate a possible adverse impact upon competition caused by a transaction or action.

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<sup>21</sup> FAS decision w/n on a petition of OOO "NTK" of 19.10.2012

Exercising the notifier's rights as granted by this norm of the Competition Law, it is expedient to make a submission well in advance of filing a notification to enable its comprehensive consideration by the antimonopoly authority within a reasonable time limit before filing a transaction notification.

Considering a pre- (post) merger notification, the antimonopoly authority can take into account all documents and data submitted at the stage of informing FAS, particularly, the conditions offered by the notifier to support competition that potentially can be included further on in an injunction issued by the antimonopoly body if a merger is approved.

## **SECTION II. THE PROCEDURE FOR CONSIDERING PRE-MERGER NOTIFICATIONS AND THE PROCEDURE FOR FILING POST-MERGER NOTIFICATIONS ON INTRA-GROUP TRANSACTIONS**

### **2.1. Selected issues of creating an obligation to file notifications and defining the scope of data to be included in notifications and the form of presentation.**

- 1) Article 32 of the Competition Law sets the procedure for filing notifications on transactions, other actions subject to government control.**

Stamp duty is paid for making decisions on exercising transactions, other actions subject to government control; the size and the procedure are set by the Tax Code of the Russian Federation.

A person can withdraw from considering the filed notifications regardless of the reasons for such withdrawal.

In this case, the documents filed by the notifier with a notification should be returned. The stamp duty is non-refundable.

The stamp duty is also non-refundable if considering a notification the antimonopoly authority establishes that a transaction or action, specified in a notification, does not require a pre-approval from the antimonopoly authority.

At the same time, Part 5.1 Article 32 of the Competition Law states that in case of submitting incomplete documents and data requested under Part 5 Article 32, a notification is not considered presented, and the antimonopoly authority informs the notifier about it within ten days.

A FAS letter that a notification is not considered presented does not constitute a decision of the antimonopoly authority made under Part 2 Article 33 of the Competition Law. In this case, the stamp duty is refundable<sup>22</sup>.

Persons who are obligated to file a notification (notifiers) depending on a regulated action or a control procedure include:

- Persons exercising a merger, acquisition or entering into a joint operations agreement in the cases listed in Article 27 of the Competition Law;
- Founders or a founder of a new entity;

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<sup>22</sup> More details on the refund policy for excess payments of stamp duties can be found in the Guidelines published on the FAS official web-site <https://fas.gov.ru/documents/575941>.

- Persons acquiring rights for shares (stake) and (or) property.

A special procedure for defining persons that must notify the antimonopoly authority in accord with Article 31 of the Competition Law is outlined in Part 3 Article 31. For instance, the antimonopoly authority should be notified about intra-group transactions / other actions by a person interested in exercising transactions, other actions listed in Articles 28 and 29 of the Competition Law. Similarly to the procedure of obtaining a pre-approval from the antimonopoly authority, such a person should be meant, first of all, the party – acquirer. If it concerns actions in the form of establishing a new economic entity or reorganizing within the meaning of Article 27 of the Competition Law, a notification should be filed by a newly formed economic entity or an entity that maintains its legal status as a result or reorganization.

As a general rule, a post- (pre-) merger notification must be signed by a notifier. Petitions on pre-approving mergers (acquisitions) of economic entities as well as establishing a commercial company or notification about establishing such a company, however, must be signed by the notifier and other persons involved in such merger (acquisition) or company establishment due to Part 6 Article 32 of the Competition Law. At the same time, notifications about mergers (acquisitions) under Article 31 of the Competition Law are signed only by the notifier.

Based on Part 1 Articles 28, 29 of the Competition Law, purchasing voting shares, assets, the rights for business corporations are subject to pre-approval from the antimonopoly authority in case of the relevant thresholds.

At the same time, the parties can perform a particular transaction that falls under antimonopoly control, and based on Article 157 of the Russian Civil Code make commencement of the rights and obligations on the transaction dependent on occurrence of legally significant circumstances. Obtaining a transaction approval from the antimonopoly authority can be indicated, in particular, as such a circumstance.

Such cases can occur, for instance, in transactions between economic entities, the subject matter of which includes acquiring rights with regard to economic entities located and / or operating in different jurisdictions. In this case, the parties to a transaction can set a closing condition when acquiring rights with regard of each of economic entities depends on the date of obtaining an approval from the antimonopoly authority of the relevant jurisdiction.

It should be taken into consideration that parties themselves bear the risk of non-occurrence of the circumstances, with which parties associate commencement of obligations, including losses caused by the specified circumstances.

If an agreement sets a transaction approval from the antimonopoly authority as a suspensive condition, the antimonopoly body can be notified after signing an

agreement but before closing a transaction. In this case, an approval from the antimonopoly authority can be obtained, for example:

- Acquiring shares of shareholding companies – prior to the date of entering a record on a shareholder’s account in the Register of Shareholders about depositing shares to an account of a registered person;
- Acquiring stake in limited liability companies – prior to the date of entering a record in the Unified State Register of Legal Entities [EGRYuL];
- Purchasing movable estate – prior to the date of signing a property transfer-and-acceptance act;
- Acquiring real estate – prior to the date of entering a record on transferring the right of ownership in the Unified State Register of Real Estate;
- Acquiring the rights that enable determining the conditions for conduct of business – prior to the date of closing a transaction entailing such rights, except cases when the conditions of a transaction postpone emergence of such rights till a particular event.

If a transaction was closed before a pre-approval was given by the antimonopoly body (for example: voting shares of an economic entity were alienated), such actions indicate an administrative offence under Part 3 Article 19.8 of the Russian Code on Administrative Offences.

In this case, a notification is duly acknowledged, of which the antimonopoly authority informs the notifier, and it is not subject to further consideration, since preliminary control over already closed transaction is not possible.

## **2) Entirety and completeness of documents submitted to the antimonopoly authority with a notification about transactions or actions.**

Notifications about transactions, other actions subject to government control under Chapter 7 of the Competition Law are drawn in writing in an arbitrary form. Documents and information listed in Part 5 Article 32 of the Competition Law should be submitted to the antimonopoly authority simultaneously with a notification.

A notification and accompanying documents can be filed to the antimonopoly authority electronically (Part 3.1 Article 32 of the Competition Law).

The content and requirements regarding notifications to the antimonopoly authority are set, apart from the Competition Law, in:

- FAS Order No. 293 “On approving the form for presenting a list of persons – members of the same group of persons” of 20.11.2006 (further on referred to as Order No.293);

- FAS Order No. 294 “On approving the Administrative Regulations of the Federal Antimonopoly Service on a public function for approval of acquiring shares (stake) in a registered capital of commercial entities, obtaining fixed production assets or intangible assets for possession or use, acquiring rights enabling to determine the conditions for conduct of business of an economic entity, in the cases provided by the law of the Russian Federation” of 20.09.2007 (further on referred to as No. 294 Order);
- FAS Order No. 129;
- FAS Order No. 342 “On approving the Administrative Regulations of the Federal Antimonopoly Service on a public function for approving establishment and reorganization of commercial entities in the cases specified by the antimonopoly law of the Russian Federation” of 25.05.2012;
- FAS Order No. 1081/16 “On approving the Procedure for filing pre- / post-merger notifications to the antimonopoly body in the electronic form” of 28.07.2016.

Part 5.1 Article 32 of the Competition Law requires that if the necessary documents and information specified in Part 5 Article 32 of the Competition Law are not presented in full, except documents and data listed in Parts 5.2 - 5.4 Article 32 of the Competition Law, a notification is considered non-presented, of which the antimonopoly authority informs a notifier within ten days.

The rules for drawing up documents and information to be submitted at the same time with a notification are detailed, in particular in Order No. 294.

According to Clauses 3.17, 3.19 of Order No. 294:

- Documents and data must be complete and authentic. The enclosed documents should be the originals or copies of the originals (duly drawn up and certified). For the latter, a person signing a pre- (post) merger notification must verify the authenticity and completeness of such copies. A pre- (post) merger notification should contain a list of all submitted documents and data;
- Copies of the charter documents (for a notifier – legal entity) or name, ID particulars (for a notifier – physical person), must be notarized. Other documents and data should be sewn together and affixed with the seal of a person filing a pre- (post-) merger notification);
- If a pre- (post-) merger notification is filed by a physical person, documents and data should be sewn and certified with signature of this physical person. Signature of a physical person should be properly authenticated;

- Signature of a physical person, that must file a pre- (post-) merger notification to the antimonopoly body, on a power of attorney, issued to another physical person – an authorized representative, should be properly authenticated.

Also, under Clauses 14, 15 of the Notes to the Form for presenting a list of persons – members of the same group of persons, approved by No.293 Order:

- A list of persons – members of the same group of persons and a schematic diagram of a group of persons on a paper carrier are signed by an authorised representative of a notifier (with certified powers), sewn together, affixed with the notifier's seal and signed by the authorized person;

- Notifier should depersonalize personal data of physical persons in a list of persons – members of the same group of persons, submitted on electronic media and on a schematic diagram of a group of persons on electronic media.

Thus, economic entities should submit original documents or copies of documents, duly certified, and electronic media simultaneously with a notification to the antimonopoly authority.

The original documents should meet particular state standards (GOST), for example, signature requirements, copy of a document, certified copy of a document.

If a copy of a document is not duly certified it is considered improper.

It should also be pointed out that data mentioned in Part 5 Article 32 of the Competition Law should be presented as separate documents signed by a notifier or a notifier's authorized representative.

Notarization of documents, drawn up in foreign jurisdictions, incurs several additional formal requirements. Apart from mandatory translation into Russian, in accord with the Fundamentals of Legislation of the Russian Federation on the Notariat (further on referred to as the Fundamentals), various regularization formalities should be fulfilled with regard to foreign public documents.

Under Article 106 of the Fundamentals, documents drawn up abroad with involvement of officials from competent agencies of other jurisdictions or their outgoing documents are accepted by notaries only after legalization. Notaries accept such documents without legalization only when provided for by the legislation of the Russian Federation and international treaties, to which the Russian Federation is a party.

For instance, under Articles 2 and 3 of the Convention Abolishing the Requirements of Legalizing for Foreign Public Documents (concluded in Hague on 05.10.1961, enacted in the Russian Federation on 31.05.1992), each of the contracting states, including the Russian Federation, relieves documents, covered by the Convention and that should be presented in its territory, from legalization. Apostille stamp is the

only formality that can be necessary for authentication of a signature, the capacity of a person who signed a document, and, in appropriate cases, the authenticity of a seal or a stamp affixed to a document.

In view of the above, this procedure is mandatory for foreign public documents used in notarial production to ascertain relevant legal acts.

It also should be pointed out that due to a number of agreements between the Russian Federation and foreign states, public documents originated from the same jurisdiction are accepted in another jurisdiction without legalization or an Apostille stamp (for example, Article 13 of the Convention on Legal Aid and Legal Relations in Civil, Family and Criminal Cases).

### **3) Disclosure of a group of persons based on the control sign.**

Under Clauses 16, 17 Part 5 Article 32 of the Competition Law, as well as FAS Order No. 293, a list and a scheme of groups of persons of a notifier and a merger target should include information only about those persons who directly or indirectly are overseen or controlled by a notifier or a merger target, persons that are members of the same group of persons with a notifier or a merger target under other grounds, but operate on the same goods markets, as well as persons under their control within the meaning of Part 8 Article 11 of the Competition Law.

For instance, if a merger notifier is a subsidiary of a holding company, that apart from this subsidiary controls other economic entities, then filing a notification on the grounds of control, the notifier does not need to disclose information in a notification about other persons controlled by the holding company, and give information only about the persons (1) under the notifier's control, (2) the holding company that directly controls the notifier, (3) persons directly or indirectly controlling the holding company (if available), (4) persons – members of the same group of persons with the notifier on other grounds and who operate on the same goods markets as the notifier or the merger target, as well as (5) persons under control of the persons listed in Item 4. A similar approach should be used to disclose a group of persons of a merger target.

### **4) Disclosing a group of persons upon a sign of operating on the same goods market with a notifier or a merger target.**

A fact of operating on the same goods market is subject to evaluation on a case-by-case basis due to the specifics of an affected goods markets and competitive relations on them, determined in accord with the Procedure for evaluating the state of competition on goods markets, approved by No.220 FAS Order of April 28, 2010

(hereinafter –FAS Order No. 220), and also taking into account Guidelines of FAS Presidium No. 17.<sup>23</sup>

For example, under Clause 51 of FAS Order No. 220, economic entities operating on the same goods market include economic entities that sell the goods in question within the geographic boundaries of this market during a particular time interval of a market research. The rules for defining the geographical and product boundaries of a goods market are given in Chapters III and IV of FAS Order No. 220.

It should be kept in mind, first of all, that under these grounds, a group of persons should comprise people that operated on the same market with a notifier and / or a merger target at the time of filing a notification, as well as persons under their control.

At the same time, an obligation to disclose persons – members of the same group of persons with a notifier or a merger target under the same market criterion, does not entail an absolute must for a notifier to carry out a fully-fledge analysis of such goods market in accord with the rules outlined in No.220 FAS Order, particularly, applying such tools of economic analysis as the hypothetical monopolist test.

It means, in particular, that to these purposes a notifier can use the methods and available information specified for predefining the products boundaries of a goods market (goods substitutability) due to Clauses 3.4. – 3.6. of No.220 FAS Order.

A similar approach can be used to define the products boundaries of a goods market for the purposes of disclosing information about a group of persons in a notification applying Clauses 4.2, 4.3 of No.220 Order.

In view of Clause 4.1 of No.220 Order, it should be kept in mind that to those ends the geographic boundaries of markets can cover the Russian Federation (the federal market) or go beyond the territory of Russia, include several constituent territories of the Russian Federation (an interregional market), do not cross the boundaries of a subject of the Russian Federation (a regional market), or do not exceed the boundaries of a municipality (a local market).

If the groups of persons of a notifier and / or a merger target include persons operating with them on the same goods markets, the geographic boundaries of which cover the Russian Federation, information about such persons is also subject to disclosure as part of information about groups of persons.

At the same time, if it is necessary to evaluate an impact of a transaction or an action upon operation of other companies from a group of persons of a notifier or a merger target, the antimonopoly authority can, based on Article 25 of the

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<sup>23</sup> FAS Guidelines No.17 “On selected issues of analyzing the state of competition” (approved by Protocol No.3 of FAS Presidium of 10.04.2019)

Competition Law, request additional information about a group of persons with no regard for the limitations set in Clauses 16, 17 Part 6 Article 32 of the Competition Law.

### **5) Disclosing information about business activity of a notifier and a merger target**

Information in the form of Appendices 1-5 to FAS Order No. 129 must be submitted about all members of the group of persons of a notifier and a merger target, as well the parties to an agreement on joint operations, disclosed in accord with the above-detailed procedure, that supply goods (works, services) on goods markets within the geographic boundaries of operations exercised by those persons. Based on a reasoned enquiry under Article 5 of the Competition Law, the antimonopoly body can additionally request data about business activity of other members of the group of persons of a notifier and a merger target.

Information in Tables 1-3 is given for 2 calendar years. For example, if a notification is filed to FAS in June of the current year, Tables 1-3 should be filled in for 2 calendar years preceding the date of submitting the pre- (post) merger notification.

Tables 1-3 show data, particularly, on transactions between persons that are members of the same group of persons. If any columns in Tables 1-3 are not filled in, a reason should be given.

*Recommendations on Table 1: Data about the key business performance indicators (further on referred to as Table 1):*

An economic entity fills in data in Table 1 on the main types of output products (works, services), which sales revenue exceeds 5% of the total revenue of an economic entity.

Products (works, services) items in column 2 Table 1 should be detailed specifying a particular category, type of products, with the *product nomenclature codes*. Generalized or abbreviated description of items that do not allow determining the type of products precisely should be avoided (for example, “other services”, “property lease”, “other property” and so on).

Column 3 “Unit” indicates the relevant units of products (works, services) both in value and volume, for example, “tons”, “kg”, “pieces”, “Rubles”, thousand Rubles”, etc. Giving units in value terms in foreign currency, it is necessary to simultaneously give their value in Rubles based on the exchange rate set by the Central Bank of the Russian Federation as of the latest date of the relevant period.

Column 4 “Output of products (works, services)” shows data on the products mentioned in Column 2 and produced by an economic entity within the geographic boundaries of the operations carrying out by a notifier, a merger target and members

of their groups of persons. If an economic entity does not produce products and is involved exclusively in their sale, Column 4 should be left empty.

Columns 5, 6 contain data about the total sales within the geographic boundaries of operations both in physical (“tons”, “kilograms” and so on) and in value terms (in Rubles or another currency).

Foreign economic entities do not fill in columns 7, 8, 9, 10 (sales of products (works, services) in the regions of registration of an economic entity and other regions of Russia).

In Columns 11 and 12 foreign economic entities put data about the products exported to Russia, while Russian companies give information about the products imported from Russia.

*Recommendations on Table 2: Information about the main buyers (consumers) of the products (works, services) (further on referred to as Table 2):*

Data are filled in by the main types of output products (works, services) entered in Table 1.

Columns 6 - 8 include all buyers purchasing 5% of a particular type of products (works, services) sold by an economic entity. If a buyer purchased goods under several categories, information about such purchases should be shown in Table 2 in separate lines.

Foreign economic entities fill in Columns 6-8 with regard to Russian buyers.

Column 5 indicates profit margin of products (works, services) in percentage terms. The following formula can be used to calculate profit margin:  $((\text{ex-works price} - \text{prime costs}) / \text{prime costs}) * 100\%$ .

Data about purchase amount in Columns 9-10 of Table 2, in their totality should not exceed the data about total sales in Columns 5-6 of Table 1.

*Recommendations on Table 3: Information about procurement of products (works, services), raw materials and components (further on referred to as Table 3)*

Data in Table 3 are filled in by the main types of purchased products (works, services), necessary to exercise the main types of a buyer’s activity. For example, an economic entity whose core business is coal production should put information in Table 3 about company’s procurement of products (works, services) directly related to coal extraction (for example, information about procurement of machinery and equipment used in coal production).

Table 3 shows suppliers that supply over 5% products (works, services) from the total supply of a particular type of products (works, services).

Foreign economic entities fill in Table 3 regarding products acquired from Russian suppliers. In the absence of such products, an economic entity gives the reason for non filling in the form (for example: “Company does not procure products (works, services), raw materials and components in Russia”).

Data disclosed in Tables 1-3 must meet the criterion of accuracy and can be verified by the antimonopoly authority in the course of an investigation, particularly, with use of public information sources.

For instance, having considered a notification, FAS did not allow it because data presented by a notifier in Tables 1-3 had not match financial and production indicators on the official web-site of a company – member of the same group of persons with the notifier<sup>24</sup>.

#### **6) Specifics of disclosing information about the subject matter and content of transactions, actions that fall under government control.**

According to Clause 3 Part 5 Article 32 of the Competition Law, mandatory and detailed disclosure of information that defines the subject matter and content of transactions, other actions that come under government control is necessary in a notification, and relevant documentation should be enclosed.

The requirements on the content of such information subject to disclosure are set in No.129 Order.

First, draft agreements for a transaction, as well as detailed information about the subject matter of a transaction should be disclosed (for example: an extract from the shareholder register, a securities account statement, an extract from the stock transfer journal as of the date of filing a notification).

Second, data on the purposes of a transaction and description of possible changes in the conduct of the parties’ business upon closure should be presented, particularly, in terms of a possible expansion of the notifier’s footprint and its conduct of business.

Submitting these data, a notifier can outline arguments and give evidence in favor of a transaction in question, positive effect for competition and the sectors of the economy in general, affected by a transaction, under the criteria in Part 1 Article 13 of the Competition Law (for more details see Clause 3.6 of these Guidelines).

#### **7) Disclosing information about beneficiaries of a notifier and merger targets**

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<sup>24</sup> FAS decision of 16.03.2018 No. AII/18184/18. This position was also supported by Arbitration Courts in other cases (for example, No. BAC-15590/12 FAS definition given by the Supreme Arbitration Court of the Russian Federation on No. A63-10821/2011 case of 28.11.2012)

The requirement to disclose information about the persons, in whose interest more than 5% of the notifier's shares (stake) are possessed, is set in Clause 18 Part 5 Article 32 of the Competition Law. The scope and the form of disclosed data are given in Clause 3.8 of No.129 Order.

For instance, the antimonopoly authority requires to give the following information on physical persons: in which jurisdiction they are tax residents (tax residents of the Russian Federation in accord with the taxes and fees legislation of the Russian Federation or another jurisdiction (state which)) and whether these physical persons have dual nationality (nationals of which jurisdiction (apart from the Russian Federation) these physical persons are).

If a notifier fails to present such data or submits incomplete data, the antimonopoly authority leaves a notification without consideration, guided by Part 5.1 Article 32 of the Competition Law and the established enforcement practice<sup>25</sup>.

Disclosing such information is important for analyzing whether a transaction, other action must be approved in accord with Federal Law No. 57-FZ and Federal Law No. 160-FZ "On foreign investments in the Russian Federation" of July 9, 1999.

In this case, if an acquirer / notifier has a foreign company in a chain of its controllers, it is advised to present information about beneficial owners as well as controllers and beneficiaries in the scope described in Decree of the Government of the Russian Federation of 01.12.2018 No. 1456.

If a company (or its group of persons) later complete a transaction that falls under No. 57-FZ, and in the absence of change in earlier presented data about the beneficial owners as well as controllers and beneficiaries, the company shall not be required to once again pre-disclose such data 30 days in advance of the transaction closure.

## **8) Scope of data about the market and competitors**

In spite of the absence of binding instructions in Part 5 Article 32 of the Competition Law, a notifier can submit information about the goods markets affected by an expected transaction and the composition of sellers and buyers on these markets simultaneously with the notification.

Such information can include, in particular, data about the product and geographic boundaries of the affected markets, competitors of a notifier and (or) a merger target on these markets, market size and market shares of the parties of a merger, presence / absence of market entry barriers, any specifics of the affected markets, etc. These data can be given in any format, including analytical reports drafted by a notifier in

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<sup>25</sup> See, for instance: FAS decision of July 24, 2014 No. АГ/29768/14

maximum compliance with FAS Order No. 220, opinions / findings of economic and other experts in the field of activities of a notifier and merger targets, etc.

## **2.2. The grounds and procedure for extending the period of notification consideration, the specifics of market analysis, possible subjects of regulator's enquiries to a notifier, merger parties, stakeholders, other bodies, the limits for notification consideration.**

Due to the base thresholds set in the Competition Law for asset value, revenue and the subject of transactions (for example: acquirable holding of voting shares / stake, rights or assets) or actions for reorganizing or establishing business corporations, the requirements on obtaining a pre-approval from the antimonopoly authority apply to a considerable number of such transactions or actions.

At the same time, mere grounds for pre-approval of actions or a transaction by the antimonopoly authority do not mean that such transactions or actions lead or can lead to restricting competition.

In view of Part 1 Article 33 of the Competition Law, within 30 day upon receiving a notification, the antimonopoly authority must consider it, decide on its merits or prolong the deadline for its consideration on the exhaustive list of grounds and inform a notifier in writing about the decision, specifying the reasons for it.

Therefore, drafting and filing a notification, it is advisable for a notifier, particularly, describing its subject matter, to present sufficient information to the antimonopoly authority, enabling to reach a conclusion about a potential impact of a merger upon competition. Considering a notification, the antimonopoly authority should ascertain within the statutory 30-day period if there is such a potentiality, particularly, entailing grounds for extending the period of petition consideration and carrying out fully-fledged analysis of the state of competition on the markets affected by a transaction or actions.

It should be pointed out that considering global mergers, FAS can apply confidentiality waivers. Waivers can be used if preferred by merger parties through FAS interaction with foreign competition authorities for the purposes of exchanging the necessary information and analytical data without duplicating enquiries, which enables making reasonable decisions as soon as practicable.

To achieve a unified application of this institution by the Federal Antimonopoly Service, FAS Presidium passed the Recommendations "On applying confidentiality waivers in merger consideration".<sup>26</sup>

### **A) Extending the period of notification consideration due to the need for its additional consideration**

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<sup>26</sup> Approved by Protocol No. 2 of FAS Presidium of 13.03.2019

A decision to extend the period of notification consideration on the grounds given in Clause 2 Part 2 Article 33 of the Competition Law can be made if considering a notification the antimonopoly authority exposes elements of possible competition restriction as a results of a notified transaction, other action, and additional consideration of the notification is necessity to obtain information and analyze the state of competition on the affected goods markets.

Exceptions are cases when the antimonopoly authority needs additional time to verify whether the norms of Federal Law No. 57-FZ are applicable to a merger.

A decision on extending the period for notification consideration on the above grounds gives the reasons for making it, in particular, description of possible sings of restricting competition on the markets following a merger.

Based on a decision to extend the period for notification consideration, additional information can be requested from a notifier. In this case, a decision lists the requested information, indicating the deadlines for submissions.

**B. Extending the deadline for notification consideration due to imposing obligations on a notifier, upon fulfilling which a decision is made to approve a merger.**

Clause 3 Part 2 Article 33 of the Competition Law provides for a special legal route to extend the deadline for notification consideration in order to impose obligations on a notifier or a merger target (further on referred to as preliminary conditions), upon fulfilling which the antimonopoly authority makes a decision to approve a merger.

This legal route is essential since it puts approval of a transaction or action under an exceptional condition of fulfilling the relevant structural or conduct obligations by the parties to a transaction or action, within the time limit set by the antimonopoly authority, which can be up to 9 months.

In this context, based on the criteria in Part 4 Article 33 of the Competition Law, a decision to extend the deadline for notification consideration in accord with the above grounds can be made by the antimonopoly authority, provided there is at least one of the following conditions:

- Having analyzed the state of competition on the markets affected by a transaction or action, the antimonopoly authority ascertains that closing the transaction or action would lead to restricting competition, in particular, establishing or strengthening dominance of an acquirer or a person formed as a result of exercising an action;
- Adverse consequences in the form of restricting competition are so substantial that it is impossible to complete a transaction or action for the purposes of the antimonopoly law without the parties exercising prior actions to support competition (for example: due to an increased dominance in a “horizontal merger” or creating

significant market entry barriers to a downstream retail market in case of a “vertical merger” between another supplier and a retail chain in view of a large market share of the parties);

- Setting preliminary conditions for parties is the only possible and economically feasible measure of antimonopoly control, which, under the circumstance of a particular notified transaction or action, cannot be replaced with a decision on approving them and issuing an injunction to the parties to undertake measures in order to support competition after transaction closure.

The requirements in the preliminary conditions should be reasoned, can include actions designed to support competition, and should meet the principles of relevancy to the parties’ operations on the goods markets affected by a transaction, and the subject of antimonopoly regulation, adequacy to the emerging risks of competition restrictions, reasonableness and enforceability in terms of the economic and technological possibility of the parties to execute the requirements in general and within the established deadline.

The above-noted also follows from Part 5 Article 33 of the Competition Law that sets an open list of possible pre-requisites to transaction parties designed to provide nondiscriminatory access to the infrastructure and non-tangible assets of parties as the basis of market power and dominance, particularly, about transfer of rights for relevant assets under economically sound conditions and requirements to a group of persons of the parties to a transaction.

For instance, considering a notification, FAS concluded that the proposed merger would create significant risks of restricting competition through raising new and strengthening the existing entry barriers to the agro-technology markets that integrate the markets of high-technology stock seeds, plant protection agents and digital solutions for agriculture, as well as considerable risks of an increased likelihood for the integrated company to abuse its market power on these markets and of anticompetitive agreements (joint competition-restricting actions) between the integrated company and its closest competitors that form a tight global oligopoly on these markets.

In this context, FAS decided to set preconditions that must be met before a merger could be approved. Such preconditions contained requirements to conclude an agreement with a special trustee for the purposes of providing a non-discriminatory access of Russian companies to data array, digital agronomic platforms and other infrastructure of the companies – merger parties that give them considerable market power and facilitate restricting competition on the adjacent markets<sup>27</sup>.

Considering another notification, and based on market analysis findings, FAS concluded that if a merger took place, the share of the acquirer and its group of

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<sup>27</sup> FAS decision of 15.11.2017 to extend the deadline for considering a notification from Bayer AG

persons, which already had the dominant position on the cement market within the geographic boundaries of the Siberian Federal District of the Russian Federation, would increase significantly. Therefore, a decision was made to extend the deadline for notification consideration and issue preconditions on exercising actions to reduce the market share by the acquirer's group of person: alienate the rights of control over an economic entity in this group of persons, - a direct competitor of the merger target - for the benefit of third parties<sup>28</sup>.

In light of the content of Part 5 Article 33 of the Competition Law, its list competition safeguarding conditions is not final; and apart from competition support, the vector of conditions set by the antimonopoly authority should correlate with those given on the list.

For example, if there is a need for conditions on the procedure of establishing sole or collegial management bodies of a legal entity, the antimonopoly authority ascertains whether there is a direct impact of the structure of the management bodies of the merger parties upon the state of competition. Otherwise, Courts would not allow such conditions<sup>29</sup>.

Under Part 6 Article 33 of the Competition Law, if a notifier submits information on fulfilling the preliminary conditions of a decision to extent the deadline as well as corroborating documents, the antimonopoly authority must consider these documents within 30 days and made a final decision upon the outcome of notification consideration. Since the regulatory requirements to support competition were already set to the merger parties in this case, if they are fulfilled, the antimonopoly authority makes a decision to approve the merger without issuing an injunction in accord with Part 6 Article 33 of the Competition Law.

### **2.3. The procedure and grounds for notifier's access to materials related to notification consideration.**

Under Part 2 Article 24 of the Constitution of the Russian Federation, the authorities must ensure a possibility for every person to be familiar with documents and materials directly concerning one's rights and freedoms, unless specified otherwise by the law.

For the purposes of comprehensive notification consideration and a justified decision-making on pre-approving a transaction or action, a balance should be achieved between the interests of persons intended to carry out a transaction or action and the public interests of the antimonopoly authority that exercises government control over economic concentration since such a decision ultimately concerns the rights of merger parties and can have a significant impact upon completing a transaction or action.

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<sup>28</sup> FAS decision of 28.09.2015 No. AII/54151/15

<sup>29</sup> Ruling of the Arbitration Court of the Urals District of 27.03.2014 No. Ф09-910/14 on No. A71-6444/2013 case.

Achieving this purpose is based, in particular, on granting a notifier access to the relevant materials prepared by the antimonopoly authority and obtained from third parties under the frame of considering a notification, provided the antimonopoly authority observes an obligation under Article 26 of the Competition Law to comply with the regime of legally protected secrets that can be contained in such materials and information.

Guided by Article 25, Clause 2 Part 2 Article 33 of the Competition Law, considering a notification, the antimonopoly body can enquire information, particularly, from the concerned legal entities, the authorities and local self-government bodies in order to comprehensively evaluate presence or absence of consequences in the form of restricting competition due to the planned transaction or action as well as the degree of likelihood of such consequences.

Particularly, in view of Clauses 3.33 of FAS Order No. 394 and 3.53 of FAS Order No. 342, the antimonopoly body analyses and assesses the state of competition on the goods markets affected by a planned transaction or action in order to check whether the notified transaction or action can lead to restricting competition, particularly, as a result of emerging or strengthening the dominant position of a petitioner, other persons (a group of persons).

According to Clause 1.5, Sections III, IV of FAS Order No. 220, the source information for market analysis can be data obtained from the authorities as well as consumer survey findings, for example, as part of the hypothetical monopolist test.

Therefore, information enquiries from the antimonopoly body on the circumstances of the notification under consideration as well as the obtained information can be important for the final decision. In this regard, the antimonopoly authority can supply information to a notifier about sending information enquiries, particularly, questionnaires for the purposes of market analysis (a consumer survey), including the texts of such enquiries and questionnaires as well as responses from the authorities, local self-government bodies, legal and physical persons to the enquiries of the antimonopoly authority, if the responses do not contain information that constitutes trade secrets or other legally protected secrets.

At the same time, as mentioned in Section 3.1 of No.13<sup>30</sup> Guidelines of FAS Presidium, depersonalized consumer survey findings about product and / or geographic market boundaries, other polling or opinion finding about the qualities of goods and / or the state of competition on a market cannot constitute information classified as trade secrets because it offers assessments of consumer opinions and should be available to a notifier for familiarization.

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<sup>30</sup> Clarification of the Presidium of FAS Russia "On information constituting a commercial secret in the framework of the consideration of a case on violation of the antimonopoly legislation, conducting inspections of compliance with antimonopoly legislation, exercising state control over economic concentration", approved by protocol of the FAS Presidium dated 21.02.2018 No. 2

It means also that the antimonopoly body can present for notifier's familiarization the results of an analysis of the state of competition on a relevant goods market complete as part of notification consideration, including data from an analytical report on the size of the shares of market participants, the goods within the product boundaries of the market, substitute goods as well the goods properties that exclude substitutability, the geographic boundaries of a goods market, compositions of sellers and buyers, market entry barriers, the level of economic concentration.

These data can be provided to a notifier for familiarization upon a written motion in such a way that a notifier can prepare and present oral or written Guidelines to the antimonopoly authority as well as additional materials in view of the deadline for notification consideration set in Article 33 of the Competition Law.

Part 3 Article 33 of the Competition Law gives the right to stakeholders to submit information to the antimonopoly body about an impact of a transaction, other action, submitted for approval from the antimonopoly body, upon the state of competition.

Based on the enforcement practice, such stakeholders can be persons, whose rights and interests are affected as a result of completing a merger, including economic entities - competitors of the parties to a merger, counteragents (buyers or sellers) of the merger parties.

This legal route is also designed to ensure full and comprehensive consideration of a notification by the antimonopoly authority, since stakeholders may present legal positions and evidence that can influence the decision.

Therefore, if there are written submissions from stakeholders under Part 3 Article 33 of the Competition Law, the antimonopoly authority gives a notifier a possibility to familiarize with the information from such persons about a transaction, obtained on the basis of the above norm of the law, and particularly, request additional Guidelines from the notifier on the substance of the obtained information.

If the relevant data are submitted by stakeholders as trade secrets, to ensure comprehensive consideration of a notification, the antimonopoly authority may undertake one of the following actions:

- 1) Request written confirmation that the information presented classifies as trade secrets, with evidence that protective measures are taken regarding such information in accord with Article 10 of the Trade Secrets Law, and indicate, which part of the presented data contains information that constitutes trade secrets;
- 2) Enquire additional written Guidelines on the substance, without including information that contain trade secrets;
- 3) Request consent to familiarize a notifier with the presented confidential data, while a notifier assumes relevant restrictions on compliance with the trade secret regime.

At the same time, a notifier can be familiarized with the materials related to notification consideration only upon consent of the antimonopoly authority and after collecting the necessary information by the antimonopoly authority for notification consideration and analyzing the state of competition, as well as in view of observance trade secrets and any other legally protected secrets by force of Article 26 of the Competition Law.

A notifier can apply for a possibility to look through the materials related to notification consideration as well as for being informed about the possible date of familiarizing with the materials simultaneously with filing a notification to the antimonopoly authority.

At the same time, a notifier must not abuse its rights when familiarizing with the above-mentioned notification-related materials; in particular, creating conditions that obstruct due notification consideration by the antimonopoly body within the period set under Article 33 of the Competition Law, is unacceptable.

#### **2.4. The changeover procedure from consideration under the Competition Law to consideration under the Law on foreign investments in strategic companies, the specifics of checks in accord with Federal Law No. 160-FZ.**

In accord with Clause 3.1 Part 2 Article 33 of the Competition Law, if a notified transaction, other action are subject to pre-approval in line with Federal Law No. 57-FZ, FAS extends the deadline for notification consideration till the date of making a decision on such transaction, other action according to the latter Law.

In this case, the overall period for notification consideration (30 days) is suspended and resumed on the date of making a decision under Federal Law No. 57-FZ.

After making a decision under Federal Law No. 57-FZ, the antimonopoly authority can extend the overall period for notification consideration based on Clause 2 Part 2 Article 33 of the Competition Law. An exception can be a decision to dismiss a notification under Federal Law No. 57-FZ. Clause 2 Part 2 Article 33 of the Competition Law does not provide for extending the general period to this end. At the same time, since notification consideration is postponed in this case due to an explicit reference to the Competition Law, it does not prevent the antimonopoly authority, if necessary, to perform market analysis and exercise other actions required for evaluating a possible impact of a merger upon the state of competition.

These grounds for extension also apply to the cases when, under Parts 4 and 5 Article 6 of Federal Law No. 160-FZ, mergers are subject to pre-approval in accord with the procedure outlined in Federal Law No. 57-FZ.

Article 6 of Federal Law No. 160-FZ does not give special criteria by types of activities of Russian companies, when acquiring shares, stake or rights can create a state security threat. In practice, Part 5 Article 6 of Federal Law No. 160-FZ is

applied on an exclusive, case-by-case basis, first of all, determined by the specifics and scale of operations of a Russian company.

Based on the enforcement practice, the procedure of pre-merger briefing of the Chairman of the Government Commission on a merger planned by a foreign investor in order to use Part 5 Article 6 of Federal Law No. 160-FZ can apply to transactions of foreign investors with regard to Russian companies: essential for the national economy (involved in large national projects and (or) pivotal town enterprises, and (or) have the dominant position on a particular goods markets); the only Russian suppliers (producers) of products on a goods markets when there are other but foreign suppliers; manufacturers of specialized civilian products that can be used for military purposes; of strategic importance for national defence and state security, when a foreign investors acquires 50% and less participating interest in such a company.

Therefore, from the date of filing a notification to seeking approval of a transaction, other action under the Competition Law, FAS verifies the grounds for considering a notification under Federal Law No. 57-FZ and Parts 4, 5 Article 6 of Federal Law No. 160-FZ in accord with the procedure outlined in Federal Law No. 57-FZ:

- 1) A merger target is involved in the types of activity that are of strategic importance for national defence and state security, under Article 6 of Federal Law No. 160-FZ;
- 2) The planned transaction (transactions), other actions will be performed by a foreign investor, recognized as such on the basis of Part 2 Article 3 of Federal Law No. 57-FZ;
- 3) The planned transaction (transactions) can be considered in the context of applying Part 5 Article 6 of Federal Law No. 160-FZ for the purposes of protecting national defence and state security as well as economic interests of the Russian Federation.

For the Chairman of the Government Commission to make a decision on the need (absence of the need) to pre-approve transactions of foreign investors with regard of Russian economic entities, FAS within 5 working days from the date when FAS learned about a transaction (particularly, on the basis of reasoned proposals from federal executive bodies or an organization exercising the functions for administering the public policy and regulation in a designated field)<sup>31</sup>:

- Notifies a foreign investor that it should suspend a transaction until receiving information from the authorized body about a decision that there is no need to inform the Chairman of the Government Commission about the transaction or a

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<sup>31</sup> Decree of the Russian Government No. 510 “On the Government Commission for control over foreign investments in the Russian Federation” of 06.07.2008

decision is made by the Chairman of the Government Commission that there is no need to pre-approve a transaction;

- Sends enquiries to the federal executive body or an organization that performs the function for administering the public policy and regulation in the field of activities of a Russian company – the target of a transaction, federal executive bodies authorized to exercise license control over operations of this economic entity subject to licensing (if the economic entity is involved in a licensed activity), as well as other federal executive bodies to give their proposals about the need to inform the Chairman of the Government Commission about a transaction or absence of it.

FAS gives information to the Chairman of the Government Commission about a planned transaction if there are relevant proposals from federal executive bodies.

If the Chairman of the Government Commission makes a decision that a pre-approval of a transaction is required, FAS informs a foreign investor within 3 working days that a transaction is subject to pre-approval from the Government Commission.

Completing a transaction without an approval from the Government Commission entails legal consequences under Part 2 Article 15 of Federal Law No. 57-FZ<sup>32</sup>.

## **2.5. Selected issues of applying ex-post notification control.**

Transactions, other actions carried out by persons – members of the same group of persons on the grounds given in Clauses 2-9 Part 1 Article 9 of the Competition Law, can take place without pre-approval from the antimonopoly authority but require post-notification, if such transactions / other actions are exercised observing the conditions set in Part 1 Article 31 of the Competition Law.

Therefore, to close an intra-group transaction, other action under ex-post notification without FAS pre-approval, it is necessary that any person – a group member presents a list of its members to the antimonopoly authority.

A list of persons – members of a group at the time of exercising transactions, other actions should not change compared to the list of such persons submitted to the antimonopoly authority. If the antimonopoly body ascertains that a list of a group of persons has changed from the time of its submission till the time of closing a merger, such a change can form the grounds for holding the person that had to file a notification administratively liable under Part 3 Article 19.8 of the Russian Code of Administrative Offences.

For example, examining No. A40-133090/10-146-830 case, Courts established that in the period from disclosing a group of persons till the date of exercising a

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<sup>32</sup> See Ruling of the Supreme Court of the Russian Federation of 13.12.2019 No. 305-ЭС19-22320 on No.A40-72889/2018 case.

transaction, a new business entity had been registered in the group of the acquirer's persons and that entity had not been disclosed in list of the group of persons submitted to FAS. Courts recognized this circumstance as a breach of ex-post notification conditions, outlined in Article 31 of the Competition Law, which meant that the acquirer had an obligation to pre-approve the transaction. The buyer was held administratively liable, which meant an obligation of the buyer to obtain a pre-approval for the transaction. The acquirer was held administratively liable under Part 3 Article 19.8 of the Russian Code of Administrative Offences<sup>33</sup>.

The list of a group of persons should not change - not only before exercising a transaction, for which a notification is submitted, but also as a result of exercising a transaction.

Changing the grounds, on which persons are considered members of the same group, the name and address of a legal entity, an individual taxpayer number, passport data, a number of votes attached to voting shares (stake in the registered capital), non-related to changing the composition of the group of persons, do not constitute a change in a list of persons – members of the same group.

A planned transaction, other action must take place no earlier than 1 month after such a submission.

A list of a group of persons should contain data about all persons – members of this group on the grounds specified in Clauses 1-9 Part 1 Article 9 of the Competition Law, which is confirmed by judicial practice. For example, Courts pointed out that to apply the ex-post procedure, all persons interrelated, both directly and indirectly under the grounds given in Article 9 of the Competition Law, are subject to disclosure. In accord with Clause 8 Part 1 Article 9 of the Competition Law, persons, each of whom is a member of the group with the same person under any of the grounds specified in Clauses 1 - 7 Part 1 Article 9 of the Competition Law, as well as other persons - members of the same group with each of such persons on any of the grounds listed in Clauses 1 - 7 Part 1 Article 9 of the Competition Law are recognized as a group of persons<sup>34</sup>.

The restriction on the scope of group disclosure, specified in Clauses 16 and 17 Part 5 Article 32 of the Competition Law, does not apply to the procedure for disclosing a group of persons.

For ex-post notification, all persons involved in a transaction, other action (participants of a joint operations agreement, a seller and a purchaser of shares,

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<sup>33</sup> Ruling of the Federal Arbitration Court of the Moscow District on 12.07.2011 No. KA-A40/7050-11 on No.A40-133090/10-146-830 case.

<sup>34</sup> Ruling of the Federal Arbitration Court of the Moscow District of 17.02.2010 No. KA-A40/239-10 on No. A40-87671/09-17-610 case.

stake, property, a merger or acquisition participant, etc.), must be members of the same group at the time of submitting a relevant list of a group of persons to FAS.

Ex-post notification does not apply if only an acquirer and a merger target are members of the same group of persons and a seller is not a member of this group.

A notification should be filed to the antimonopoly authority within 45 days from the date of a transaction, other action by any person that was interested in a transaction, other action (stakeholder) mentioned in Articles 28 and 29 of the Competition Law, or a person that was formed as a result of the actions outlined in Article 27 of the Competition Law.

Stakeholders can include, for instance, participants of a joint operations agreement, persons acquiring shares, stake, rights or property, or a merger target.

As a general rule, intra-group transactions can create a threat of restricting competition only in exceptional circumstances. Typically, members of the same group of persons are able to coordinate their actions on the market and act as a “single economic entity” and pursue common economic interests even prior to a transaction.

Nevertheless, transactions within the same group of persons can restrict competition in exceptional circumstances. For example, if as a result of a transaction, other action an acquirer gains control over its competitor, while such control was absent prior to a transaction.

In these circumstances, the antimonopoly authority can, guided by Part 10 Article 33 of the Competition Law, issue a binding injunction to the parties of an intra-group action under Clause 2 Part 1 Article 23 of the Competition Law.

If the antimonopoly authority ascertains that a transaction reported in a notification leads to competition restriction and any other injunction made in accord with Clause 2 Part 1 Article 23 of the Competition Law cannot eliminate an adverse effect of a transaction, the antimonopoly authority can order the acquirer to alienate the acquired shares, stake, assets or rights with regard to a merger target.

### **SECTION III. GROUNDS TO ALLOW MERGERS AND THEIR PARTICULAR CONDITIONS**

Due to Part 1 Article 13 and Clauses 1, 5 Part 2 Article 32 of the Competition Law, considering a notification, the antimonopoly authority gives legal evaluation to two main circumstances:

- Whether the notified actions or transactions will lead to restricting competition on the affected markets, particularly establishing or increasing dominance of the participants of an action or a transaction in the longer term;
- Whether the petitioned actions or a transaction can be allowed based on the evidence presented by a notifier in accord with the criteria listed in Part 1 Article 13 of the Competition Law, i.e., in terms of developing positive effects for competition and the affected sectors of the economy in general due to exercising such actions or a transactions compared with possible anticompetitive effects.

In this context, considering a petition and ascertaining the above circumstances, the antimonopoly authority can take into account, in particular, the following:

- Expediency of ex-post as well as ex-ante analysis of the market effected by an action or a transaction;
- The differences between horizontal, vertical and conglomerate mergers, since analysis of each type of mergers has its own specifics, and such mergers can have different effects upon competition;
- Use the obtained data about market shares as a starting point for analysis rather than the only source data for decision-making;
- Possibility to compare positive and negative consequences of a merger to make a well-balanced decision based on the totality of the analyzed factors;
- A rationale for using a broad range of information sources that can be requested from the merger parties as well as third parties (competitors, consumers, and so on).

### **3.1. Analyzing possible anticompetitive consequences of mergers**

Based on Part 2 Article 33 of the Competition Law, adverse consequences for competition in the form of establishing or strengthening the dominant position of its participants (acquirer and its group of persons, an integrated company as a result of organization, or a newly formed legal entity), can constitute the grounds to refuse a merger or make a decision to approve it with issuing an injunction.

The antimonopoly bodies have developed general approaches to evaluating a merger impact upon competition. For instance:

- A notification can be approved if an aggregate market share is less than 35%;
- A notification can be approved with simultaneously issuing an injunction if an aggregate market share is from 35 to 50%;
- A notification can be rejected if an aggregate market share exceeds 50%;
- A notification can be approved with simultaneously issuing an injunction if an aggregate market share exceeds 50% provided that the notifier has

presented evidence that a merger can be allowed under Part 1 Article 13 of the Competition Law.

It should be noted, however, that market share (a quantitative criterion) is not a pivotal indicator, but rather just one of the indicators for analyzing the possession of market power by the merger parties as well as a threat of developing it or restricting competition; therefore, apart from defining market shares, the antimonopoly authority carries out a complete analysis of the state of competition on the relevant markets in accord with the procedure outlined in FAS Order No. 220.

As follows from Article 5 of the Competition Law, performing government control over economic concentration and for the purposes of establishing the dominant position of an economic entity, the following should be analyzed:

- 1) The size of a market share in terms of exceeding the relevant thresholds for individual and collective dominance (quantitative criteria) at the time of making a transaction and an aggregate market share of an acquirer and a merger target after closing a merger, economic concentration growth rates as indicated with the Herfindahl-Hirschman Index (HHI);
- 2) The ratio of the market shares of the parties to a merger to market shares of other market participants, a degree of changing market shares in the period in question, and particularly, over the long term in view of market entry barriers and possibility to overcome the exposed entry barriers as well as other performance specifics of the analyzed market in terms of its competitive environment;
- 3) Possibility to acquire market power as an outcome of a transaction, i.e., possibility for an acquirer, a newly formed company to unilaterally gain market power as merger outcome, i.e., determine common conditions of goods circulation on the analyzed market.

Exercising the government control over economic concentration, it can be found that in spite of exceeding the threshold market share, an economic entity does not have the dominant position on the market, and a merger does not lead to restricting competition. The antimonopoly body analyses these factors on a case-by-case basis, in view of the specifics of each petitioned transaction (action), keeping in mind the specifics of a goods markets affected by the analyzed transaction (action).

For example, FAS approved a transaction for acquiring fixed production assets (production capacity) of a competitor since it would not restrict competition<sup>35</sup>.

In the course of its analysis, FAS took into account that the acquirer is one of the largest companies on several markets, including copy paper and offset paper,

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<sup>35</sup> FAS decision of 20.01.2020 No. II3/ II3/2926/20

cardboard paper, paper products for personal care, where it partly intercrosses with the merger target. At the same time, FAS considered the presence of other large producers on the market affected by the merger, an insignificant market share of the merger target, which, in their totality were not leading to an increase of economic concentration and a growth of the acquirer's market power.

For the purposes of establishing whether a horizontal merger restricts competition on the market, the antimonopoly authority analyses an ability of the merger parties to unilaterally (i.e., without accounting for the competitors' actions) determine the general conditions of goods circulation on an affected market, particularly, in case of their integration as a result of a merger, i.e., if the parties possess or will obtain market power as a result of a merger, or if a merger increases the market power of a merged company.

For instance, based on ex-ante analysis of the market of drill-pipes as part of a petition consideration, a decision was made to refuse a merger due to the following circumstances in their totality:

- The group of persons of the notifier has the dominant position on the market of drill-pipes, being the largest manufacturer;

- In course of the merger, all drill-pipe manufacturing capacities would be transferred to the merger target from a company – member of the same group of persons. The manufacturing capacities were enhanced significantly in 2016 - 2018, which, coupled with the acquirer's capacities, would lead to the dominant position of the merged company on the analyzed market and, in view of a significant growth of economic concentration, restrict competition<sup>36</sup>.

If a merger is “vertical”, than the subject of analysis can be presence or absence of market power in the hands of an acquirer and a merger target on the affected markets of upstream and subsequent operations and, as a consequence, possibility of anticompetitive consequences of establishing a vertically-integrated group of persons.

It, in particular, stems from Sub-Clause “d” of FAS Order No. 220, which in general considers presence (creating) vertically-integrated economic entities as a market entry barrier if their presence or creation entails advantages for the participants of vertical integration compared to other players on the affected markets.

In particular, if one of the parties has the dominant position on a highly-concentrated upstream market, then acquiring the rights by this party for an economic entity – a consumer of the goods as a result of a merger can in the future restrict competition on the relevant downstream market, particularly, create discriminatory conditions for other consumers.

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<sup>36</sup> FAS decision of 28.08.2018 No. AII/69944/18

For example, having considered a transaction, FAS concluded that it would lead to operation of a vertically-integrated company on the market in the person of an acquirer as a primary aluminum producer that has the dominant position on the upstream market, and a merger target as a manufacturer of aluminum wheel disks, operating on a competitive downstream market. In this context, the antimonopoly authority found that the merger could restrict competition on the downstream market, which formed the grounds to set the requirements, in particular, to enter into contracts with consumers for supplying primary aluminum at non-discriminatory conditions<sup>37</sup>.

Similar anticompetitive consequences can develop in case of merging two vertically-integrated groups of persons, which in general constitutes a horizontal merger.

For instance, approving a deal of an oil company for purchasing 37.52% voting shares of another oil company, FAS exposed a collective dominance of the notifier and other oil companies on the wholesale market of motor gasoline, diesel fuel and aviation kerosene. FAS also found that the acquirer and the merger target intercross on multiple retail markets of motor gasoline and diesel fuel within the boundaries of the relevant constituent territories of the Russian Federation, in the part of which dominance will develop following the merger, while in the other part the markets will remain less concentrated.

Ascertaining these circumstances enables FAS to reach a conclusion that if a merger takes place, an anticompetitive effect can develop on multiple retail markets not only due to an increased economic concentration but also because of a possibility of the vertically-integrated group to create discriminatory conditions for independent players on such retail markets. Thus, FAS issued not only a structural injunction in the form of alienating filling stations in order to decrease the market share on these retail markets, but also to support non-discriminatory conditions for interaction with independent market players<sup>38</sup>.

It should be kept in mind that in “vertical” mergers, elements of restricting competition can develop, in particular, on an upstream competitive market due to the dominance and market power of a merger target that operates on the downstream market and acquires goods to produce own products or resell them.

In this regard, the antimonopoly authority can analyze whether such a merger can create discriminatory conditions for other economic entities operating in the upstream market, make a merger target to reduce or stop buying goods from them, particularly, in terms of a possibility of an acquirer in the merger to fully or considerably satisfy the needs of a merger target in these products.

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<sup>37</sup> FAS decision of 07.03.2018 No. АИ/15420/18, FAS injunction of 07.03.2018 No. АИ/15432/18

<sup>38</sup> FAS decision of 25.11.2016 No. ИА/82240/16, FAS injunction of 25.11.2016 No. ИА/82239/16

For instance, considering a transaction between economic entities – members of the group of persons of mobile network operators for acquiring shares of an electronics retailer, FAS concluded that there was a risk of creating discriminatory conditions for retailer’s counteragents, that were not members of the group of persons with the purchasers, in interaction with the merger target due to a considerable share of the latter company on the retail markets. Thus, simultaneously with a decision to approve the merger, FAS issued conduct injunctions to the acquirers and the merger target<sup>39</sup>.

A similar approach to analyzing the threats of restricting competition can be used by the antimonopoly authority to consider notifications on conglomerate mergers, when an acquirer and a merger target are not economic entities – competitors, but operate on the markets with similar consumers, and the goods (services) of such companies can be substitutes. In this regard, possible signs of restricting competition can develop, in particular, if following a merger its participants will apply a model of the so-called “tied” sale of goods or services and one of the companies has significant market power on a merger-affected market. The described circumstances must be analyzed by the antimonopoly authority in the course of considering a relevant notification.

For example, FAS approved a transaction on acquiring 100% voting shares of an insurance company by a bank. Making this decision, FAS took into account, in particular, the fact that acquiring all issued voting shares of the insurance company by the bank would not create conditions for monopolistic activities and entail competition restrictions on the markets of investment banking and insurance services in Moscow, the Moscow region and the Russian Federation in general<sup>40</sup>.

### **3.2. Evaluating a possibility of consumers to switch to alternative suppliers and the buyers’ market power**

As stated above, to analyze possible anticompetitive effects, market shares of merger parties can be taken into account as the core indicator, but cannot be an exclusive factor predetermining conclusions that a merger will increase the level of economic concentration significantly and restrict competition.

Considering a notification and analyzing the market affected by the notified actions or a transaction and in view of the specifics of such markets, and in order to expose elements of restricting competition and developing or strengthening the dominance position of the parties, the antimonopoly authority, in particular, can evaluate both the fact and a possibility and a degree of consumers switching to alternative suppliers at the current stage and further on, following a merger. Such evaluation is

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<sup>39</sup> FAS decision of 15.11.2012 No. AK/37488/12

<sup>40</sup> The decision on a petition filed by “VTB Bank” of 13.05.2011

taking into account the specifics of a merger, particularly, its “horizontal” or “vertical” nature.

For instance, based on Clause 4.6 of No.220 Order and the Guidelines of FAS Presidium on aspects of its application<sup>41</sup> the “hypothetical monopolist test” enables to find out whether small but significant for buyers and non-transitory increase in price (for example, for goods A) can encourage buyers to get other goods instead (goods B). If a small increase in price decreases the demand for goods A to such an extent through switching consumers to goods B that makes a price increase for goods A unprofitable, then goods A and B form the same goods market.

If such an increase of prices is only short-term, and then the price goes down, consumers with a considerable degree of likelihood may not switch to other goods. Therefore, one of the test conditions is non-transient increase of price; typically, a 1-year period is considered. There are markets, however, that operate in a short-run (for instance, seasonal markets), so the period of a hypothetical increase of prices on such markets can be shorter.

In the “hypothetical monopolist test”, consumer survey is carried out to find an answer to the following question: "Which goods, in what volume and from what alternative supplier would they prefer to replace predefined goods with if the price for them increases non-transiently (for longer than 1 year) by 5 - 10 %, while the prices for other goods are held constant?".

Thus, if we assume that applying the “hypothetical monopolist test”, the price for the purchaser’s good increases in particular parameters, then a survey can confirm, to what extent the goods consumers are ready to switch to substitute goods from alternative suppliers, including the products of a merger target.

If survey findings show that in case of a price increase by an acquirer in a “horizontal merger” the majority of consumers can switch only or to a considerable extent to the products of a merger target and do not contemplate the economic expediency of switching to products from other suppliers, such survey outcome can indicate a high probability of anticompetitive effects caused by a merger due to a potential increase of the prices by the parties to a merger.

If, however, consumers consider products from other suppliers to a greater degree or equally substitutes with the products of an acquirer purchaser or a merger target, the likelihood of anticompetitive effects from a merger can be considerably less.

Similarly, this approach can be used to evaluate signs of restricting competition and the degree of market power of the parties in an analysis of “vertical” or conglomerate mergers.

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<sup>41</sup> FAS Guidelines No. 17 “On particular issues of analyzing the state of competition” approved by Protocol No. 3 of FAS Presidium of 10.04.2019”.

To evaluate whether a transaction can have an anticompetitive effect, the antimonopoly authority can also take into account and analyze the specifics of goods consumption on the market in question in terms of, whether consumers have the market power enabling them to exercise significant influence upon the conditions of goods circulation from the side of buyers or monopsony. Presence of buyers' market power can create preconditions for decreasing an anticompetitive effect from a horizontal merger between the goods sellers.

### **3.3. The significance of the level of market entry barriers.**

To evaluate whether a transaction (action) can have an adverse impact upon the state of competition, the antimonopoly authority can analyze entry barriers to the market in question as well as to what extent such entry barriers can be surmountable, in line with the rules in Section VIII of No.220 Order in view of the specifics of a market affected by a transaction (action).

It should be noted, in particular, that market entry barriers can be analyzed not only in terms of possibility for potential sellers, including those operating on the adjacent markets, to become participants of the market in question but also in terms of a possibility of the economic entities operating on this market to expand their production capacity or sales of the goods (Clause 8.3 of No.220 Order).

The antimonopoly authority can give such an assessment in the course of a questionnaire-survey of the actual and potential sellers or industry specialists (experts).

As pointed out in the Guidelines of FAS Presidium, establishing that barriers are surmountable since the costs of overcoming the barriers are justified by the advantages gained, can indicate absence of the dominant position of an economic entity, event if it controls a big market share<sup>42</sup>.

### **3.4. Legal grounds and the procedure for allowing mergers under Article 13 of the Competition Law.**

The antimonopoly authority evaluates whether a notified transaction (action) can be allowed under Article 13 of the Competition Law if a notifier has presented relevant evidence of allowability.

Article 13 of the Competition Law sets general rules for allowing, particularly, transactions and other actions provided for in Articles 27 - 29 of the Competition Law, as well as agreements on joint operations concluded between economic entities – competitors.

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<sup>42</sup> See Clause10 of FAS Guidelines No. 17 “On particular issues of analyzing the state of competition”, approved by Protocol No. 3 of FAS Presidium of 10.04.2019”.

It means that even if notified transaction or actions lead to competition restriction, and, in particular, to establishing or strengthening market dominance, such actions or transactions can be allowed when all conditions set in Part 1 Article 13 of the Competition Law are available and if:

- Positive effects are a direct consequence of a merger and cannot be achieved otherwise, causing less adverse consequences than a merger in question;
- There are clear cause-and-effect mechanisms for transferring commensurable economic benefits from a merger to consumers;
- Positive effects can be estimated with a high level of accuracy, and there are no doubts that these effects will be manifested in the foreseeable future.
- Positive effects are significant and can compensate to a considerable degree the adverse effects of a merger in the part of weakening competition.

In particular, positive effects from horizontal actions or a transaction that can bring commensurable advantages for consumers and merger parties can be reduction of marginal or fixed costs of production by a merged company, which can lead to decreased prices, optimized production, expanded product assortment, improvement of product quality due to acquirer's investments in the infrastructure of a merger target and employment of new technologies.

For instance, considering a notification on acquiring the rights to determine the conditions of conduct of business of a Russian shareholding company, FAS concluded that in case of completing the merger, the share of the acquirer's group of persons on the markets of copper wire rods and profiles, copper wire as well as copper pipes and tubes would be over 35%, on the markets of copper foil no thicker than 0.15 mm (excluding the frame) and copper plates, sheets and bars (or strips and bands), thicker than 0.15 mm – over 50%, which can restrict competition on the relevant markets. At the same time, FAS took into account that the production capacities of the merger target were technologically obsolete and required prompt modernization. Absence of modern equipment prevented a merger target from being competitive on the domestic and foreign markets, as evidenced by a consistent decline of production and sales in 2007 - 2012. The investments to the production capacities of the merger target, announced by the acquirer, including reengineering of the production site with complete replacement of technological equipment served as the grounds for allowing the merger and approving the notification with issuing an injunction<sup>43</sup>.

In another case, FAS approved acquiring 92.73% voting shares of a Russian zinc plant, although the merger could restrict competition. The reason for approving the merger was the evidence presented by the notifier that the merger can be allowed

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<sup>43</sup> FAS decision of 19.03.2013 No. AI/10389/13

under Part 1 Article 13 of the Competition Law, particularly, in view of the obligations undertaken by the acquirer to finance development of zinc enterprises in 2017 - 2021.<sup>44</sup>

It was established, in particular, that the expected merger outcomes include improved production, increased competitiveness of the products of Russian producers of zinc and zinc-aluminum alloys on the domestic and world markets as well as benefits to buyers of zinc and zinc-aluminum alloys commensurable with the advantages gained by producers due to the enhanced quality and price improvement.

Considering another notification, FAS found that a merger could form a dominant position of the acquirer' group of persons on the market of portal systems as a result of acquiring the rights by the notifier that enable to determine the conditions of conduct of business with regard to the group of companies. In view of the evidence submitted by the notifier, however, that the merger can be allowed under Part 1 Article 13 of the Competition Law and taking into account the undertaken obligations to produce portal systems on the production-and-assembly capacities of the acquirable group of companies, including components and automatic equipment under the trade marks / service marks of the acquirable group, FAS allowed the merger pursuant to Article 13 of the Competition Law, approving it with a simultaneous injunction<sup>45</sup>.

Among possible positive effects of “vertical” mergers, one can highlight, for example, reduction of the so-called “double margin” effect when after a merger a vertically-integrated company can optimize its costs and, as a consequence, the price policy, stimulate production of finished products and improve its quality because a raw materials supplier and a company that uses these raw materials for producing products at the next stage are within the same group, which as a consequence, creates a positive effect on the downstream markets for consumers proportionate to the benefits for the parties to a merger.

For example, considering a notification, FAS concluded that as a result of a merger, a vertically-integrated company would operate on the market in the person of a acquirer as a manufacturer of primary aluminum and a merger target as a manufacturer of aluminum wheel disks. Making a decision to approve the merger, FAS arrived to a conclusion that the merger can be allowed in view of the planned acquirer's investments, designed to increase competitiveness of domestic products, particularly, establishing a new production line, increasing the volume of production, its modernization, launching new technologies for products thermal treatment<sup>46</sup>.

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<sup>44</sup> FAS decision of 30.09.2016 No. АИ/67399/16

<sup>45</sup> FAS decision of 25.01.2018 No.АД/4617/18, FAS injunction of 25.01.2018 No. АД/4619/18

<sup>46</sup> FAS decision of 07.03.2018 No. АИ/15420/18

These approaches should be employed, taking into attention the specifics of the sectoral legislation for particular markets. Decisions on particular actions or transactions are made by the antimonopoly authority on a case-by-case basis in view of all circumstances.

### **3.5. Grounds for allowing non-compete agreements.**

Analysis of the accumulated enforcement practice shows that that in the course of approving mergers it can be found that parties fix non-compete conditions.

In this regard, similarly to the cases of evaluating whether joint operations agreements between competitors in Russia can be allowed, the antimonopoly body can assess the allowability criteria for agreements on acquiring shares, stake, rights and assets.

Typically, in accord with the conditions of agreements on acquiring shares, stake, rights and assets, the seller party forgoes certain independent actions on the market, particularly, undertakes to refrain from exercising activities that compete with the activities of an alienated economic entity / business-segment. This measure is an additional guarantee for the buyer in terms of successfully launching and developing the acquired business and a possibility to integrate and recoup the investments.

Regarding possible adverse consequences for the state of competition on the market, the fact of competitive relations between the parties after a merger is completed, is excluded in such cases for acquiring shares, stake, rights and assets. It happens because, typically, a certain buyer's business-segment is alienated that the buyer does not wish to develop on their own any longer. The expression of will by the seller to transfer a particular business-segment to a buyer and in return get an agreed payment shows an independent and legitimate desire to stop doing business on the market in question. Thus, after completing a merger, the seller will not be a buyer's competitor.

These circumstances clearly indicate that the public danger of refusing to compete under the frame of the agreements for acquiring shares, stake, rights, assets is considerably lower than, for example, joint operations agreements between economic entities – competitors.

Analyzing particular non-compete terms in agreements on purchasing shares, stake, rights and assets, the antimonopoly authority, first of all, ascertains presence or absence of a possibility to restrict competition by the parties to such an agreement.

For instance, it is possible to recognize that non-compete provisions in agreements on purchasing shares, stake, rights, assets conform to the norms of the antimonopoly law if the following conditions are met in their totality:

- 1) The terms of an agreement should serve the purpose of an agreement for purchase/sale of shares, stake, rights, or assets.

Provisions on an agreement that provide for a seller's refusal to compete should serve the purpose and nature of the agreement in question, namely: they should be related to the activities of the acquirable economic entity (business-segment) and have the purpose to enable its efficient and profitable performance, safekeeping and integrity and efficient investment of resources, which a buyer plans to make in the course of developing it as well as return on the buyer's investments in the target.

- 2) The terms of an agreement do not apply to other goods markets apart from those, where the transferable (acquirable) economic entity / alienable business-segment operates.

If an agreement sets restrictions on the terms of goods circulation that apply to other goods markets than the market, where the acquirable economic entity (business-segment) operates, and the adjacent markets, such restrictions cannot be recognized as complying with the norms of the antimonopoly legislation.

- 3) An agreement provides for fixing a validity period of a non-compete clause, necessary for a buyer to return on its investments and gain profit.

In the short-run, non-compete provisions for a buyer can be justified by the need to ensure return on the investments by a buyer and to gain the target profit. In the long-run, however, competition-restricting impact cannot be justified by this factor.

Similarly to joint operations agreements, a validity period of non-compete clauses should not exceed the period required to ensure return on investments, i.e., the pay-back period on an investment project (typically, around 5 years) and the profit-gaining period (within 1-2 years after the pay-back on an investment project).

- 4) The terms of an agreement should not provide for exchanging information that can facilitate cartels or competition-restricting concerted actions or other anticompetitive agreements.

Unlike agreements on joint operations between economic entities – competitors, typically the fact of competitive relations and interaction between parties after a transaction are excluded in such transactions for acquiring shares, stock, rights and assets.

Nevertheless, all no-compete clauses should be evaluated on a case-by-case basis.

There is no need to seek approval for a non-compete clause in transactions for acquiring shares, stock, rights, or assets separately from a merger that must be approved by FAS, since it is part of a transaction filed for an approval. At the same time, if a transaction is not subject to approval under Articles 27-29 of the Competition Law and it is not obvious that a non-compete clause in an agreement on acquiring shares, stock, rights or assets is allowable, a buyer can exercise its right to submit this clause to FAS voluntarily in accord with Article 35 of the Competition Law.

## **SECTION IV. DECISION-MAKING BASED ON NOTIFICATION CONSIDERATION AND ISSUING INJUNCTIONS**

### **4.1. Grounds to approve without an injunction or an unconditional refusal to approve a transaction; grounds to approve a transaction with an injunction**

Setting special thresholds in the Competition Law in the form of aggregate assets value / revenue of the groups of persons of the parties to a transaction, as well as thresholds in the form of the subject matter of a transaction gives objective and measurable criteria, entailing an obligation to pre-approve a transaction with the antimonopoly authority.

At the same time, commencement of an obligation of the persons that handle a transaction to obtain an approval from the antimonopoly authority is not a presumption that such a transaction can increase a level of economic concentration and, as a consequence, have an adverse impact upon the state of competition on the affected goods markets.

In the course of considering a notification, the antimonopoly authority should evaluate a possible impact of an action for establishing or reorganizing an economic entity, or a relevant transaction upon the state of competition based on the documents and data submitted by a notifier as well as the information available to the antimonopoly authority or obtained in the course of conducting analysis.

As stated in Section II of the given Guidelines, if a notified action or a transaction evidently does not cause an increased economic concentration, namely, cannot lead to restricting competition on the affected goods markets, such actions or transactions can be approved by the antimonopoly body without issuing an injunction (an unconditional approval).

For instance, there may be the following circumstances for making a decision to approve an action or a transaction without an injunction:

- An acquirer and a merger target or economic entities – members of the same groups of persons with them do not operate on the same or adjacent goods markets

in the sense that a vertically-integrated group will not be formed as a result of a merger;

- An acquirer and a merger target or economic entities – members of the same groups of persons with them operate on the same goods markets, but the aggregate share of such economic entities will not lead to establishing dominance, particularly, collective dominance under Article 5 of the Competition Law;

- A transaction has a “vertical” nature, i.e., an acquirer and a merger target operate on the goods markets, where the acquirer acts as a seller and the merger target as an actual or potential buyer, provided that the parties’ share on each of these goods markets does not exceed 20% (or other value if it is provided for by the law for particular types of activities);

- At the time of completing a transaction for acquiring over 25% voting shares (1/3 stake) of an economic entity, the acquirer already possessed the right to determine the conditions of conduct of business for such an economic entity or give binding directives, particularly, due to a transaction approved earlier by the antimonopoly authority, regardless of the position of the acquirer and the acquirable economic entity on the affected goods markets.

It should be pointed out that a decision on approving a transaction without an injunction can be made in other cases, when, upon considering a notification, it is established that the relevant actions or a transaction cannot result in restricting competition.

In view of the specifics of particular goods markets, the antimonopoly authority can also approve a transaction (other action) and issue an injunction or refuse to approve if there are the above-described preconditions. In particular, such a decision can be made when special requirements of an industry-based legislation are applicable to a transaction, for example, a prohibition to combine several types of activities in the electric power industry. In this case, the motives and the rationale of the relevant conclusions of the antimonopoly authority should be given in the decision.

For instance, considering a notification FAS found that an acquirer’s group of persons included generating companies that exercised competitive types of activities within pricing zones of the wholesale market (generating and buying-and-selling electric power). At the same time, an acquirable company was a holder of natural monopoly and was included in the Register of the holders of natural monopolies in the fuel-and-energy complex, Section I “Services for electric power and (or) heat energy transmission”. In this context, making a decision to approve the transaction, the antimonopoly authority issued an injunction to observe Article 6 of Federal Law No. 36-FZ of 26.03.2003 for a year from the date of closing a transaction that prohibits combining activities for electric power transmission and operative-dispatch management in the electric power industry with activities for generating

and buying-and-selling electric power within the boundaries of the same pricing zone of the wholesale market<sup>47</sup>.

#### **4.2. Submission of reasoned proposals on voluntary obligations by a notifier to the antimonopoly authority as a condition for approving a notified action or transaction**

To give comprehensive consideration to a notification, observe the rights and legitimate interests of the parties to a transaction and undertake antimonopoly measures adequately to the level of economic concentration, as well as in case of exposing the risks associated with possible adverse consequences of a transaction or an action for competition, persons participating in the notified actions or a transaction can submit proposals to the antimonopoly authority on their obligations to support competition. Such obligations can include both conduct conditions (providing access to infrastructure facilities, network facilities, information, technologies on a non-discriminatory basis, measures to decrease market entry barriers, devising commercial-and-sales policy, etc.) as well as structural changes of the parties' business (sell some assets, etc.)

Such proposals can be submitted in writing as part of a notification or separately, and with due advance pending a decision of the antimonopoly authority based on the outcome of a notification consideration.

In particular, such proposals can be presented as part of a notification when filing it, as well as when the antimonopoly authority makes a decision on extending the period for notification consideration if potential risks of restricting competition are revealed.

The proposals should be specific and include descriptions of the obligations that the parties are ready to undertake in order to support competition, and can also contain descriptions of the means for securing and executing these obligations, including the necessary deadlines, Guidelines as to how efficiently the proposed obligation, in case of their execution, will enable to avoid negative consequences for competition due to closing a transaction.

The antimonopoly body considers the received proposals and can take account of them in decision-making and issuing an injunction; particularly, they can form the grounds for allowing transactions, while obligations can be implemented in the content of an injunction<sup>48</sup>.

At the same time, considering the proposals, the antimonopoly body can send enquiries to the parties requesting additional Guidelines on the substance of such

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<sup>47</sup> FAS decision and injunction of 13.02.2018 No. BK/9228/18

<sup>48</sup> See, for example, FAS decision of 07.03.2018 No. AI/15420/18

proposals. Thus, proposals on obligations to support competition should be submitted with due advance, in such a way that the antimonopoly authority has sufficient time to analyze them (for instance, immediately after a decision to extend the period for considering a notification under Clause 2 Part 2 Article 33 of the Competition Law).

### **4.3. Making a decision by the antimonopoly authority to approve an action or a transaction with issuing an injunction**

Guided by Clause 4 Part 2 Article 33 of the Competition Law, the antimonopoly authority can make a decision to approve an action or a transaction and issue an injunction in order to support competition.

An injunction issued by the antimonopoly authority upon the results of exercising governmental control over economic concentration outlines the binding conditions set by the antimonopoly authority, without fulfilling which a transaction, other action cannot be recognized as approved by the antimonopoly authority.

A decision to approve a transaction and issue an injunction can be made if having considered a notification the antimonopoly authority finds that a transaction can be allowed and at the same time orders that obligations can be imposed upon the parties to the transaction that considerably decrease or eliminate possible anticompetitive consequences on the affected goods markets.

A decision to approve a transaction and issue an injunction must be well-reasoned. For instance, it is advisable that the text body of a decision contains descriptions of the circumstances ascertained by the antimonopoly authority considering a notification, particularly, in the course of analyzing the state of competition by the antimonopoly authority, as well as other information important for the decision-making.

An injunction issued by the antimonopoly authority on the basis of a decision to approve a transaction (action) should comply with the principles of relevance to the activities of the parties on the markets affected by a transaction and to the subject of antimonopoly regulation, proportionality to the emerging risks of restricting competition, reasonableness and enforceability in terms of economic and technological capabilities of the parties to fulfill these requirements in general and in due time.

The antimonopoly authority can issue injunctions directly to a notifier and (or) persons that are members of its group of persons, a merger target and (or) a newly formed person. At the same time, such injunctions must comply with the enforceability criterion. For instance, Courts of three instances recognized a FAS injunction enforceable in spite of applying to a group of persons, particularly, those

that controlled the notifier, while the arguments put forward by a controlling person that an injunction was unenforceable were dismissed<sup>49</sup>.

If the antimonopoly authority lacks reasonable doubts that a transaction can lead to competition restrictions, and there are no grounds to undertake measures to support competition, such transaction is subject to approval without issuing an injunction.

To support enforceability of an injunction and its efficiency, the antimonopoly authority can, upon its own initiative in the course of a notification consideration, send a reasoned enquiry to the persons involved in a notified action or a transaction asking to give their proposals about obligations aimed at competition support. An enquiry can be sent, in particular, if a notifier has not proactively submitted its reasoned proposals to the antimonopoly authority about voluntary undertaking obligations (see Clause 4.2 of the given Guidelines).

As a statement of reasons, an enquiry from the antimonopoly authority can contain information about the state of competition on the goods markets affected by a transaction or action, ascertained by the antimonopoly body upon the outcome of its analysis, including the risks of restricting competition on these markets if a transaction is completed.

Such data, in particular, can be requested to make a decision on extending the period for notification consideration in order to additionally consider it under Clause 2 Part 2 Article 33 of the Competition Law. A decision to request such information can also be made if the antimonopoly authority reaches a conclusion on expediency of defining preconditions for the parties in accord with Clause 3 Part 2 Article 33 of the Competition Law and till the final decision is made on defining them.

Thus, considering a notification, the antimonopoly authority gives a comprehensive and full evaluation of the availability of legal mechanics in the form of possible obligations to support competition that can be included in an injunction in order to prevent an unreasonable refusal to approve a transaction.

### *Structural and conduct conditions*

Injunctions of the antimonopoly authority can be aimed at changing the structure of the goods markets affected by a transaction (i.e., changing the shares of sellers or buyers on the market by alienating business-assets of transaction participants or their groups of persons to third parties, providing access to the infrastructure, technologies, alienating the rights for intellectual property items, etc.), as well as at meeting particular conduct conditions (granting non-discriminatory access to

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<sup>49</sup> Ruling of the Arbitration Court of the Moscow District of 13.12.2018 No. Ф05-14688/2018 on No. A40-100615/17 case.

consumers, pursuing an economically sound price policy, devising in-house documents (policies, procedures, model agreements) etc.).

The purpose of structural requirements typically is to achieve such changes in the composition of sellers and / or buyers and their market shares, which will prevent the risk of developing dominance of an acquirer or a merged company on particular markets.

Hence, it follows that structural injunctions can be helpful, in particular, for mergers that can lead to consolidating market shares of direct competitors as a result of horizontal concentration.

For instance, in case of merging two direct competitors, when the market share of each of them is 30%, the antimonopoly authority can issue an injunction to the merger parties to alienate 10% of business and more in such a manner that their aggregate market share after merger does not exceed 50%.

As an example, having allowed a network of household appliances stores to acquire 100% shares of a competitor's registered capital, FAS issued an injunction to stop operations, within six months upon closing a deal, in the part of retail facilities areas, located in 35 constituent territories of the Russian Federation, in order to decrease their aggregate share to 35% on the retail markets of household appliances and audio- and video-equipment in each of those constituent territories of the Russian Federation and give their competitors a possibility to use the free space, through terminating lease agreements and sublicensing contracts, as well as making owned retail facilities available for use by independent third parties.<sup>50</sup>

In another case, having considered a notification of an oil company for acquiring 100% voting shares of a competitor, FAS approved the transaction under the condition of conducting bidding for sale of fuel filling stations in order to bring the aggregate share in terms of the sales volume of motor gasoline and diesel fuel to the level not exceeding 50%<sup>51</sup>.

An aggregate share of a merged company can also be decreased through a FAS request to alienate shares (stake) of economic entities – members of a group of persons of a notifier and / or a merger target.

Another possible injunction in a case of the above-described merger can be a request to give competitors of merging parties access to technologies or intellectual property items of the latter, if such access enables competitors to increase their markets share in the short term in such a way, that a merged company would not be able to have a market share over 50% for long periods of time<sup>52</sup>.

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<sup>50</sup> <http://en.fas.gov.ru/press-center/news/detail.html?id=42533>

<sup>51</sup> FAS decision of December 29, 2012 No. АД/45393/12

<sup>52</sup> See, for example, FAS decision of 15.11.2017 on extending the period for considering a petition filed by Bayer AG.

As mentioned earlier, structural injunctions are also given by the antimonopoly authority when a positive decision with regard to a merger leads to combining prohibited types of activities.

Whereas, the purpose of conduct injunctions is to ensure that merger participants exercise any other actions aimed at competition support that are not directly related to changing the structure of the affected goods markets.

For example, conduct injunctions are requirements from the antimonopoly authority that are typically designed to exercise particular actions upon completing a transaction that are related to price conditions (direct or indirect regulation of the ceiling price level<sup>53</sup>), volumes of production (requirements to supply production if there is demand), non-discriminatory conditions for choosing counteragents and contracts terms (particularly, through devising policies / procedures for choosing counteragents, model agreements), providing the up-to-date information to the antimonopoly authority about changing prices, output, conditions of valid contracts, etc.

A list of possible conduct requirements that can be set by the antimonopoly authority is not limited to the above and is based on Clause 2 Part 1 Article 23 of the Competition Law.

At the same time, defining the content of conduct injunctions, the antimonopoly body relies, in particular, on the scale of anticompetitive effects that can develop following an action or a transaction, for example, if such actions or a transaction can lead to capturing or strengthening dominance.

For example, having considered a notification regarding the market of retail, wholesale and small wholesale sales of consumer electronics, FAS issued an injunction to the parties to reject competition-restricting conditions of their collaboration. Such conditions, in particular, presumed that a large retail chain would refuse to sell household appliances, competing with the products of the other party to the agreement on joint operations, as well as a refusal of a retail chain to enter into similar agreements with competitors of the other party. The antimonopoly authority approved the joint operations agreement and simultaneously issued an injunction to remove these terms from the agreement<sup>54</sup>.

Conduct conditions can also be issued to prevent adverse effects of vertical integration of an acquirer (its group of persons) and a merger target (its group of persons).

For instance, Courts supported the arguments of the antimonopoly authority about possible restriction of competition as a result of vertical integration, when an

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<sup>53</sup> See, for example, FAS decision of 30.09.2016 No. AI/67403/16

<sup>54</sup> FAS decision of 07.11.2017 No. AK/76988/17 and FAS injunction of 07.11.2017 No. AK/76991/17.

economic entity operating on a particular market gains control over an economic entity, operating on another but related market (for example, a goods manufacturer gets control over its buyer and vice versa). The FAS argument, however, was factored in by Courts in conjunction with the fact that the acquirer was the main consumer of the products produced by the merger target<sup>55</sup>.

Mere presence of “vertical” relations (seller-buyer relations) between an acquirer and a merger target is not sufficient to issue an injunction, if the state of competition on the affected goods markets, where the acquirer (its group of persons) and a merger target (its group of persons) operate, will not be restricted after closing a merger (the shares of independent economic entities and their number on the market will not change, market entry barriers will not be created, etc.)

If a transaction (other action) does not create or strengthen dominance, an injunction does not include a requirement to exercise actions aimed at preventing violation of Part 1 Article 10 of the Competition Law, particularly, a requirement to set non-discriminatory conditions for access to the goods or requirements with regard to price-setting.

Also, an injunction cannot be issued only on the grounds that a merger target has had the dominant market position even before completing a transaction (other action), and a transaction (other action) does not strengthen the dominant position and does not influence the state of competition otherwise (for instance, by increasing a market share or decreasing the number of independent economic entities on the market, developing a threat of market entry barriers, etc.). In any case, however, the antimonopoly authority can issue an injunction to the parties of a transaction if the antimonopoly authority ascertains cause-and-effect relations between completing a transaction (other action) and emerging or strengthening (a threat of emerging or strengthening) adverse consequences for the state of competition on the market.

For instance, Courts established that an acquirer (its group of persons) did not operate on the same goods market with merger targets prior to a transaction. Therefore, Court rejected an argument about restricting competition as a result of a transaction since the group of persons of the merger targets had had already an over 50% share on the affected market even before the merger<sup>56</sup>.

Issuing an injunction exclusively on the grounds that a merger target operates on the markets in the state of natural monopoly also is not appropriate since transactions, other actions on such markets cannot restrict competition due to its initial absence

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<sup>55</sup> Ruling of the Arbitration Court of the Moscow District of 13.12.2018 No. Ф05-14688/2018 on No. A40-100615/17 case.

<sup>56</sup> Ruling of the Arbitration Court of the Moscow District of 02.08.2018 No. 09АП-36140/2018 on No. A40-125627/17 case.

on the market<sup>57</sup>. In this context, considering notifications on acquiring shares (stake), assets or rights with regard to holders of natural monopolies, it is necessary to analyze a possible adverse effect of a transaction, other action upon adjacent markets that are not in the state of a natural monopoly.

Therefore, issuing injunctions, the antimonopoly authority proceeds from the adequacy of the injunction requirements to the position of the parties after completing a merger and the degree of its impact upon competition.

Dividing merger control injunctions into structural and conduct ones is rather tentative, and the injunctions should be analyzed on a case-by-case basis to reveal their ability to eliminate the risks associated with competition protection, particularly, creating or increasing dominance within the scope of each particular merger.

In other words, “structural” or “conduct” injunctions can apply not only depending on the merger form (horizontal, vertical or other), but in view of the circumstances of a particular transaction, other action. Such circumstances that can serve as an additional criterion for choosing an injunction, and can include the technological specifics of the affected markets and operations of the parties on them, demand for the parties’ assets, impact of the parties’ technologies upon the state of competition on the market, and others.

Meanwhile, requirements set in injunctions should be determined by the need to support competition on the market and eliminate the consequences of a particular transaction or action.

#### **4.4. Making a decision by the antimonopoly authority to deny approval of an action or a transaction.**

The antimonopoly authority makes a decision to deny approval of an action or a transaction and dismiss a notification in exceptional cases and on the grounds provided for in Clauses 5, 6 Part 2 Article 33 of the Competition Law.

For instance, guided by Clause 5 Part 2 Article 33 of the Competition Law, the antimonopoly authority denies approval if one of the following conditions is met:

- A transaction or actions lead or can lead to restricting competition (particularly, as a result of developing or strengthening dominance of a petitioner or dominance of a person that will be formed as a result of exercising the notified transaction, other action);
- If examining the submitted documents, the antimonopoly authority finds that the information, contained in them and important for decision-making, is unreliable;

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<sup>57</sup> Ruling of the Supreme Arbitration Court of the Russian Federation of 20.07.2011 No. BAC-4558/11 on No. A40-30999/10-106-135 case.

- If a petitioner failed to provide available information, requested by the antimonopoly authority, in the absence of which a decision on restricting competition or absence of restricting competition cannot be made on a notification in question.

A decision to deny an approval can be made if a transaction is not allowable and the obligations that can be imposed by an injunction are not commensurable with the adverse consequences that can emerge following a notified action or a transaction, particularly, if the obligations proposed by the parties are not sufficient or the parties failed to fulfill prerequisites under Part 6 Article 33 of the Competition Law. The antimonopoly authority can also deny an approval if a notifier submitted evidence confirming that a planned transaction / action can be allowed, however, according to evaluation made by the antimonopoly authority, the submitted evidence contains insufficient grounds to recognize that an action or a transaction can be allowed under Part 1 Article 13 of the Competition Law.

If a notifier failed to submit evidence confirming that a planned transaction / action can be allowed, the antimonopoly authority cannot allow the transaction under the grounds specified in Part 1 Article 13 of the Competition Law; however, a notifier can submit the relevant evidence for notification reconsideration.

For instance, FAS did not approve a merger, indicating that the merger would increase the share of the notifier and its group of persons on the market of mineral wool over 50% within the boundaries of the Central, Northwest, South and North Caucasus Federal Districts, and at the same time the notifier and its group of persons failed to present any arguments that the merger could be allowed under Article 13 of the Competition Law<sup>58</sup>.

The merger was approved upon reconsideration because the notifier had changed significantly the terms of closing the merger and submitted evidence that the merger could be allowed in accord with Article 13 of the Competition Law. In particular, FAS established that in spite of the risk of increasing the share of the acquirer's group of persons over 50%, the expected merger outcome would be improving production, enhancing competitiveness of the products of Russian companies – producers of mineral stone wool on the domestic and world markets, as well as receiving benefits by the buyers of mineral stone wool proportionate to the advantages gained by the producers through an increased quality and production process optimization. The notifier also undertook obligations to fund development of manufacturing heat- and sound-insulating materials on the site of the merger target.

A decision not to approve a transaction (action) due to restricting competition should be well-reasoned. In particular, it is advisable that the text body of the

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<sup>58</sup> FAS decision of 16.05.2017 No.AII/20426/17

decision should include descriptions of the circumstances ascertained by the antimonopoly authority in the course of notification consideration, for instance, analyzing the state of competition, as well as other information important for decision-making.

If the antimonopoly authority refused to approve a merger on the above grounds without due legal substantiation based on the results of a market analysis, Court can obligate to reconsider the notification<sup>59</sup>.

As pointed out earlier, standalone grounds for denial under Clause 5 Part 2 Article 33 of the Competition Law is ascertaining a fact by the antimonopoly authority of submitting unreliable information or data, that are presented by a notifier as part of a notification and are of paramount importance for decision-making, as well as a refusal by a notifier to submit data of paramount importance for decision-making and evaluation of the degree of impact of an action or a transaction upon competition.

For example, FAS refused to approve a notification because information about the persons, mentioned by the notification as the sellers differed from information about the shareholders of the merger target, disclosed in the lists of affiliated persons in accord with the current legislation<sup>60</sup>.

In another case, Courts found that the antimonopoly authority had legitimately refused to approve a merger because a notifier had failed to present information requested by the antimonopoly authority about the main performance indicators of the members of the notifier's group of persons<sup>61</sup>.

The antimonopoly authority also can make a decision not to approve a merger on the above grounds if a notifier failed to present available information upon a request from the antimonopoly authority, in the absence of which a decision cannot be made on competition restriction or its absence with regard to the notification in question.

An absolute reason to refuse approving an action or a transaction is also non-conformance to the requirements of Federal Law No.57-FZ, that is, in case of disapproval by the Government Commission for control over foreign investments, particularly, if this decision is made through applying a procedure under Article 6 of Federal Law No. 160-FZ to a transaction.

#### **4.5. Decision of the antimonopoly authority**

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<sup>59</sup> See, for instance, the Ruling of the Arbitration Court of the Moscow District of 22.01.2020 on No. A40-315103/2018 case

<sup>60</sup> FAS decision of 30.04.2014 No. АД/17654/14

<sup>61</sup> Ruling of the Supreme Arbitration Court of the Russian Federation of 28.11.2012 No. BAC-15590/12 on No. A63-10821/2011 case.

To ensure publicity and openness of government control over economic concentration, Part 1 Article 33 of the Competition Law requires that a decision of the antimonopoly made upon the results of considering a notification, should outline the reasons for making a particular decision.

#### **4.6. The procedure for reviewing injunctions**

A legal mechanism for reviewing merger injunctions is a response measure of the antimonopoly authority to significant changes in the state of the competitive environment on the goods markets affected by a merger in the part of amending or eliminating regulatory requirements that have become excessive or inconsistent with the situation on the market due to the appeared changes.

For instance, in accord with Part 11 Article 33, a mandatory condition for reviewing an injunction fully or partially is significant circumstances, that occurred after an injunction was issued and exclude a possibility and (or) appropriateness of executing it.

The procedure for reviewing injunctions is regulated by No.544 FAS Order of 24.08.2012 (further on referred to as the “Review Procedure”).

An injunction can be reviewed not only upon an application from a person, to whom it was issued, but also by the antimonopoly authority upon its own initiative based on the “*non reformatio in pejus*” principle (no change for the worse in a person’s position that existed before reviewing) and at any point of time when the relevant grounds emerge. It means that based on the results of reviewing an injunction, any amendments or additions to it cannot set tighter or more extended requirements to a notifier against those that already existed in the initial version of the injunction.

The Competition Law sets an exhaustive list of grounds for reviewing such injunctions, namely:

- Changes in the product or geographic boundaries of a goods market;
- Changes in the composition of sellers or buyers;
- Loss of dominance by an economic entity.

It means that each of the emerging grounds should have a significant influence upon the state of competition on the goods market where a person that was issued an injunction operates (for example, loss of dominance), and, possibly, on adjacent, upstream/ downstream markets in the distribution chain of relevant goods, which makes execution of the injunction impossible or inexpedient in general or by the established means.

Based on Clause 2.4 of the Review Procedure, an application for reviewing an injunction should contain arguments about the grounds for reviewing it as well as evidence confirming the stated arguments. In particular, a notifier can submit documented information about changing the state of competition on the relevant

goods markets. Evidence can comprise, among other things, expert opinions on market analysis if such opinions are drafted in view of No.220 FAS Order and rely on verifiable data (for example, findings of a consumer survey conducted by an independent expert body, with indications of respondents, possibility to provide questionnaires, etc.).

It should be noted that providing evidence by a notifier does not exclude an analysis of the state of competition on the relevant markets by the antimonopoly authority in order to verify the grounds as specified in Part 11 Article 33 of the Competition Law.

For example, considering a notification on acquiring over 50 % voting shares of a Russian shareholding company, FAS found that a merger would increase considerably the dominant position of the notifier on the relevant goods markets of zinc concentrate within the geographic boundaries of the Russian Federation. Owing to these circumstances, FAS issued a conduct injunction to the notifier<sup>62</sup>.

Later, however, the notifier filed an application to FAS asking to reconsider the injunction and submitted evidence confirming that the notifier had lost the dominant position on the market and the market boundaries had changed.

To verify the arguments in the application, FAS analyzed the state of competition on the market of zinc concentrate. Following the study, the antimonopoly body reached a conclusion that there were sufficient grounds to expand the geographic boundaries of the market: to cover Kazakhstan and China.

The analysis of the dominant positions of both producers (the monopoly) and consumers (monopsony) of zinc concentrate, carried out by FAS, showed that the company share on the market was less than 50%.

Ex-ante market analysis also revealed that two large economic entities are planning to enter the market in 2022-2023. Another competitor also has plans to develop a new field. Those circumstances served as the grounds for abolishing the injunction<sup>63</sup>.

If an application states that it is necessary to change the content of an injunction, concerning, in particular, the means of executing it, it is useful to describe a suggested new means of executing the injunction with an adequate substantiation. For example, a submitter can ask to make changes to certain points of an injunction in order to exclude the circumstances that have become excessive or impossible to execute and, in the submitter's opinion, should be removed or changed considerably, which includes reporting requirements associated with an obligation to perform certain actions.

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<sup>62</sup> FAS decision of 25.07.2017 No.AII/50950/17

<sup>63</sup> <http://en.fas.gov.ru/press-center/news/detail.html?id=54062>

For example, the antimonopoly authority made a decision upon an application from an economic entity to reconsider an earlier issued injunction in the part of pricing for primary aluminum, grades A7, A7Э and A7E (in the form of pig ingots or T-bars) under contracts for consumers in the Russian Federation. The substantiating factors for reviewing the means of executing the injunction was that the quotations for primary aluminum on the London Metal Exchange (LME) do not reflect the actual price for consumers operating on comparable world markets, to which, in accord with the injunction, pricing for the submitter's aluminum products is tied. In this regard, FAS decided to amend the price formula for primary aluminum, grades A7, A7Э and A7E (in the form of pig ingots or T-bars) for consumers in the Russian Federation, including, apart from LME, the regional premiums for this type of products for the global market segment, where the submitter's enterprises maintain their major export deliveries<sup>64</sup>.

Due to the mandatory requirements of the Competition Law, the antimonopoly authority must decide upon the grounds to reconsider an injunction or their absence within 30 calendar days from the date an application was received. Within this period, the antimonopoly authority verifies the submitted information and documents and must give a legal opinion whether reconsidering an injunction is possible.

Considering an application, the antimonopoly authority can send an enquiry to the submitter for the purposes of obtaining additional materials that confirm the presented arguments. Since the consideration period cannot be extended, the antimonopoly authority makes a decision on the grounds to review an injunction or their absence upon expiry of 30 calendar days.

If the materials submitted with an application are not sufficient for making a decision on reconsidering an injunction, but they imply possible preconditions for changing the state of competition on the relevant goods market, the antimonopoly authority can analyze the market in question in accord with c No.220 Order.

In this case, the antimonopoly authority notifies the application submitter in writing about its decision to initiate an analysis of the state of competition, based on which, but no later than 30 calendar days from the date of drawing an analytical report, the antimonopoly authority makes a final decision to review an injunction upon its own initiative and in light of the earlier filed application.

A decision of the antimonopoly authority on the outcome of reviewing an injunction should be well-reasoned and comprise:

- Conclusions on the grounds to abolish, change or add to an injunction, with descriptions of factual circumstances and the available evidence, confirming

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<sup>64</sup> <http://en.fas.gov.ru/press-center/news/detail.html?id=42885>

these conclusions, particularly, the results of an analysis of the state of competition on the goods market;

- Reference to the injunction provisions that should be removed, changed or added to;
- In case of amending or adding to an injunction – the content of the injunction provisions that are passed as a result of changing or adding to it.

## **SECTION V. THE PROCEDURE FOR PUBLIC DISPLAY OF INFORMATION ABOUT NOTIFICATIONS AND DECISIONS**

According to Part 9 Article 32 of the Competition Law, information about a notification filed to the antimonopoly authority for approving a transaction, other action is subject to publication on the official web-site of the antimonopoly authority.

To pursue the openness principle in FAS work, this legal mechanism is designed to enable stakeholders (counteragents of the persons involved in a merger or their competitors, consumers) to be aware about a planned merger and present their positions on its substance, being mindful of its possible impact upon competition due to an increased economic concentration.

In the enforcement practice, when filing a notification, a notifier can state that the presented information and materials constitute trade secrets and cannot be disclosed, given to third parties without a permission from the right holder. Such information can include, for example, information about the final beneficiaries of the group of persons of a notifier or a merger target as well as financial performance data, disclosed by filling in Tables 1-3 given in No.129 FAS Order.

In this respect, following Guidelines No. 13 of FAS Presidium of 21.02.2018, it is necessary to place information on the official web-site of the antimonopoly authority about a fact of filing a notification by a legal entity or a physical person, including data about the parties to a transaction, other action, stated in the notification (except personal data of physical persons), as well as the subject matter of a notified transaction, other action (for instance, FAS received a notification from limited liability company A [OOO “A”] (location; core activity) seeking an approval for acquiring 50% shares of B shareholding company [AO “B”] ( location; core activity); an individual X petitioned to FAS to get ownership over fixed production assets of shareholding company Y [AO “Y”]).

Stakeholders that have intentions to submit their written opinions to FAS on the merits of a merger, may not get acquainted with the notification materials, but can rely on publically available information about the substance of a merger, published on the web-site of the antimonopoly authority.

Decisions made by the antimonopoly authority upon the outcome of considering notifications filed to FAS are subject to publication on the official web-site of the antimonopoly authority.

It should be taken into account that decisions on mergers made with simultaneously issuing an injunction, or decisions to deny merger approvals must be well-reasoned. In particular, these decisions can give descriptions of the studied materials and evidence, which constituted the grounds for making a particular decision, including the results of analyzing the state of competition on the relevant goods markets. If the reasoning part of a decision contains descriptions of documents and data that have the legal status of trade secrets, it is possible to prepare the text body of the decision and remove the relevant information for the purposes of publishing the decision on the official web-site of the antimonopoly authority (for example, without changing the documents structure, a part of the text that cannot be published is presented in such a way that it is unreadable).

At the same time, Part 9 Article 32 of the Competition Law entitles the Government of the Russian Federation to determine cases when the antimonopoly authority is prohibited to publish information on its official web-site about a notification received by the antimonopoly authority for approving a transaction, other action.

For instance, according to Decree of the Government of the Russian Federation of 28.05.2019 No. 680, the antimonopoly authority may not publish information on its official web-site that FAS has received a notification for approving a transaction, other action, if it contains information about persons against whom restrictive measures (sanctions) apply, introduced by a foreign state, state association and (or) union and (or) governmental (intergovernmental) agency of a foreign state or state association and (or) union), and (or) about a credit institution that falls under the category of the authorized (designated) banks in accord with the Federal Law of 29.12.2012 No. 275-FZ “On public defence procurement” (hereinafter referred to as the Law on GOZ).

A decision on non-publishing such information can be made by the antimonopoly authority only on the basis of a statement from a person that files a notification containing documented information about applying restrictive measures against such persons and (or) classifying these persons as authorized banks in accord the Law on GOZ and the particulars of the documents confirming this information.

It should be kept in mind that this rule applies when a foreign state introduces restrictive measures against the parties to a merger, legal or physical persons that are members of the same group of persons with them, the final beneficiaries, and may also be applicable when such persons are among shareholders.

For example, a confirmation of restrictive measures can be an entry of a particular physical or legal person in the so-called Specially Designated Nationals and

Blocked Persons List, compiled by the Office of Foreign Assets Control of the US Treasury Department (OFAC)<sup>65</sup>.

Similar regulation for non-publishing information about a merger was introduced in a case of involvement of an authorized bank in a merger, when guided by the Law on GOZ the bank is chosen as the general contractor or appointed by the Government of the Russian Federation.

## **SECTION VI. THE CONSEQUENCES OF NON-COMPLIANCE WITH THE MERGER APPROVAL REQUIREMENTS**

### **6.1. The procedure and grounds for holding administratively liable**

Obtaining a pre-approval from the antimonopoly authority for an action or a transaction specified in Articles 27-29 of the Competition Law, is an obligation of the relevant parties, failure to perform it incurs administrative liability under Part 3 Article 19.8 of the Code of Administrative Offences in the form of administrative fines.

Also, any transaction or action closed after filing a notification to the antimonopoly authority (regardless of an interim decision) but before obtaining a preliminary consent of the antimonopoly authority, is also administratively liable (Part 3 Article 19.8 of the Code of Administrative Offences), since in this case the procedure for filing a notification is breached.

In view of the established enforcement practice, a violation related to failure to submit a notification on approving a merger to the antimonopoly authority, cannot be continuing in the meaning of Part 2 Article 4.5 of the Code of Administrative Offences. In this regard, the 1-calendar year limitation period for holding administratively liable for such violations must be calculated from the date when the obligation to file a notification should have been executed rather than from the date of exposing the committed violation by an official of the antimonopoly authority<sup>66</sup>.

This approach is also based on Clause 14 of the Resolution of the Plenum of the Supreme Arbitration Court of the Russian Federation No. 5 “On some questions related to applying the Code of Administrative Offences of the Russian Federation by Courts” of 24.03.2005, according to which failure to execute an obligation within a particular period is not considered a continuing violation.

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<sup>65</sup> <https://www.treasury.gov/ofac/downloads/sdnlist.pdf>

<sup>66</sup> See for example, Ruling of the Federal Arbitration Court of the Moscow District of 22.10.2008 No. KA-A40/9151-08 on No.A40-21393/08-146-248 case; Ruling of 29.10.2008 No. KA-A40/9937-08 on No.A40-21474/08-152-212 case; Ruling of 09.04.2014 No.Ф05-1810/2014 on No.A40-92557/13-106-605 case

A similar legal reasoning was given by the Presidium of the Supreme Arbitration Court of the Russian Federation<sup>67</sup>, stating that a violation in the form of a *failure to notify the antimonopoly authority*, is related to non-executing an obligation within the designated period as specified in a regulatory enactment, and, therefore, *cannot fall under a category of continuing violations*.

In view of the above, the limitation period for holding administratively liable under Part 3 Article 19.8 of the Code of Administrative Offences of the Russian Federation starts from the date of completing a transaction (transfer of shares, stake, rights, assets), subject to approval by the antimonopoly authority, or from the date of establishing / reorganizing the relevant economic entities.

For the purposes of recognizing an antimonopoly violation or its absence, the antimonopoly authority may, before opening an administrative case, request documents and information from the merger parties with regard to the subject matter of a merger, financial statements which confirm exceeding of the threshold values (particularly, in addition to publically available reports), information about a group of persons and other related data.

As mentioned earlier in the Guidelines, the grounds for holding administratively liable under this norm of the Russian Code of Administrative Offences can arise in case of breaching the procedure for notifying the antimonopoly authority about an intra-group merger in accord with Article 31 of the Competition Law<sup>68</sup>.

It should be also noted that not only a legal entity that committed an administrative violation, but also its executive are subject to administrative liability under Article 2.4 of the Russian Code of Administrative Offences. As a general rule, an executive to be held administratively liable is a person that exercises the functions of a sole executive body; unless evidence is presented that the relevant powers were transferred to another appointed executive.

To ascertain elements of an administrative violation in the actions of an executive, the antimonopoly authority requests information about the executive from a legal entity that is held administratively liable.

If the relevant data have not been submitted under the frame of administrative proceedings, particularly, at the stage of an administrative investigation, the antimonopoly authority may open a case on an administrative violation guided by Article 17.7 of the Russian Code of Administrative Offences.

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<sup>67</sup> Ruling of the Presidium of the Supreme Arbitration Court of the Russian Federation of 26.09.2006 No. 6638/06 on No. A65-31104/2005-CA1-36 case.

<sup>68</sup> See, for example, the Ruling of the Federal Arbitration Court 13.07.2017 on No. 4-19.8-1015/00-05-17 case and others.

## **6.2. Legal consequences of failure to execute an injunction issued by the antimonopoly authority**

Under Parts 5, 6 Article 33 of the Competition Law, failure to execute an injunction issued by the antimonopoly authority constitutes the grounds for:

- Holding guilty legal entities and their executives administratively liable under Part 2.3 Article 19.5 of the Russian Code of Administrative Offences;
- Invalidate particular mergers through judicial proceedings on a claim of the antimonopoly authority.

Based on the nature of legal consequences, which can occur following the statutory response measures, their application by the antimonopoly authority should be determined by the circumstances of a case. In particular, applying the described measures is based on the principles of proportionality and efficiency for the purposes of competition support, due prevention or elimination of the consequences of violations, if such consequences of failure to execute an injunction occurred in the form of competition restriction and monopolistic activity.

If an injunction is not executed and, in the opinion of the antimonopoly authority, holding administratively liable has not eliminated an administrative violation, the actions of a guilty persons can be considered, in particular, for elements of abusing dominance under Part 1 Article 10 of the Competition Law, or the antimonopoly authority may turn to a remedial route and file a claim to invalidate a merger.

Similarly, FAS already used an algorithm of actions in order to apply legal mechanisms and enforce an injunction and subsequently fulfill a robust antimonopoly investigation against another economic entity in the part of providing the infrastructure for radio access to LTE networks in the range 2500-2530/2620-2650 MHz to be used by the telecoms providers that are putting into effect an MNVO business-model (Mobile Virtual Network Operator)<sup>69</sup>.

## **6.3. The procedure and grounds for contesting mergers judicially**

By virtue of Part 2 Article 34 of the Competition Law, the antimonopoly authority is entitled to file a lawsuit to Arbitration Court to invalidate a merger, completed without obtaining a pre-approval from the antimonopoly authority.

A mandatory condition for filing a lawsuit is that the antimonopoly authority possesses evidence confirming that the disputed merger has led or can lead to restricting competition, particularly, as a result of establishing or strengthening dominance. Therefore, should a fact of completing a merger, that is subject to pre-approval, be ascertained, the antimonopoly body analyses the state of competition

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<sup>69</sup> FAS decision of 26.07.2013 No. АГ/29254

on a relevant goods market, particularly, using ax-ante analysis in order to expose the relevant adverse consequences.

It means, in particular, that holding a person, who breached a requirement for obtaining a merger approval from the antimonopoly authority, administratively liable does not mean that the merger must be recognized invalid due to the given circumstances.<sup>70</sup>

The limitation period for a claim on invalidating a transaction under Clause 2 Article 181 of the Civil Code of the Russian Federation is one year and it starts from the date when the antimonopoly authority learned or was meant to learn about completing a transaction in breach of the antimonopoly legislation. Similarly, the limitation period is calculated for enforced liquidation or reorganization of an economic entity if it was formed or the relevant actions towards a merger or an acquisition were carried out without approval from the antimonopoly authority.

If a transaction was completed between foreign companies abroad without obtaining an approval from the antimonopoly authority, and the purpose of the transaction was to gain the rights for a Russian economic entity, such transaction can be challenged by the antimonopoly authority and invalidated in its relevant part.

In accord with Part 6 Article 33 of the Competition Law, the antimonopoly authority also may file a claim to Arbitration Court in order to invalidate a merger in case of failure to execute an injunction.

This legal mechanism can be used based on the principle of proportionality and, first of all, in the cases when structural injunctions are issued for alienating assets or performing other actions designed to reduce or prevent an increase of the market share of the relevant companies.

In this case, the limitation period starts from the date of ascertaining a fact by the antimonopoly authority of failure to execute an injunction. At the same time, exposing such a fact, the antimonopoly authority must, in particular, apply administrative penalties in accord with Part 2.3 Article 19.8 of the Russian Code of Administrative Offences.

If a person fails to execute a conduct injunction, particularly, requirements to fix an economically justified price for the relevant goods on the market, where this person has the dominant position, and avoid obstructing market entry, the antimonopoly authority, along with holding the person administratively liable, may also initiate a case against such person upon elements of violating Part 1 Article 10 of the Competition Law and carry out an antimonopoly investigation.

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<sup>70</sup> See for example, Ruling of the Arbitration Court of the Moscow District of 26.12.2019 No. Ф05-22893/2019 on No.A40-297347/2018 case.

Chairperson  
Of the FAS Presidium,  
Head of FAS Russia

Maxim Shaskolsky