

FAS Russia publishes merger control guidelines

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The Federal Antimonopoly Service (FAS Russia) has published merger control guidelines¹ (the “**Guidelines**”). This is the first time over the fifteen-year existence of the modern Competition Law² that the service has published guidelines of such scope and depth in this area. The document not only summarizes the decade and a half of the antimonopoly authority’s practice of considering mergers, but also provides insight into the regulator’s position on a number of questions for which the laws and regulations did not give straightforward answers. Parties would ask the regulator to clarify them on a case-by-case basis,³ but those clarifications were not always consistent. Or, parties had to rely on common sense and the overall logic of the Competition Law to interpret the unclear provisions.

Practical aspects of evaluating transactions requiring antimonopoly clearance

The first section of the Guidelines, which describes the transactions (or practices) subject to antimonopoly control, provides answers to purely practical questions. In particular, what financial statements should be used to calculate the asset/revenue thresholds of the parties to the transaction, how to convert foreign currencies to rubles, how to calculate the amounts of foreign entities’ supplies to the Russian Federation (including supplies by entities in the same group and supplies made through distributors), what formal requirements should be followed when valuing assets whose acquisition is subject to antimonopoly control, etc. It has been clarified that an individual’s personal assets unrelated to his business activity are not included in the asset calculation, in contrast to the assets of the companies controlled by that person.

The part of the document that clarifies the parameters of transactions falling under antimonopoly control is crucial. In particular, the regulator calls attention to the need for

approval (if asset/revenue thresholds are exceeded) of acquisition of rights enabling to determine the terms on which an entity does business as a result of a participant exiting a limited liability company, the company’s shares (or participatory interests) being distributed among shareholders (or participants), conversion of preferred shares into ordinary shares, inheritance, and other cases. Government control of the placement of shares (or participatory interests) in trust, in investment funds or pledge is further explained. FAS Russia has for the first time presented a generalized description of such concepts as “acquisition of rights enabling to determine the terms of conducting business,” and “negative control,” and has pointed out the features of transactions requiring clearance by the antimonopoly authority.

Joint venture agreements between competitors and non-compete provisions

Some of the most anticipated rules of the Guidelines are about competitors entering into joint venture agreements and the grounds for allowing non-compete provisions. When considering the first issue the authors of the Guidelines refer to the corresponding FAS Russia guidelines published in 2013⁴ but at the same time state the service’s point of view on the most important aspects of regulating such agreements that were not covered before. In particular, according to the Guidelines, the following are not joint venture agreements between competitors and do not require clearance: “corporate agreements mediating the issues of exercise of the parties’ rights as company participants to participate in voting, including the range of issues for such voting and applicable voting thresholds, as well as other agreements regulating financial issues of payment by company shareholders or participants for their contributions to the company, in the absence of provisions directly related to the activities of the parties to the agreement *on the market as part of promoting goods, work or services.*” There is a

¹ Guidelines of the Presidium of the Federal Antimonopoly Service “On the Exercise of State Merger Control” No. 19 of June 11, 2021, published on FAS Russia’s website: <https://fas.gov.ru/documents/687797>.

² Federal Law No. 135-FZ on Protection of Competition of July 26, 2006.

³ Pursuant to Article 23(2)(5) of the Competition Law.

⁴ The August 7, 2013, guidelines on the procedure and methods for analyzing joint venture agreements are published on FAS Russia’s website http://fas.gov.ru/netcat_files/File/razyasneniya_SP.pdf; <https://fas.gov.ru/documents/575737>.

similar approach to regulating syndicated loan agreements and pledge management agreements.

The issue of evaluating whether the parties to a joint venture agreement are competitors (whether de facto or potential) for merger control purposes is considered in detail. From the practical perspective, relevant here is the conclusion that even if the parties compete on the product markets of other countries, or on other markets in Russia unrelated to the subject of the joint venture agreement and which are not affected markets, this does not automatically make the parties potential competitors in terms of antimonopoly clearance.

As for non-compete arrangements where the seller of shares, interests or assets undertakes not to compete with the business being disposed of, what seems extremely important is the regulator's expressed opinion that such a declaration of intent by the seller attests to the seller's lawful and independent desire not to do business on that market. Based on this, it is concluded that non-compete provisions in agreements to purchase shares, interests, rights or assets are much less a danger to competition than, for example, in joint venture agreements between competitors. Therefore, the provisions can be allowed, if a number of conditions are met.⁵

Procedural aspects of preparing and reviewing merger control applications and accessing the antimonopoly service's materials

Another section of the Guidelines that is certainly useful from a practical perspective is the section on procedural aspects of preparing and reviewing merger control applications. For example, the requirements for documents to be submitted, the specifics of disclosing a group of persons on the basis of control and the possibility of limiting disclosure based on activities on a single product market, submission of information about the economic activities of the parties to the transaction and their groups, and disclosure of information about the applicant's beneficiaries. There is a practice summary of the grounds and procedure for extending the deadline for reviewing applications, for example, if clearance is needed under the Foreign Investment Law⁶ and the Strategic Investment Law.⁷ Of particular relevance for foreign investors are the examples of FAS Russia applying Article 6(5) of the Foreign Investment Law. According to that article, transactions involving non-strategic Russian business entities may require clearance by the

Governmental Commission for Control over Foreign Investment in the Russian Federation.

The Guidelines contain a section that is innovative: for the first time the Guidelines expressly provide for the antimonopoly authority's right to disclose certain materials to applicants for review upon request. The section describes how and on what grounds applicants can access these materials related to analysis of the application by FAS Russia. In particular: requests for information sent by the antimonopoly authority to government agencies, local government authorities, legal entities and individuals, the responses to those requests, the results of the analysis of the state of competition on the product market in question, and the information on whether the transaction affects competition submitted by the interested parties.

Permissibility of transactions and consequences of not complying with the clearance requirements

Finally, the Guidelines codify the practice of applying the grounds for deeming transactions permissible by the antimonopoly authority (in particular, depending on the combined share of the acquirer's group and the target, the ability to influence the general terms for the circulation of goods, whether consumers are able to switch to alternative suppliers, whether the merger should be permitted because the economic effects would be predominantly favorable, etc.), grounds for FAS Russia refusing to clear a transaction or to clear a transaction with remedies, and grounds for amending remedies.

Also summarized is the practice of applying the consequences of failure to comply with the antimonopoly authority's transaction clearance requirements and failure to comply with the FAS Russia's remedies. There is also a clarification that if a transaction is made between foreign companies in a foreign jurisdiction for the purpose of acquiring rights to a Russian company, the court may invalidate the relevant part of the transaction (as opposed to the entire transaction) further to a suit by the antimonopoly authority.

The publication of the FAS Russia Guidelines will certainly promote greater legal certainty and consistent application of the laws. The document will have tremendous value for the development of antitrust regulation of M&A, foreign investment and corporate relations in general.

⁵ Generally, if they meet the criteria of the FAS Russia guidelines published in 2013 for allowing such provisions when competitors enter into joint venture agreements.

⁶ Federal Law No. 160-FZ on Foreign Investment in the Russian Federation of July 9, 1999.

⁷ Federal Law No. 57-FZ on Procedures for Foreign Investment in Business Entities of Strategic Importance for National Defense and State Security of April 29, 2008 (as amended on March 9, 2021).

Contacts**Marat Mouradov**

Partner, Head of Competition and
Compliance practice

T: +7 495 644 05 00

E: marat.mouradov@dentons.com

**Valeria Ponomareva**

Counsel

T: +7 495 644 05 00

E: valeria.ponomareva@dentons.com

