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**International Cooperation Under Section F of the Set:
Adoption of the Guiding Policies and Procedures**

Contribution of the Russian Federation

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The Russian Federation
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In the modern world, the international economy shows an increasing trend towards globalization, there are more and more companies that operate on the territory of several countries, both developed and developing. Such companies have a tremendous impact on international trade, movement of investment flows, as well as on the state of both the global economy as whole and national economies. There are entire markets that do not have clear geographical boundaries. However, since large transnational companies have significant market power, anticompetitive behavior of these entities can negatively affect economies of different countries.

Competition authorities around the world currently face restrictive business practices of large transnational companies. Such practices adversely affect international trade and economic development, especially in developing countries.

Strengthening international cooperation in response to growing threat of unfair practice by such companies is no longer in doubt. The aim of such cooperation should be to eliminate or effectively regulate restrictive business practices by strengthening and improving control over them.

The FAS Russia keeps pace with the modern reality and believes that international cooperation is one of the most important aspects of competition policy in combating such anticompetitive practices.

We actively participate in the events of international organizations, such as International Competition Network (ICN), Organization for Economic Cooperation and Development (OECD), United Nations Conference on Trade and Development (UNCTAD) and Asia-Pacific Economic Cooperation (APEC) and fruitfully implement various forms of cooperation with colleagues from foreign competition authorities, including regional cooperation within Commonwealth of Independent States (CIS) and Eurasian Economic Union (EAEU), as well as in the BRICS format.

In general, cooperation is carried out through requests and exchange of information, notifications, consultations, as well as joint market analysis and enforcement activities, mainly on the base of bilateral and multilateral agreements.

In relation to competition authorities of the **CIS Countries**, interaction is mainly carried out through the Interstate Council for Antimonopoly Policy (ICAP)¹, which coordinates formation of legal and organizational basis for the purposes of prevention, restriction and suppression of anticompetitive practices and unfair competition within the CIS Economic Area.

Moreover, the Headquarters for Joint Investigations of the Violations of the Antimonopoly Legislation in the CIS Countries² detect and investigate violations of the antimonopoly legislation in the cross-border markets within the CIS, including identifying problems of competition development in socially significant and infrastructure markets, successful functioning of which ensures the effective development of economic integration of the CIS countries.

With the purpose of developing international cooperation in the frame of the **EAEU**, the FAS Russia closely interacts with both the Eurasian Economic Commission (EEC)³ and competition authorities of the EAEU Member-States. Cooperation within the EAEU is established by the Treaty of the Eurasian Economic Union (hereinafter – the Treaty).

One of the key features of the Treaty is partial transfer of EAEU Member-States functions to EEC. In accordance with the Treaty, EEC is empowered to investigate cases of violation of competition legislation on cross-border markets (within EAEU), make decisions and impose sanctions (remedies). For that purpose, Competition Authorities and EEC could exchange information (including confidential information). For protecting it from disclosure the Agreement on the Protection of Confidential Information and Liability for its Disclosure in the Exercise of the European Economic Commission its Powers of Monitoring the Compliance of the Common Rules of Competition was developed.

In accordance with the Treaty, the EAEU Member-States shall cooperate on the law enforcement activities by sending notifications, requests for information, inquiries and orders to conduct certain procedural activities, exchange of information, coordination and implementation of the law enforcement activities at the request of any Member-State⁴. The Treaty also includes provisions on cooperation between the EEC and the EAEU Member-States for monitoring compliance with the general rules of competition.

Significant place in the international activity of the FAS Russia is taken by the

¹ <http://en.fas.gov.ru/international-cooperation/icap/>

² <http://en.fas.gov.ru/international-cooperation/icap/icap-headquarters.html>

³ <http://www.eurasiancommission.org/en/Pages/default.aspx>

⁴ More information on tools and procedures on cooperation of EAEU Competition Authorities can be found in Protocol 19 to the Treaty on Eurasian Economic Union (URL: http://www.un.org/en/ga/sixth/70/docs/treaty_on_eeu.pdf)

development and diversification of cooperation with competition authorities of **BRICS** countries. We are carrying out constant interaction aimed at maintaining a high pace of five-way cooperation in the field of antimonopoly policy.

One of the most important stages in the development of cooperation between the BRICS Competition Authorities was the signing of Memorandum of Understanding between the BRICS Competition Authorities on cooperation in the field of competition law and policy in May 2016 in Saint Petersburg (prolonged in 2020 for an open-end period⁵). In addition to the traditional forms of interaction, such as consultations and the exchange of non-confidential information, the Memorandum provides for the possibility of organizing work in the format of joint Working Groups for the research of competition issues in different markets, primarily socially significant ones, and development of joint approaches to solving problems in these markets.

Currently, BRICS Contact Group on Cartels and Working Groups on pharmaceuticals, food value chains, automotive industry and digitalization successfully function on the BRICS platform. Within the activity of these Working Groups BRICS competition authorities conduct joint market studies and initiate cross-border investigations.

Within the framework of the BRICS Working Group for Research of Competition Issues in the Pharmaceutical Markets, a joint comparative study of medicine prices was carried out, which led to a decrease in prices for up to 30% for expensive medicines in Russia. BRICS Working Group for the Research of Competition Issues in the Food Markets developed new approaches to the consideration of mergers in the seed market, as well as established close cooperation between the competition authorities of the BRICS countries when considering a global transaction of economic concentration in the agro-technological sector Bayer/Monsanto. Within the framework of the BRICS Working Group for Research of Competition Issues in the Digital Markets, the first joint report of the BRICS competition authorities was prepared – "BRICS in the Digital Economy: Competition Policy in Practice"⁶. Moreover, BRICS Working Group for the Research of Competition Issues in the Automotive Markets is currently preparing a joint study of the BRICS competition authorities, the first draft of which is planned for 2020.

Moreover, the FAS Russia cooperates with BRICS partners within the framework of BRICS Competition Law and Policy Centre⁷. Activities of BRICS Competition Centre are aimed at conducting research on competition issues in key socially significant markets. In 2017-2019, the BRICS Competition Centre provided

⁵ <http://en.fas.gov.ru/documents/documentdetails.html?id=15359>

⁶ Joint report of the BRICS competition authorities "BRICS in the Digital Economy: Competition Policy in Practice": <http://en.fas.gov.ru/documents/documentdetails.html?id=15348>

⁷ <http://bricscompetition.org/>

significant methodological and analytical support to the BRICS competition authorities in the framework of the study of food and digital markets. International scientific teams operating at the BRICS Competition Centre, taking into account the needs of the BRICS competition authorities, prepared two comprehensive academic reports: Report on the Global Food Chains in the BRICS Countries⁸ and the Report on the Development of Competition in the Digital Age⁹. In addition, the provided methodological best practice were used by the BRICS antimonopoly authorities when considering a number of antitrust cases and global mergers in socially significant markets. In 2020, the Government of the Russian Federation issued an order to support the activities of the International BRICS Competition Law and Policy Center as an independent subdivision in the structure of the Higher School of Economics.

The FAS Russia also pays special attention to **bilateral cooperation** with competition authorities worldwide. Over the period of existence of the authority, more than seventy intergovernmental and interdepartmental agreements on cooperation in the field of antimonopoly policy have been signed and put into effect.

These documents provide strategic directions and forms of the FAS Russia cooperation with relevant foreign law enforcement services, with a view of shaping common positions in key areas of economic development, sharing experience in law making and practice, providing methodological assistance in examinations and consultations, organizing training activities and seminars.

In order to strengthen bilateral cooperation the FAS Russia concludes the so-called "new level agreements", which include clauses on the specific behavior of the parties in the event of investigations and on holding consultations in order to suppress violations of antimonopoly legislation in the territory of the parties to the agreement.

For instance, in 2019 the Agreement between the Government of the Russian Federation and the Government of the Republic of Belarus on cooperation in the field of competition protection was signed, which provides for exchange of confidential information and coordination of enforcement efforts, including organizing joint inspections and investigations, issuing simultaneous decisions on cases, carrying out proceedings, as well as initiating enforcement activities.

Due to the increasing number of cross-border violations of antimonopoly legislation, i.e. performed by global companies, that have affected or may affect the state of competition in several jurisdictions at once, the FAS Russia seeks to interact with

⁸ Report on the Global Food Chains in the BRICS Countries:

<http://bricscompetition.org/agriculture-and-food/>

⁹ Report on the Development of Competition in the Digital Age:

<http://bricscompetition.org/research-digital-markets/>

competition authorities worldwide in order to increase the efficiency of the process of **considering antimonopoly cases and mergers**.

Such cooperation allows avoiding the contradictory conditions imposed on companies in different jurisdictions, as well as optimizes the procedure of investigation of antimonopoly cases and merger review by saving national resources and reducing time of the consideration.

In the process of investigations against transnational corporations and global M&A review, the FAS Russia applies both formal requests and informal talks involving the interested market participants, exchanges information, organizes the meetings with case handlers using all possible communication channels. This helps to evaluate the risks for competition not only at the national level but also in the global market.

The FAS Russia has successful track record in a great number of case investigations, such as antimonopoly cases against Microsoft, Google, Booking.com and Apple, where we successfully cooperated with our foreign colleagues, including European Commission, U.S. Federal Trade Commission, Netherlands Authority for Consumers and Markets and Israel Competition Authority. Moreover, recently the FAS Russia held consultations with Belarus and Kazakhstan in *Yandex/Uber* (2017), with BRICS countries and the European Commission in *Bayer/Monsanto* (2017-2018), with the competition authorities of the USA, Australia, Brazil, India, South Africa and the European Commission in *Siemens/Alstom* (2018-2019), with Israel, Brazil and the EC in *Takeda/Shire* (2019), South Africa in *GSK/Pfizer* and *Avon/Natura* (2019), with South Africa and the USA in *Abbvie/Allergan* (2019).

The decisions made by the FAS Russia on the abovementioned cases significantly took into account the information received from the counterparts in both non-confidential and confidential (on the base of waivers) manner.

The FAS Russia widely uses such mechanism as waivers of confidentiality for international cooperation of antimonopoly agencies when considering **global transactions of economic concentration**.

It is worth noting that the information transmitted as part of the use of the waiver remains confidential to all third parties. In case of waivers application, the party to the transaction notified in several jurisdictions, permits the regulator to exchange confidential information only with the agency that is indicated in the waiver, and only to the extent that is specified in the waiver.

Keeping in mind that the application of waivers, on the one hand, benefits reducing the time of transaction consideration, as well as avoiding contradictory decisions, on the other hand can become a risk for the companies that may doubt that the information they share will not be transferred to the third parties.

However, when granting waivers, the companies may be sure that the FAS Russia guarantees the protection of confidential information.

In this process, the FAS Russia is guided by the Federal Law of July 26, 2006 No. 135-FZ "On Protection of Competition", as well as by the Federal Law of July 29, 2004 No. 98-FZ "On commercial secrecy", which provides the disciplinary, civil, administrative and criminal liability for the disclosure of confidential information by the competition authority. In 2018, the FAS Russia Presidium adopted specialized Recommendations on the issues of obtaining and protecting confidential information in M&A review, which distinguish confidential information from non-confidential one, determine the appropriate regime of access to it by the third parties, and declare the inadmissibility of transfer of confidential information to the party not listed in the waiver. Such measures together provide a legal guarantee to the merging parties.

Recent examples of the FAS Russia broad and comprehensive consultations on the basis of waivers with foreign competition authorities include Bayer/Monsanto and Siemens/Alstom mergers.

Within the consultations on Bayer/Monsanto, the merger of two large agricultural technology companies that has had a significant impact on competition around the world, including Russia, which were carried out in the form of both audio conferences and face-to-face meetings, the FAS Russia was able to discuss the methodological approaches used in various countries when considering this transaction, as well as the remedies that we were ready to set for companies in order to develop competition in the agricultural market in our countries.

The consequences of the merger were taken into account not only for the Russian market, but also for the global market of agricultural technologies, the development trends of which in the medium term could affect Russian players.

Based on the results of the consideration of the transaction, the FAS Russia issued remedies that are aimed at creating conditions for the development of potential competition from Russian companies in the agricultural market including digital agriculture.

First, companies are required to provide non-discriminatory access to Russian companies to the platform package solutions offered to agricultural producers by a merged company based on digital agronomic precision farming platforms.

Secondly, companies should provide a transfer of technologies that are available and applicable in Russian agro climatic conditions, combined with access to the data and knowledge necessary to create new varieties and hybrids for key crops.

Monitoring of the execution of the FAS Russia remedies issued following a transaction review is carried out by the Technology Transfer Center.

During all phases of the merger consideration, the FAS Russia was holding consultations with the competition authorities of Brazil, India, China, South Africa and the European Commission. Besides, after issuing a decision, the FAS Russia shared a confidential version of it with the Competition Commission of India, representatives of which came personally to Moscow for this purpose.

The decision and remedies that the FAS Russia issued following the review of the Bayer/Monsanto transaction were largely based on the results of consultations with foreign competition authorities.

In 2019, the FAS Russia held consultations with foreign competition authorities when considering Siemens/Alstom merger – the merger of the Europe and world's largest manufacturers of rolling stock.

The consultations were held with the European Commission, USA, Australia, Brazil, India and South Africa through e-mail correspondence, telephone calls, and face-to-face meetings on the basis of waivers. The possible decision, as well as draft remedies, which included both structural and behavioral requirements, were also confidentially discussed.

The remedies developed by the FAS Russia, as well as potential further steps to control its execution, were largely based on the results of consultations conducted with foreign competition authorities, especially taking into account that the markets affected by the transaction coincided in many jurisdictions and included the market for production and assembly of rolling stock and the market for production and installation of signaling systems on railways.

Within the consultations, antitrust regulators, taking into account position of the FAS Russia on this transaction, came to the conclusion that the potential risks of the transaction outweighed the possible benefits of the merger. In February 2019, it was decided that the significant technological potential that could be formed by the merged company Siemens/Alstom, as well as its access to huge data sources regarding unique technologies for the production of rolling stock and signaling systems on railways, could be critical for other market participants. Thus, the Siemens/Alstom merger was blocked by the European Commission, and the parties withdrew their application worldwide.

The FAS Russia realizes that there are different timeframes for M&A review in different jurisdictions. Some of the agencies have a possibility to consider mergers for years, the Russian competition authority, in turn, has a fairly tight period for consideration.

That is why the FAS Russia analyzes the global market and attempts to consult foreign agencies and exchange information from the very beginning of M&A

review. This approach was also applied within the Bayer/Monsanto and Siemens/Alstom mergers, as well as commonly used at the present day.

When the agency's focus shifted toward global transactions, the FAS Russia realized the necessity to systematize work on the application of the waivers on the national level. In 2018, the FAS Russia together with leading Russian lawyers, as well as taking into account the best international guidelines, developed Recommendations on applying waivers of confidentiality when considering merger control transactions (hereinafter – the Recommendations)¹⁰.

One of the main goals of the Recommendations is to ensure a uniform application of the waiver by the FAS Russia in cooperation with the foreign competition authorities and the parties to the transactions.

Taking into account the importance of waivers from a practical point of view, the FAS Russia also proposed to shift the Recommendations to the CIS format, and in 2019, Model Recommendations for the competition authorities of the CIS member states¹¹ were adopted. Moreover, the FAS Russia initiated the adoption of similar model recommendations within the BRICS.

Since the economies face with similar difficulties while considering global mergers, such model recommendations may have an extremely positive impact and ease the procedure of merger control in several countries letting exchange the necessary materials in a unified and non-contradictory form keeping a sufficient degree of protection of confidential information.

All these steps laid the foundation for the creation of the FAS Russia system of interaction with other competition authorities in the framework of the review of global M&As, which marked a transition from a "spot mode" of assessing cross-border transactions to the application of a clear system similar to that used by leading international law enforcement agencies.

An algorithm of actions provides for the implementation of a number of steps, including determining the global market, analyzing the situation abroad, holding consultations with foreign antitrust agencies, including on the basis of waivers, with the aim of exchanging opinions and information, including confidential, as well as the development of coordinated approaches to decision-making on the transaction and subsequent control over their implementation.

The use of such a system lets the FAS Russia hold a comprehensive analysis of the transaction involving all interested parties and allows issuing decisions that would ensure a balance of interests of the business and competition protection.

¹⁰ <https://en.fas.gov.ru/press-center/news/detail.html?id=53894>

¹¹ <http://en.fas.gov.ru/documents/documentdetails.html?id=15357>

Having regard to the above, it should be pointed out that many countries, especially developing ones, do not have any formal bilateral or multilateral cooperation agreements. Theoretically, they can be concluded, however, in a situation where a large international company openly disregards the competition laws of a developing country and has a negative impact on its economy, the competition authority of such a country (if it actually exists) does not have enough experience and knowledge in the field of enforcement, remains without effective tools to counter such unfair practices, and, as a result, is unable to resist them.

Not only the lack of opportunities for interaction with foreign antimonopoly authorities formally established in agreements can become an obstacle to international cooperation in the investigation of specific cases of large transnational companies. Legal restrictions imposed by legislation, as well as a lack of material resources, especially in developing countries, including professional staff, the ability to quickly translate information, limiting the financing of foreign visits can become a serious obstacle.

Opportunities for cooperation and required knowledge should be available to competition authorities small and large, young and mature, throughout the world.

In order to implement such cooperation on a global scale, it is important to create an effective legal basis for interaction between competition authorities.

Currently, the most comprehensive international instrument on competition law and policy is the UN Set on Mutually Agreed Equitable Principles and Rules for the Control over Restrictive Business Practices (UN Set on Competition) adopted by the United Nations General Assembly in 1980. Section F "International measures" of the UN Set on Competition allocates the possibility of holding consultations between competition authorities on the UNCTAD platform. At the same time, this document does not currently have a specific mechanism for holding such consultations, as well as the possibility of using other methods and mechanisms of cooperation.

In this regard, it was necessary to include provisions that establish mechanisms for practical cooperation between the competition authorities in the UN Set on Competition.

The FAS Russia proposed this initiative during the 16th session of the Intergovernmental Group of Experts on Competition Law and Policy (IGE) UNCTAD, which took place on July, 2017 in Geneva (Switzerland), in order to create a document that establishes tools of international cooperation of competition authorities for combating restrictive business practices of transnational corporations and transborder violations of rules on competition, which could be adopted as Annex to the Section F of the UN Set on Competition.

In order to further discuss the given issue at the UNCTAD platform, Discussion

Group on International Cooperation was created along with the Drafting Committee, which has taken over the function of preparing a consolidated text of the document.

Thus, **Guiding Policies and Procedures under Section F of the UN Set on Competition** (hereinafter – the Guiding Policies and Procedures) were elaborated and approved by a consensus decision of all delegates at the 18th session of IGE UNCTAD in 2019.

The given document is of practical nature as it helps to establish contacts and implement cooperation. It is based on the best world practices and background papers of the international organizations (OECD, UNCTAD, ICN and others), as well as on the results of numerous discussions at leading global platforms.

The Guiding Policies and Procedures are aimed at consolidating mechanisms and procedures for investigating specific cross-border violations of competition rules, which is extremely important for developing countries, where the institutionalization of competition authorities is in the initial phase and where the practice of effective cooperation with more experienced and developed departments has not been established at the moment. Using these mechanisms, competition authorities can carry out international cooperation in order to enhance their enforcement activities.