

Insight

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Special Overview

Guidelines of the Federal Antimonopoly Service

On 18 July 2013, the Presidium of the Federal Antimonopoly Service (FAS of Russia) approved Guidelines on the Procedure and Technique of Analysis of Joint Venture Agreements Containing Non-Compete Clauses.

The purpose of the Guidelines is to set a uniform approach to the assessment of the admissibility of joint venture agreements (JVAs), including JV agreements containing clauses in which the parties waive competition against each other and/or the JV on certain markets (so-called non-compete clauses).

Although widespread, such provisions give rise to questions in the context of their compliance with Federal Law No. 135-FZ "On the Protection of Competition" dated 26 June 2006 as, unlike Europe, Russian law does not provide for specialized regulation of JV agreements. The approval of the Guidelines is no doubt an important and progressive step toward the creation of uniform and clear-cut regulation of non-compete clauses in the context of JVAs.

The Guidelines set forth the position of FAS of Russia with respect to the assessment of such clauses from the viewpoint of their coverage by the overall prohibitions of anti-competition agreements as per Article 11 of the Law on the Protection of Competition and the applicability of the criteria of admissibility as listed in Part 11 of Article 13 of said Law.

The Guidelines establish a step-by-step procedure for the assessment of JVAs containing non-compete clauses for compliance with the criteria of admissibility provided for under the Law, with a list of admissible and inadmissible terms, and offer practical Guidelines with respect to the applicability of each of such criteria. In addition, the Guidelines contain additional criteria for the assessment of the "redundancy" of non-compete clauses.

This overview summarizes the principal provisions of the Guidelines.



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In This Issue:

- General Provisions
- Criteria of Assessment
- Assessment Technique
- Assessment Result
- Application of the Guidelines and Plans to Amend the Law on the Protection of Competition

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General Provisions

The Guidelines are to be applied to the assessment of any agreements that may produce negative effects provided for under Parts 1 and 4 of Article 11 of the Law on the Protection of Competition and are made *between actual or prospective competitors*.

The Guidelines **do not apply** to vertical agreements (as expressly provided for in the Guidelines) and, as it follows from the above rule of the Guidelines' applicability, may not apply to other agreements made between companies not competing on the market (e.g., between banks and insurance companies).

To begin with, it is important to note that the Guidelines introduce the concept of the **"joint venture agreement"** (JVA) the absence of which from the Law raised so many questions in practice. According to the Guidelines, JVAs, are in fact, any agreements providing for joint activities under either Russian or foreign, law providing or not providing for the establishment of a new legal entity or the parties' joint participation in an existing legal entity (JV).

Further, the Guidelines contain a number of **characteristics that JVAs should possess to distinguish them from anti-competition agreements**. For example, JVAs should assume that: (a) the parties are pooling their resources and/or making mutual investments for the purposes of joint operation and jointly bear risks involved in joint operation; and (b) information on the planned joint operation and the making of the JVA shall be public.

Notably, the Guidelines regard information as being **public** not as an announcement of the planned joint operation but as the direct filing of the JVA with FAS as per the requirements to obtain preliminary approval of the JVA¹ or within the framework of the procedure for the consideration of draft agreements provided for under Article 35 of the Law. From this, it actually follows that draft JVAs not filed with FAS do not demonstrate indicia of being public and may be declared to be anti-competition agreements.

In addition, the Guidelines indicate the kind of JVAs and JVA terms that are **inadmissible**. These are JVAs designed to restrict competition, leading to a number of adverse effects for the market (such as establishment of a commodity price, division of a commodity market, etc.; the list is generally similar to the list of adverse effects of cartels contained in Part 1 of Article 11 of the Law) and JVAs imposing such restrictions on their parties or on participants in their groups, which may result in abuse by such parties of their dominant position.

With respect to the waiver by the JVA's parties of competition on the commodity market where the parties plan to operate jointly (so-called **"Affected Market"**) and on related markets, the Guidelines specify that JVAs may contain such clauses and also provide for

a list of examples of such clauses. The list is not exhaustive and includes such practically widespread restrictions as the parties' waiver of the production and/or sale on their own of the goods covered by the JVA; the obligation of one party to make to the other JVA party and or to the JV the first offer of participation in new similar joint venture projects; the prohibition of acquisition by the parties of shares in the JV's competitors and the like.

The Guidelines contain an overall principle that such non-compete clauses may potentially restrict competition, so JVAs containing such provisions are invariably subject to assessment with respect to their admissibility in terms of the Guidelines.

Criteria of Assessment

The Guidelines provide for the following principal criteria for the assessment of JVAs containing non-compete clauses:

- I. Analysis of the size of the JVA parties' share of the Affected Market and the state of competition of such market;
- II. Analysis of the feasibility of the admissibility criteria established in Part 11 of Article 13 of the Law;
- III. Examination of the con-compete clauses to check their redundancy with respect to the purposes of joint operation.

Assessment Technique

I. Ascertainment of the aggregate market share of the JVA parties and analysis of the Affected Market

Ascertainment of the commodity and geographical boundaries of the Affected Market, assessment of the JVA parties' aggregate share of the Affected Market and research into such market are the very first and most important stage of such analysis. Such research is to be conducted in accordance with FAS of Russia Order No. 220 "On Approving the Procedure for Analyzing the State of Competition on a Commodity Market" dated 28 April 2010.

The Guidelines single out two principal aspects of the JVA parties' aggregate share of the Affected Market impacting the further technique of JVA assessment:

1. The JVA parties' aggregate share of the Affected Market does not exceed 35%

According to the Guidelines, in such cases the parties are unable to restrict or eliminate competition on the Affected Market. In such instances, no further detailed research into the Affected Market and no analysis of the feasibility of the admissibility criteria established in Part 11 of Article 13 of the Law are conducted. However, the non-compete clauses are examined to ascertain whether they are redundant in relation to the purposes of joint operation, as described in greater detail below in Section III of this Overview.

¹ Such requirements are planned to be introduced into the Law (reported in greater detail below).

2. The JVA parties' aggregate share exceeds 35%

According to the Guidelines, in this case the JVA parties are capable of restricting competition on the Affected Market and may even eliminate it. In this connection, further detailed analysis of the feasibility of the admissibility criteria established in Part 1¹ of Article 13 of the Law is conducted (as described in greater detail in Section II of this Overview), as is examination of the non-compete clauses to check their redundancy with respect to the purposes of joint operation (as described in greater detail in Section III of this Overview).

II. Assessment of applicability to the JVA of the admissibility criteria specified in Part 1¹ of Article 13 of the Law

This stage checks whether, *in aggregate*, all the admissibility criteria listed in Part 11 of Article 13 of the Law have been complied with, specifically:

1. The JVA parties are unable to eliminate competition on the Affected Market

According to the Guidelines, there is a chance for *elimination of competition* as a result of the implementation of the JVA if the aggregate share of the JVA parties exceeds 35% and the Affected Market displays the following characteristics: (a) is highly concentrated, has a stable composition of players whose relative share sizes remain unchanged for lengthy periods or are subject to insignificant fluctuations, (b) have high access barriers; and (c) display high import barriers.

If, based on the results of the above examination, it is determined that all the above criteria are present in aggregate, FAS of Russia concludes that implementation of the JVA containing the non-compete clauses will entail elimination of competition on the Affected Market; the relevant JVA is declared inadmissible and no further analysis is conducted. In the absence of at least one of the criteria, further analysis is conducted as described below.

2. JVA clauses do not impose restrictions on third parties

A JVA should not impose restrictions on third parties except the JVA parties and those who are part of their groups.

According to the Guidelines, such restrictions may be indirectly indicated by provisions containing *unconditional* obligations of the JVA parties or members of their group not to participate, with third parties, in other (investment or other) projects similar to the subject matter of joint operation or operation of the JV. As a result of the performance of such obligations, according to FAS of Russia, third parties (intending to participate in such new projects) are in fact denied an opportunity to implement their projects, in particular if several JVAs are made on the relevant market. Therefore such terms are inadmissible.

Along with this, the Guidelines note that an obligation of one JVA party to give prior notice to the other party, and/or the JV, of its intent to participate in such projects or an obligation to first offer to the other JVA party, and/or the JV, participation in a new project (and, only if it is refused proceed with the implementation of the new project on its own or jointly with a third party) *is not regarded as unconditional*.

3. The JVA results or may result in improvements in the production or sales of goods or encourage technological or economic progress or direct investments by its parties on Russian Federation territory (including the introduction of new production capacities or modernization of existing production capacities)

According to the Guidelines, improvements in the production or sales of goods or the attainment of the above progress may be achieved, for example, by way of combining complementary assets and know-how, eliminating redundant costs, etc.

The Guidelines specify what may be regarded as direct investments and where modernization of production capacities takes place. Please note that, according to the Guidelines, one of the factors evidencing the good faith of the JVA parties is the obligation to make investments *pro rata* to the participation of the parties in the JV (disproportionate participation in the JV may give rise to questions from FAS of Russia).

4. The JVA results or may result in the customers obtaining advantages (benefits) commensurate to the advantages (benefits) obtained by the JVA parties

According to the Guidelines, benefits obtained by customers may include, for example, lower commodity prices, saturation of the market with goods, improvements in the commodity sales system, improvements in product quality, etc.

If, based on the results of the assessment of the applicability to the JVA of the admissibility criteria specified in Part 11 of Article 13 of the Law, it is ascertained that, although at least one of the criteria is not complied with, FAS of Russia concludes that performance of the JVA containing non-compete clauses will restrict competition on the Affected Market and the relevant JVA is declared inadmissible, no further analysis is conducted. If all the criteria are complied with, further analysis is conducted as described below.

III. Examination of the non-compete clauses to check whether they are redundant with respect to the purposes of joint operation

According to the Guidelines, non-compete clauses contained in a JVA are not regarded as redundant if they:

1. conform to the purposes of joint operation

According to the Guidelines, non-compete clauses will be regarded as such if they (a) are directly connected with the operation of the JV; (b) are designed to assure effective and profitable operation

¹ Such requirements are planned to be introduced into the Law (reported in greater detail below).

of the JV, preservation and effective investment of the resources the JVA parties plan to pool in the course of the establishment and development of the JV or in the course of joint operation; and (c) serve to return the investments made by the parties into the JV and generate the necessary profits.

2. do not apply to other commodity markets except the Affected Market and related markets

The Guidelines specify that application of non-compete clauses to commodity markets where the JV does not operate or where the JVA parties do not operate jointly is redundant with respect to the purposes of joint operation.

3. are limited to a period of time required for the return of the JVA parties' investments and for them to obtain the necessary profits

Significantly, the Guidelines note that a limited term of the non-compete clauses is an essential condition of the JVAs admissibility. The term of such clauses should not exceed the term of investment project return (pursuant to the Guidelines, it is, as a rule, five years) and the periods required to obtain profits (one to two years following project cost recovery). The parties to the JVA may file with FAS a business plan substantiating longer periods and/or request an extension of the deadlines if, following the declaration of the JVA as admissible, the period of joint venture cost recovery increased materially for objective reasons.

4. do not provide for an exchange of information that may facilitate cartels or concerted action restricting competition

As a general rule, a JVA should not provide for an exchange of commercial information that has no relation to the operation of the JV or is not otherwise connected with the parties' joint operation.

Assessment Result

Based on the above assessment, JVAs containing non-compete clauses may be:

1. Recognized as admissible without the issue by FAS of a directive, if the aggregate share of the JVA parties does not exceed 35 percent and the non-compete clauses are not redundant.

2. Recognized as admissible with the issue by FAS of a directive:
 - a. to bring the JVA into conformity with the Law and the requirements of the Guidelines if, as a result of the analysis of the non-compete clause (as described in Section III above), it is determined that such clauses are redundant; and/or
 - b. to perform actions aimed at assuring competition if all the criteria of admissibility specified in Part 11 of Article 13 of the Law are complied with and the non-compete clauses are not redundant while the aggregate market share of the parties exceeds 35 percent.
3. Recognized as inadmissible if the JVA does not fully meet all the admissibility criteria specified in Part 11 of Article 13 of the Law on Competition (either the parties to the JVA are able to eliminate competition or any of the remaining admissibility criteria is not met).

Application of the Guidelines and Plans to Amend the Law on the Protection of Competition

As noted in the introduction to the Guidelines, they are to be applied in the event a JVA is filed with the FAS of Russia so as to: (a) obtain approval pursuant to Articles 27 and 28 of the Law on the Protection of Competition or (b) check whether the draft JVA conforms to the Law on the Protection of Competition as prescribed in Article 35 of the Law.

At this stage, FAS of Russia has drafted amendments to the Law on the Protection of Competition whereby the making of any JVA will be subject to preliminary approval in the event the thresholds established under the Law are exceeded (similar to the thresholds established in Article 27 for mergers and accessions of commercial organizations). Such practice already exists in the EU with respect to certain types of JVs.

Not being a regulatory act, the Guidelines are an internal document of FAS of Russia to be used by and are binding on, FAS of Russia and its territorial authorities. Nonetheless, the Guidelines will no doubt be useful to market players, helping them grasp the underlying principles and criteria of the assessment of JVAs containing non-compete clauses and the position of FAS of Russia on this matter.

The Guidelines will soon be posted on the FAS website at: <http://www.fas.gov.ru/>.