



Changes in Antimonopoly Regulations

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“Second Antimonopoly Package”

- Federal Law “On Introduction of amendments to **the Federal Law “On the Protection of Competition”** and Certain Legislative Acts of the Russian Federation” (No. 164-FZ of 17 July 2009)
- Federal Law “On Introduction of amendments to **Articles 17.1 and 53** of the Federal Law “On the Protection of Competition” (No. 173-FZ of 17 July 2009)
- Federal Law “On Introduction of amendments to the **Administrative Offences Code (the “AOC”)** and certain legislative acts of the Russian Federation” (No. 160-FZ of 17 July 2009)
- Federal Law “On Introduction of amendments to **Article 178 of the Criminal Code**” (No. 216-FZ of 29 July 2009)
- Order by the Government of the Russian Federation “On Circumstances in which **Agreements** between Business Entities **are Allowable**” (No. 583 of 16 July 2009)

Major Changes

- **Extraterritorial application** of the Federal Law “On the protection of Competition” was detailed and expanded
- The notion of **dominant** position was clarified and expanded
- The concept of **monopolistic low and high prices** and the methods of their determining were clarified
- The requirements for the rules for non-discriminatory access to the markets of **natural monopoly holders** were set
- Most of “**vertical**” agreements were exempted from “per se” prohibitions
- “**General exceptions**” were established with respect to seller-purchaser and innovative activity agreements
- Thresholds for **state control** over material equity and asset sale transactions were reduced
- Regulations on granting of rights in **state and municipal property** and granting of state and municipal **preferences** were changed
- New requirements with respect to **the state and municipal procurement** contracts have been established
- Rules for exercising of **control by the Federal antimonopoly service (FAS)** over compliance with antimonopoly laws were introduced
- **Administrative and criminal liability** for violation of antimonopoly laws was enhanced

Scope of Application of the Law “On the Protection of Competition”

List of entities which are subject to the Law “On the Protection of Competition” was extended by adding **organizations** (which include Russian and foreign legal entities, companies and other corporate associations with a civil legal capacity, international organizations, their branches and representative offices set up on the territory of the Russian Federation).

The Law “On the Protection of Competition” was amended to expressly apply to:

- **acts** performed outside the Russian Federation by Russian and/or foreign persons/organizations
- agreements and acts in respect of shares, participatory interests or rights of **foreign** for-profit entities.

Dominant Position

An entity holding more than 35% share of a given market for commodities (goods, services, works) may be deemed to have a dominant position if:

1. it is able to determine the price level for the commodities and exercise dominant influence on the general terms of sale of the commodities in the commodity market;
2. it can hinder access of new competitors to the commodity market;
3. the commodities cannot be replaced with commodities of the other entities;
4. a change in the price of the commodities does not lead to lower demand for those commodities.

Monopolistic High and Low Prices: General Provisions

Criteria for the determining monopolistic high or low prices:

1. the total amount of costs necessary for the production and sale of the commodities and the profit; and
2. the price established in a competitive environment of a comparable commodity market.

Methods of determination:

- by increasing/decreasing a price for the commodities established earlier (*subject to certain conditions*)

or

- by maintaining or not increasing/decreasing a price for the commodities established earlier (*subject to certain conditions*).

Monopolistic High and Low Prices: Exceptions

- The price for the commodities resulting of innovative activities *will not be deemed to be a monopolistic high price* subject to certain conditions provided for by the Federal Law “On the Protection of Competition”. (This implies that the entities who market innovative commodities should not be penalized whichever prices they establish for such commodities.)
- The price for the commodities *will not be deemed a monopolistic low price*, if such pricing by the seller of the commodities does not lead to the reduction of participants in this commodity market which do not belong to the same group with the sellers or buyers of the commodities.

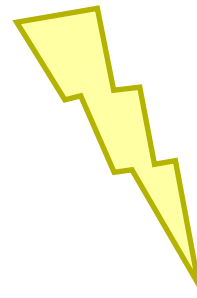
Access to Commodity Markets of Natural Monopoly Holders

- The Law “On the Protection of Competition” lists the requirements to the **contents** of the Rules for Non-Discriminatory Access to be approved by the Government of the Russian Federation
- The Rules will apply to **commodity markets** and/or commodities of natural monopoly holders

“Vertical” Agreements

Most of “vertical” agreements (agreements between a seller of commodities and a buyer who are not competitors, e.g. distribution) were exempted from the scope of prohibitions “**per se**” except for “vertical” agreements which:

- set **resale prices** for the commodities;
- prohibit sales of **competitive** commodities (other than sales of the commodities under the trademark or trade name of the seller or manufacturer)



Agreements Restraining Competition: General Exceptions

The Government of the Russian Federation defined the circumstances in which agreements and coordinated actions (that may involve restriction of competition and are generally prohibited) are allowable, and thus set forth **general exceptions** in respect of:

- agreements between **buyers** and **sellers**;
- agreements between business entities on **joint research** and joint **use** of scientific and/or development results thus obtained

Effective period for the general exceptions: from 31 July 2009 **5 years**

General Exceptions: Agreements Between Buyers and Sellers (I)

Agreements between buyers and sellers are allowable, if:

1. The seller sells the commodities:
 - to ≥ 2 buyers + the **seller's** share in the market for the commodities is **below 35%**; **or**
 - to 1 buyer + the **buyer's** share in the market for the commodities is **below 35%**; **and**
 2. The seller and the buyer **do not** compete, or they compete in the commodity market where the buyer acquires the commodities for *resale*; **and**
 3. The buyer **does not** manufacture interchangeable commodities
- ! An agreement specifying the territory for sales of the commodities by this buyer **only** (*exclusivity*) must include a **waiver** by the buyer of its right to conclude any agreements for sales within the same territory with sellers of interchangeable commodities (*competitors*)

General Exceptions: Agreements Between Buyers and Sellers (II)

Restrictive or binding conditions are not allowable, e.g.:

- a) restriction of the buyer's ability to **determine prices**, to set **minimal** or **fixed** resale prices;
- b) waiver by the buyer of its right to sell in the **designated territory** and/or to the **designated category of buyers**;
- c) restriction of the seller's ability to sell to its customers **spare parts or components** for the product manufactured by the buyer, as well as to sell them to specialist repair and service organizations;
- d) preventing the buyer from manufacturing, buying and/or selling **interchangeable commodities**;
- e) obligation by the buyer **to acquire from the seller >50%** of the total volume of the commodities acquired by the buyer over the year;
- f) obligation by the buyer to incorporate into subsequent product sale contracts a **ban on resale** of the product

General Exceptions: Agreements on Joint Research

Agreement on joint research and joint use of the scientific and/or engineering results thus obtained is:

allowable – if it contains conditions which make it possible to determine the *rights* of the parties *to use the scientific and/or engineering results*;

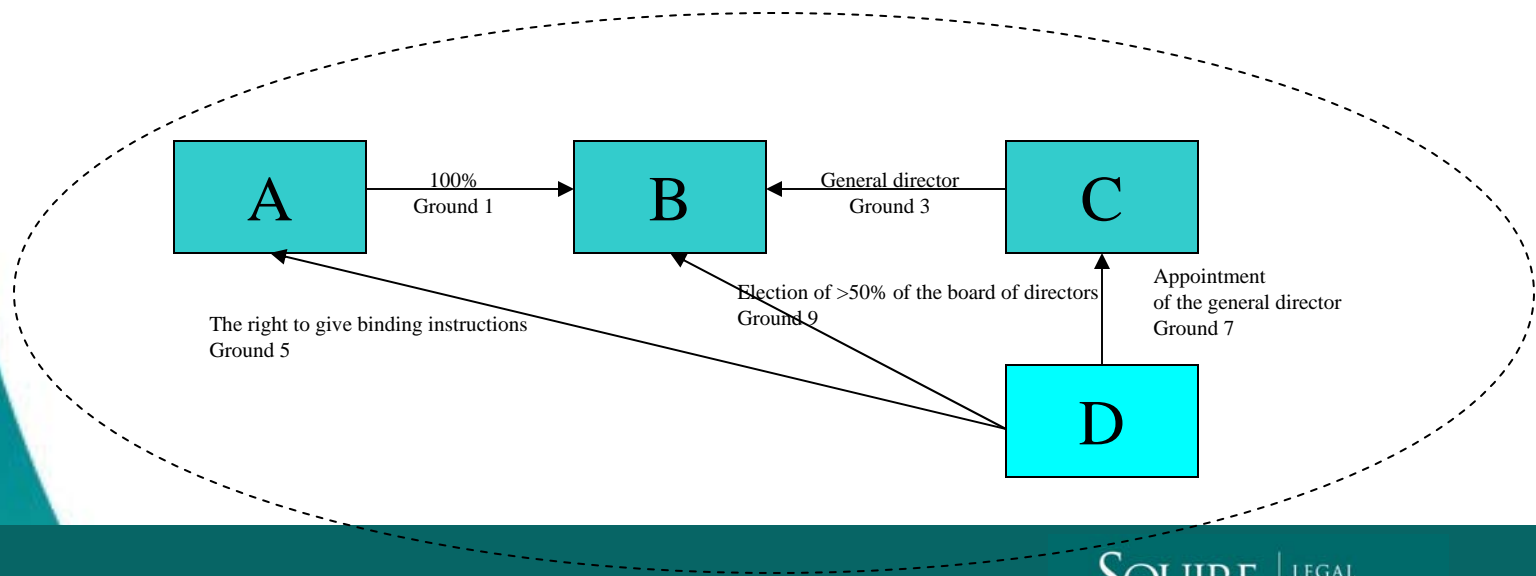
not allowable – if the costs incurred by the parties do not qualify as *R&D costs*.

Group of Persons (I)

Article 9 of the Federal Law on the Protection of Competition set forth 14 grounds to consider individuals and legal entities as a group of persons

Ground 14 (previous wording):

- persons that each belong to a group with the same person on one of the grounds; and
- other persons that belong to the same group with **each** of such persons on one of the 13 grounds.

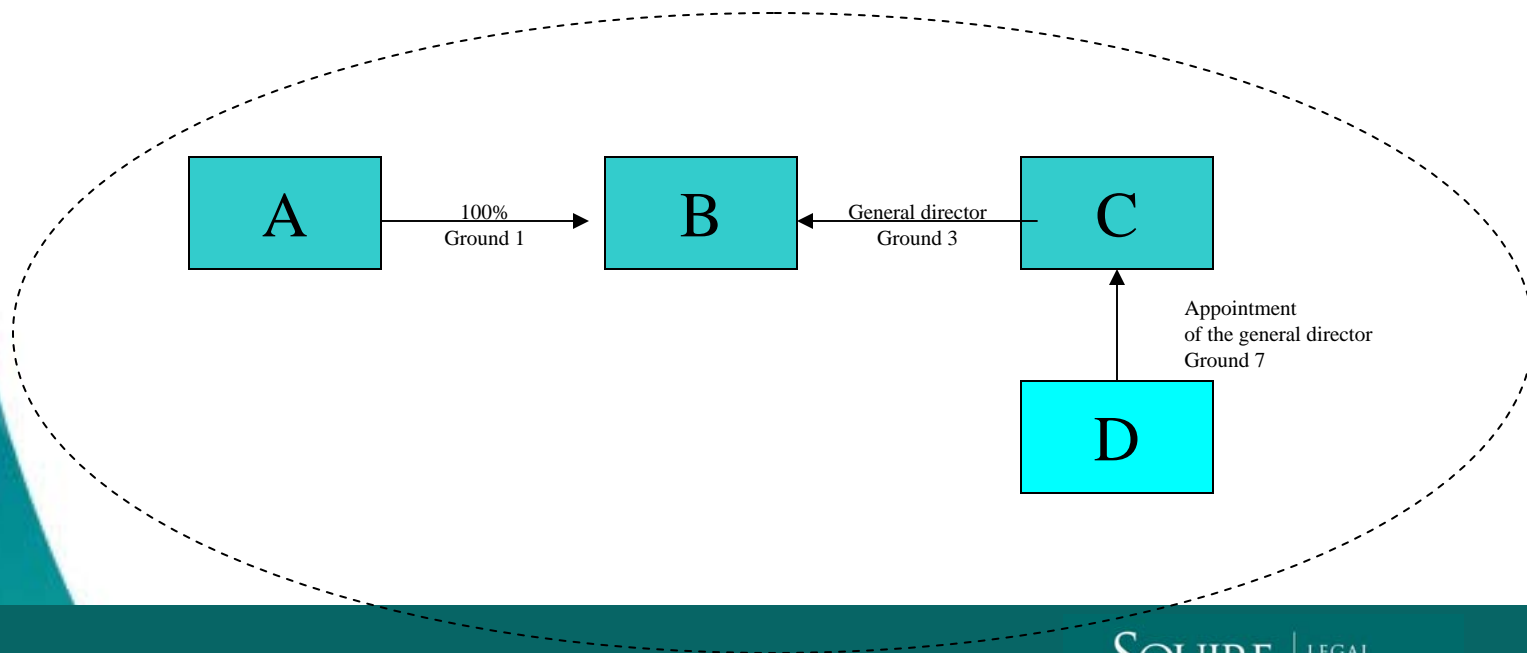


Group of Persons (II)

Ground 14 (new wording):

- persons that each belong to a group with the same person on one of the grounds; and
- other persons that belong to the same group with **any** of such persons on any of the 13 grounds.

This means that the composition of a group of persons is broadened.

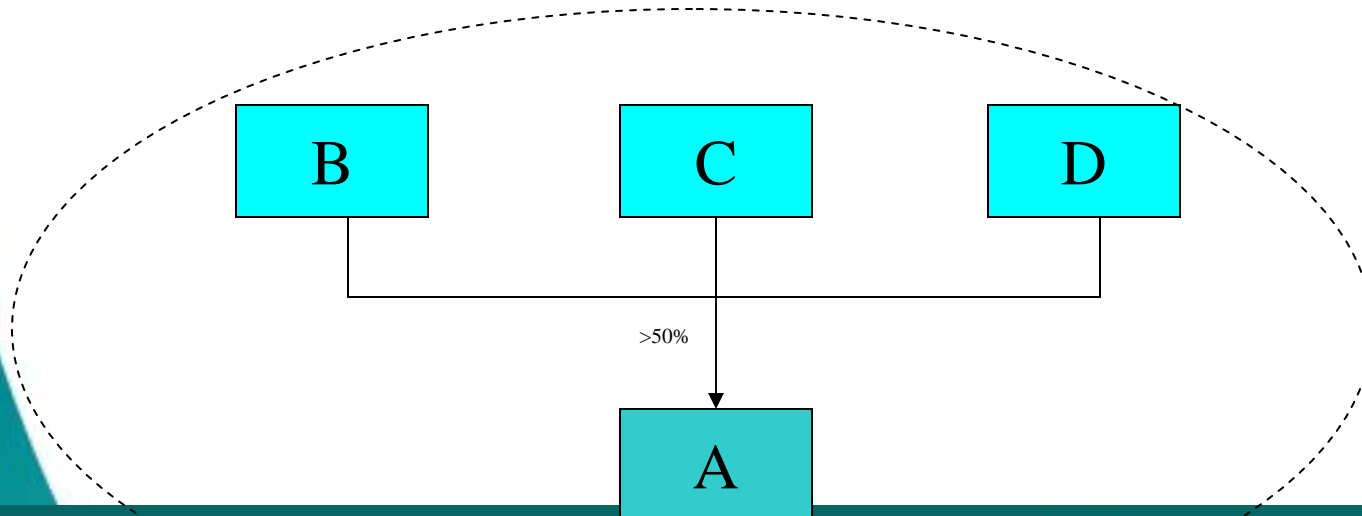


Group of Persons (III)

New Ground 15 was introduced:

individuals and/or legal entities hold more than 50% of the total votes represented by the voting shares (participatory interests) in the charter (share) capital of the company (partnership) due to:

- their **joint participation** in such company (partnership), or
- their authority obtained from other persons.



Actions Requiring Prior Approval by or Subsequent Notification of FAS

<u>Prior approval</u> <u>(Article 27)</u>	<u>Subsequent notification</u> <u>(Article 30)</u>
Establishment of a for-profit organization (including establishment as a result of reorganization), provided that:	Establishment of for-profit organizations as a result of a merger of for-profit organizations:
the total asset value of the founders (or their groups) and persons (their groups) whose shares (participatory interests) and/or assets are contributed to the charter capital of the newly established for-profit organization exceeds 7 billion rubles ,	if one or more for-profit organizations merged with the for-profit organization,
<i>or</i>	
the total sales revenues of the above persons for the previous calendar year exceed 10 billion rubles ,	if the total asset value of such organizations
<i>or</i>	<i>or</i>
the organization whose shares (participatory interests) and/or assets are contributed to the charter capital is included in the register of persons holding a dominant position in the respective commodity market	their total sales revenues for the previous calendar year exceed 400 million rubles .

Transactions Requiring Prior Approval by or Subsequent Notification of FAS

Transactions involving shares (participatory interests), assets of for-profit organizations, rights in respect of for-profit organizations	
<u>Prior approval (Article 28)</u>	<u>Subsequent notification (Article 30)</u>
<p>If the total asset value, according to the latest balance sheets of the acquirer and its group and the person and its group whose shares (participatory interests) and/or property, and/or in respect of whom rights are to be acquired, exceeds 7 billion rubles</p> <p>or</p>	<p>If the total asset value, according to the latest balance sheet,</p> <p>or</p> <p>the total sales revenues of the acquirer and its group and the person and its group whose shares (participatory interests) and/or property, and/or in respect of whom rights are to be acquired, exceed 400 million rubles</p>
<p>If their total sales revenues for the previous calendar year exceed 10 billion rubles</p>	<p>and the total asset value, according to the latest balance sheet of the person and its group whose shares (participatory interests) and/or property, and/or in respect of whom rights are to be acquired, exceeds 60 million rubles.</p>
<p>and the total asset value, according to the latest balance sheet of the person and its group whose shares (participatory interests) and/or property, and/or in respect of whom rights are to be acquired, exceeds 250 million rubles,</p>	

Control of Economic concentration: Other Changes

- **Clarifications in respect of transactions requiring prior approval by FAS (Article 28):**
- “...provided that previously the acquirer ...controlled **no more than 25%** of the voting shares”;
- “....provided that the book value of assets being the subject of the transaction or related transactions exceeds 20% of the book value of the **fixed production-related assets** of the business entity which disposes of or transfers such assets”.
- **NB! Prior approval by FAS is no longer required, if transactions are made within the same group of persons** (formed on the basis of Ground 1 specified by Article 9).
- **New:** Notification of FAS is required in case of acquisition of shares (participatory interests), rights and/or assets from a financial organization, if the asset value of the acquirers as shown on the latest balance sheet exceeds the amount set forth by the Government of the Russian Federation (in case of a credit institution - by the Government of the Russian Federation in consultation with the Central Bank of the Russian Federation).

Persons that Need to Submit Applications and Notifications to FAS (applicants)

Persons that need to submit applications:

- For mergers or takeovers of for-profit or financial organizations - organizations **participating in the respective merger or takeover**;
- In case of establishment of a for-profit organization – persons or one of the persons **taking the decision to establish the organization**;
- For transactions involving shares, participatory interests, assets, rights in respect of for-profit or financial organizations - the **acquirers**

Persons that need to notify FAS:

- For transactions involving shares, participatory interests, assets, rights in respect of financial organizations - the **acquirers**

Documents and Information to be Submitted to FAS

The list of documents and information to be submitted to FAS together with an application for FAS consent to or notification of FAS on a transaction subject to state control was supplemented with certain documents and information contained in ***FAS Order No. 129 of 17 April 2008***

The following was added to this list as well:

- A list of for-profit organizations which control more than 5% of the shares (participatory interests) of the applicant;
- **!Ultimate beneficiaries:** the details of the persons in whose interests more than 5% of the shares (participatory interests) of the applicant are held by their nominee holders, including the details of such persons registered offshore

FAS Control over Compliance with Antimonopoly Laws: Audits

Persons that may be audited:

- federal executive bodies, governmental bodies of the constituent territories of the Russian Federation, local governments, and other bodies performing the functions of such bodies and organizations; and
- state extra-budgetary funds,
- for-profit and non-for-profit organizations, their subdivisions (including branches and representative offices); and
- individuals (including individual entrepreneurs)

Audit format – **field audits** only

Audits are carried out on the basis of an order signed by the ***head of the respective FAS office***

Duration of audit – no more than ***1 month***. This period may be extended ***by 2 months*** upon an order of the head of the FAS office

Scheduled and Unscheduled Audits

Scheduled audits are carried out not more than **once** within **3 years**, after expiry of a 3-year period from:

- the incorporation date of a legal entity or organization, or state registration date of an individual entrepreneur;
- the completion date of the last scheduled FAS audit

Unscheduled audits are carried out on the following grounds:

- materials received from law enforcement and other agencies, or from non-governmental organizations;
- reports and statements by individuals and legal entities, media reports;
- expiry of the deadline for compliance with a previously issued FAS improvement notice

Period of notice:

Scheduled audit – at least **3 days prior to the audit**;

Unscheduled audit – at least **24 hours** (**except** audits of compliance with prohibitions on agreements restraining competition or on concerted actions)



New Powers of FAS and Violation Investigations

New Powers of FAS

FAS may request necessary documents, oral and written information, including **in-house communications in electronic form**

Limitation period - **3 years** from the date of the violation, or - for ongoing violations - from the date when the violation ended or was revealed.

Upon expiry of the limitation period no investigation of antimonopoly law violation can be initiated, and any ***investigation thus initiated*** should be closed

Administrative Liability for Violation of Antimonopoly Laws: Changes in the Administrative Offences Code (I)

New definitions of administrative offences and/or stricter liability are established for the following:

- Restraint of competition by state authorities, local governments;
- Abuse of the dominant position in a commodity market;
- Abuse of the dominant position by a business entity which holds less than a 35% share in the market for the particular commodities (new);
- Conclusion of an agreement restraining the competition, conduct of concerted actions restraining the competition, coordination of economic activities;
- Violation of the order placement procedure for state or municipal procurement;
- Provision, publication or placement of inaccurate information on the placement of the state or municipal procurement orders, submission of inaccurate details, entry of the same into the register of the state or municipal procurement orders, or the register of malevolent suppliers;
- Violation by a wholesale supplier of electric power and capacity or by a retail supplier of electric power of the procedure, manner or deadline for publication of information in printed media, in electronic media, or of the procedure, manner of deadline for disclosure of information upon written request by interested parties (new).

Administrative Liability for Violation of Antimonopoly Laws: Changes in the Administrative Offences Code (II)

Conditions for exemption from liability for the conclusion of an agreement or for the conduct of concerted actions which are barred by antimonopoly laws in case of voluntary reporting to FAS:

- By the time a person reported to FAS, the latter does not have relevant information and documents about the administrative offence;
- The person withdrew from participation or from further participation in the agreement, or from the conduct or further conduct of the concerted actions;
- The information and documents thus submitted are sufficient for the establishment of the occurrence of the administrative offence.

NB: The first person to comply with all the conditions above will be exempt from administrative liability.

Applications filed on behalf of several persons simultaneously will be disregarded by FAS.

Criminal Liability

Article 178 of the Criminal Code

- Essential elements of the offence were changed:
«Prevention, restraint or elimination of competition:
 - by concluding **or** performing **agreements** or **actions restraining the competition**;
 - **by multiple abuse of the dominant position**».
- Stricter penalties
- Conditions for **exemption** from criminal liability (**new**):
 - the offender cooperated in the exposure of the offence,
 - reimbursed the damage, **or**
 - remitted the income derived from criminally liable actions to the federal budget, **and**
 - his actions did not contain other elements of crime.

Provision of Rights in State and Municipal Property

The list of circumstances in which agreements on granting of rights in state and municipal property (e.g. lease) may be concluded without a bidding process was extended.

- A person who was granted the rights to possess and/or use **immovable property** may, subject to the owner's consent, assign to a third party its rights in a part (or parts) of immovable property equal to $\leq 10\%$ of the area and ≤ 20 sq. m without a bidding process.
- The deadline for renewal of lease agreements for state and municipal property with small and medium business entities was extended to **1 July 2015** (provided that by the time of renewal there are no grounds for early termination).
- As of **1 January 2011**, information on tenders or auctions for the right to conclude agreements on the provision of rights in state and municipal property will be posted on the official website of the Russian Federation used for the placement of information on bidding processes, as specified by the Government.

Procurement for State and Municipal Needs

Changes in Federal Law no. 94-FZ of 21 July 2005 “On Placement of Orders for Supply of Goods, Performance of Work, Provision of Services to Meet State and Municipal Needs:

A bidder at a tender (auction, public auction in electronic form) may independently determine the method for securing its obligations under a state or municipal contract,

unless the customer, competent authority set forth in the tender documentation that security in the form of contract liability insurance is not allowed.

A surety may be a Russian legal entity whose capital and reserves, as stated in the appropriate section of the financial statements, are not less than **300 million rubles** as of the last reporting date (or as of the previous reporting date, if the surety agreement was concluded before the expiry of the deadline for the submission of financial statements after the end of the reporting period)

and

the surety's commitment must not exceed **10% of the capital and reserves** of the surety.

Granting of State or Municipal Preferences

State or municipal preferences - privileges granted on the basis of regulatory acts of an authority at the appropriate level to individual business entities:

- **by transfer of state or municipal property**, other objects of civil law rights, or
- by granting **property benefits**.

As a general rule, such preferences require **prior approval by FAS**.

If the fact of unauthorized use of a preference is established, FAS will now issue (not only to the state or municipal authority that granted the preference but also) to the relevant **business entity** enjoying the preference an **improvement notice** seeking:

- **to surrender** the property, other objects of civil law rights; or
- **to stop** the use of the property by such business entity.

Conclusions

- **Extraterritoriality** – foreign companies influencing the Russian market will be subject to the same requirements that apply to Russian companies.
- **Increased thresholds** for the submission of applications and notifications to FAS – i.e. lesser administrative burden on businesses.
- Wider definition of the term “**group of persons**” needs to be taken into account in preparation of the documents to be submitted to FAS, and in the process of corporate approval of interested party transactions.
- **Exclusion** of “vertical” agreements **from prohibitions per se** – more opportunities for distribution.
- Wider powers of FAS in the field of control of antimonopoly law violations.
- **Stricter** administrative and criminal liability.