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ClientInsight

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Russian Legislation Update

Third Antimonopoly Package

On 6 December 2011 the President signed Federal Law No. 401-FZ amending the Federal Law "On the Protection of Competition" and certain other legislative acts of the Russian Federation, and Federal Law No. 404-FZ amending the Administrative Offences Code of the Russian Federation.

The amendments are widely referred to as the "third antimonopoly package" and are aimed primarily at liberalising, improving and clarifying certain provisions of antimonopoly legislation. Most changes concern the Federal Law "On the Protection of Competition" (the "Law") and relate to the provisions regulating agreements and agreed-upon actions limiting competition. In particular, the amendments introduce the concept of a "cartel" and provide an exhaustive list of agreements which are considered to be cartels. In addition, the amendments clarify the concept of "agreed-upon actions" and develop a separate article establishing prohibitions and requirements with respect to agreed-upon actions, and introducing the exceptions from the prohibitions. The concept of "vertical agreements" has also been improved and clarified.

The amendments also change the provisions of the Law regarding transactions on economic concentration (mergers, acquisitions, etc.) which require Federal Antimonopoly Service (the "FAS") approval. In particular, the amendments clarify the extent of the extraterritorial application of the Law, introduce value thresholds for transactions involving foreign entities which perform activities in Russia, and expand the list of documents and information required to be submitted to FAS for approval of a transaction representing economic concentration.

Furthermore, the amendments aim at eliminating excessive administrative barriers to companies' activities. In particular, the following requirements have been abolished: (i) the subjects of natural monopolies are no longer required to select financial organizations for rendering services solely by a tender or an auction; (ii) financial organizations are no longer required to notify FAS of certain agreements.

Amongst others, important amendments are made to the provisions of the Administrative Offences Code establishing liability for: (i) abusing a dominant position, and (ii) limiting competition agreements and agreed-upon actions. In particular, the Law specifies the applicable fines and their methods of calculation, and introduces new mitigating and aggravating factors to be considered when calculating a fine.

Furthermore, the amendments introduce administrative fines for abusing the requirements for submitting applications and notifications according to the legislation on foreign investments. The maximum amount that can be imposed as a fine is RUB 500,000 (for failure to submit notifications) and RUB 1,000,000 (for failure to submit applications).

The Laws entered into force on 6 and 7 January 2012, respectively.

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Corporate

On 7 December 2011 the President signed Federal Law No. 419-FZ amending the Criminal Code of the Russian Federation and Article 151 of the Code of Criminal Procedure of the Russian Federation.

The amendments aim at combating so-called *day fly companies* and introduce a new criminal activity – the unlawful establishment of a company. This means creation of a company by means of misleading fictitious persons – company founders or management bodies (e.g. when criminals unlawfully use somebody's personal data to establish a company aiming to commit financial crimes). According to the amendments, this crime is punishable, in particular, by a fine of up to RUB 500,000 or up to 5 years imprisonment.

The Law entered into force on 19 December 2011.

Securities

Central Depositary

On 7 December 2011 the President signed Federal Law No. 414-FZ "On the Central Depositary" and Federal Law No. 415-FZ amending certain legislative acts in connection with the adoption of Federal Law No. 414-FZ.

Federal Law No. 414-FZ establishes distinctive features of the central depositary and operation (including its rights, obligations and restrictions of its operation, exclusive functions and material conditions of the depository agreement); it also sets forth the procedure for obtaining its status, and distinctive features of state control and supervision over its operation.

A central depositary may only be a joint-stock company whose shareholders comprise any of the following Russian entities: (i) management companies of investment unit funds, joint-stock investment funds and non-state pension funds; (ii) professional participants in the securities market; (iii) organizers of trades, (iv) clearing organizations, and (iv) other persons if so provided for under the central depositary's charter.

Federal Law No. 415-FZ amends federal laws "On Joint-stock Companies", "On the Securities Market", "On Insolvency (Bankruptcy)", "On Enforcement Proceedings" in connection with records of rights to securities by the central depositary.

Federal Law No. 414-FZ entered into force on 1 January 2012, save for certain provisions. Federal Law No. 415-FZ will enter into force on 1 July 2012, save for certain provisions.

Organized Trades

On 21 October 2011 the President signed Federal Law No. 325-FZ "On Organized Trades" and Federal Law No. 327-FZ amending certain legislative acts in connection with the adoption of Federal Law No. 325-FZ.

Federal Law No. 325-FZ systematized and detailed current regulatory framework overseeing the operation of stock exchanges and organizers of trades, and introduced a single terminology used in this sphere. In particular, an organizer of trades may be any business entity, and a stock exchange may only be a joint-stock company. An organizer of trades must obtain a license either for a stock exchange or for a "trading system" and must possess funds in an amount of no less than RUB 100 million (stock exchange) and no less than RUB 50 million (trading system).

Federal Law No. 325-FZ also sets out requirements for founders, management bodies and employees of organizers of trades and participants of trades, as well as principal provisions of state regulation and state control over organization of trades.

Federal Law No. 327-FZ amended more than 40 laws, in particular, federal laws "On Joint-stock Companies", "On the Securities Market", "On Non-state Pension Funds", "On Investment Funds", "On Mortgage Securities", "On Appraisal Activity", "On the Central Bank of the Russian Federation", "On the Foundations of Trading in Russia", the Administrative Offences and the Budgetary Codes of the Russian Federation, and other acts.

Federal Law No. 325-FZ entered into force on 1 January 2012, save for a number of provisions calling for a period of transition (namely, change of the organizational form of operative stock exchanges, which will be possible starting from the date of official publication of the law, and also obtaining of new licenses by stock exchanges and organizers of trades) that will be ended by 1 January 2014.

Notifications

On 4 October 2011 the Federal Service for Financial Markets ("FSFM") issued Order No. 11-44/pz-n setting requirements, forms, terms and procedure for giving notifications by shareholders (participants) according to securities market legislation.

The Order was registered with the Ministry of Justice on 25 November 2011.

According to Federal Law No. 39-FZ "On the Securities Market", there is an obligation to provide notifications to the issuer and the FSFM concerning:

- Appearance (absence) of a controlling entity by persons owning five or more percent of voting shares in the issuer;
- Acquisition by a person of a right to dispose of, directly or indirectly and independently or together with other persons specified in the Law, a certain amount of voting shares in the issuer, if the amount of such voting shares is five percent or becomes more or less than 5, 10, 15, 20, 25, 30, 50, 75 or 95 percent of the total number of voting shares;
- Acquisition (disposition) of voting shares in the issuer by an entity controlled by the issuer;
- Gaining powers necessary for calling and holding an extraordinary general shareholders' meeting by shareholders or other persons in case of charging them with such duty by the court.

The Order now sets the requirements for the content, form, terms and procedure for giving such notifications. The notifications are to be provided within ten days from the date when a person found out, or should have found out, about the occurrence of the respective event (within one day from the date when a person found out, or should have found out, about entry into force of the respective commercial court decision in case of gaining powers for calling and holding an extraordinary general shareholders' meeting).

The Order will enter into force 10 days after the date of its official publication (as of 17 January 2012, the Order has not been published).

Banking

Cashless payment settlements

On 23 December 2011 the Central Bank issued Letter No. 196-T regarding payment demands.

The Letter is issued in view of Central Bank Directive No. 2749-U (which became effective on 29 December 2011). The Directive divided payment demands into those (i) payable with the payer's acceptance and (ii) payable with an acceptance granted in advance (as opposed to payment demands payable with or without acceptance, previously).

The Letter clarifies that after 29 December 2011 banks should not accept payment demands which refer to payment "without acceptance." However, if an agreement provides for direct debiting of a payer's account, banks should accept payment demands which refer to payment "with acceptance" and fulfil such payment demands as payable with an acceptance granted in advance.

The Letter was published in the Central Bank Herald on 29 December 2011.

Provisions for potential losses

On 17 November 2011 the Central Bank issued Directive No. 2732-U regarding formation of provisions for losses in operations with securities rights which are recorded by depositaries.

The Directive was registered with the Ministry of Justice on 12 December 2011.

According to the Directive, banks are to make provisions for potential losses related to securities rights which are recorded by organizations (depositaries), unless those organizations (depositaries) meet the criteria set forth in the Directive. The provisions should amount to 50% of the securities' value. Banks that form the provisions for such securities in accordance with Central Bank Regulation No. 283-P should form additional provisions if the formed provisions are below the above amount.

The Directive will enter into force on 20 May 2012.

Special Economic Zones

On 30 November 2011 the President signed Federal Law No. 365-FZ amending the Federal Law "On Special Economic Zones" and certain other legislative acts of the Russian Federation.

The Federal Law "On Special Economic Zones" is supplemented with the following new terms: (i) *managing company* (it is specified which companies may manage a special economic zone (SEZ)) and (ii) *cluster* (a set of SEZs which is defined by the Russian Government and managed by one managing company). The managing company's role is to secure the creation and operation of the SEZ's infrastructure and attract investments to the SEZ. A SEZ is to be created for a 49 year period (before the amendments, as a general rule, it was for a 20 year period).

The amendments also require the Ministry of Economic Development of the Russian Federation to conclude with a managing company *an agreement on managing a SEZ* and stipulate its main provisions (in particular, the managing company's duties, SEZ's performance characteristics, parties' liability, grounds and procedure for termination of the agreement).

The amendments entered into force on 1 January 2012, save for provisions on new terms which entered into force on 1 December 2011.

Environmental

Water supply (concessions)

On 7 December 2011 the President signed Federal Law No. 416-FZ "On Water Supply and Water Disposal".

The Law establishes a legal framework for governing activities in relation to water supply and water disposal in Russia through centralized and decentralized water systems. The Law, in particular, sets out the requirements to guarantee the quality of drinking water and defines the powers of federal and regional authorities, as well as the rights and obligations of organizations involved, and specifies environmental protection measures. In certain cases the Law prohibits privatization of facilities of centralized water supply and water disposal systems although it reinforces the possibility for private investors to operate water facilities, including on a basis of concession agreements.

The Law also sets out the procedure for tariff regulation. In particular, it envisages the possibility for establishing tariffs based on the principle of maintenance of return on the invested capital.

The Law will enter into force on 1 January 2013, save for certain provisions.

Energy

On 22 December 2011 the Government issued Resolution No. 1107 on maintenance of a register of fuel and energy complex facilities.

Following the recently adopted Federal Law "On Safety of Fuel and Energy Complex Facilities" (see our update for 22-28 August 2011), fuel and energy complex facilities in Russia must be included in a register maintained by the Ministry of Energy. The Resolution approves the procedure for establishing and maintaining the register. In particular, fuel and energy complex facilities, which were classified by their potential level of hazard, are to be included in such register along with a list of information which is specified in the Resolution. Such information must be provided at the request of federal and regional authorities and owners of such facilities.

The Resolution will enter into force from the date when the Government Resolution establishing criteria and the procedure for conducting classification of a fuel and energy complex facility enters into force (the date is unknown).

Court Practice on Penalty

Article 333 of the Russian Civil Code

On 22 December 2011 a Plenary Session of the Supreme Commercial Court approved Resolution No. 81 "On Certain Aspects of the Application of Article 333 of the Russian Civil Code."

According to Article 333 of the Civil Code, a court may decrease the amount of penalty (*neustoyka*) if it is obviously incommensurate with the consequences of violation of obligation. The Resolution clarifies a number of issues related to the application of this article, in particular:

- The penalty may be decreased only if the debtor requests it (i.e., the court may not do it on its own initiative);
- The debtor must prove that the amount of penalty is incommensurate with the consequences of violation of obligation, and its references to bad financial standing, counterparties' defaults and the like are not sufficient on their own;
- A contractual arrangement excluding application of Article 333 or providing for a maximum/minimum threshold of penalty does not prevent its being reduced based on this article;
- As a rule (to be skipped in exceptional cases), courts should not decrease the penalty below twice the bank rate of the Central Bank which applied at the time of violation;
- The debtor who voluntarily paid the penalty to the creditor may not claim its reduction based on Article 333 thereafter.

The Resolution is mandatory for lower commercial courts when considering similar issues.