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Special Update: "Third Antimonopoly Package" of Amendments

On 6 December 2011, the President of the Russian Federation signed several federal laws comprising the so-called "third antimonopoly package" of amendments. The amendments were mainly introduced to the Federal Law "On the Protection of Competition" (the "Law") and the Code of Administrative Offences of the Russian Federation ("Code of Administrative Offences"). The amendments also affected certain provisions of the Criminal Code and some other legislative acts of the Russian Federation.

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The "third antimonopoly package" of amendments was initiated and developed by the Federal Antimonopoly Service ("FAS") and is primarily aimed at liberalization of antimonopoly legislation and clarification of its certain provisions to eliminate the problems which may arise in course of its application.

This special update covers the principal amendments provided under the "third antimonopoly package."

Anti-Competitive Agreements and Concerted Actions; Other Types of Monopolistic Activities

The provisions of the Law on anti-competitive agreements and concerted actions have been substantially changed. The Law now includes a separate article on the regulation of anti-competitive concerted actions – the result of implementation of the long-debated intention of FAS to clearly distinguish regulation of agreements from regulation of concerted actions.

Anti-Competitive Agreements

The main innovation introduced by the third antimonopoly package is the notion of a "cartel" and a direct indication that a cartel may only be established between competitors, i.e., between companies selling goods on the same commodity market.

The list of agreements that may be considered as cartels has been reduced to five and now includes agreements that result or may result to: (1) maintenance of prices, (2) division of market, (3) maintenance or manipulation with prices on tenders, (4) decrease or stoppage of the production of goods, and (5) refusal to execute agreements with certain sellers or customers.

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Cartels are unconditionally prohibited. However, they may be deemed admissible if they are: (a) joint venture agreements (subject to a number of criteria listed in the Law); (b) entered into by entities belonging to the same group and connected by relations of "control" (as described in detail below), or (c) concerned the transfer of the results of intellectual activity. Other criteria of admissibility as provided for under Article 13 of the Law are, as before, inapplicable to cartels.

The amendments also clarified the prohibitions of vertical agreements. While the previous language of the Law and FAS practice prohibited the seller to influence on the establishment by the buyer of its own retail prices for goods, the "third antimonopoly package" has introduced an amendment - providing for the seller's right to determine, for the buyer, a maximum price for resale of such goods.

As in its previous version, the amended Law provides that the other agreements (except for the admissible vertical agreements) may also be prohibited if it is proved that they result or may result in the restriction of competition on the market (e.g., if they impose unfavorable contractual terms on the counterparty, raise obstacles to other entities' access to the market and the like).

The "third antimonopoly package" reflects (although in a limited form) the long-debated exception with respect to agreements restricting competition but entered into between the entities belonging to the same group. For example, according to the new exception, prohibitions of anti-competitive agreements do not extend to agreements made by entities one of which controls the other or by those under the common control of the same entity. For the purposes of such exception, the Law now includes a notion of "*control*" which applies where one entity holds a controlling stake in another entity and/or may exercise functions of such entity's sole executive body. This is an exception of a general nature, i.e., it applies to any agreements restricting competition, even if they are acknowledged as cartels.

The amendments also introduce another general exception pursuant to which the prohibitions of anti-competitive agreements do not apply to agreements under which the results of intellectual activity are provided or transferred.

Anti-Competitive Concerted Actions

The definition of concerted action has been mainly changed. The amendments now specify that concerted is an action which, in addition to meeting the other criteria, "was known in advance to each of the economic entities involved in such action and *information on the commitment of these actions was publicly announced by one of such economic entities*". Implementation of this innovation will require the development of FAS position and law enforcement practice (in particular, what should be deemed to be a public announcement and what should evidence its existence or absence) but it appears that the introduction of this condition will make it harder for FAS to prove concerted actions.

The Law now includes a new article on the regulation of anti-competitive concerted action containing a list of: (a) unconditionally prohibited types of concerted action, and (b) types of concerted action that are prohibited if they restrict competition. The lists of such prohibitions are similar to the prohibitions imposed with respect to anti-competitive agreements.

By analogy with the prohibitions of agreements, prohibited types of concerted actions are permitted if performed by entities belonging to the same group provided that such entities are united by relations of control.

In addition, the prohibitions do not extend to concerted action performed by persons without a considerable market share (such entities' aggregate share of the commodity market may not exceed 20%, and the share of each separate entity may not exceed 8%).

We note that the Law provides the possibility to prove the admissibility of any (even unconditionally prohibited) concerted actions according to the Article 13 of the Law, which distinguished the regulation of the latter from the regulation of the agreements.

Prohibited Coordination of Economic Activities

The amendments specified the concept of "*coordination*". Particularly, as amended, the entity which coordinates actions of third parties shall not operate on the same market with the "coordinated" entities. In addition, the amendments expressly provide that actions by economic entities performed under vertical agreements do not constitute coordination. Any coordination may be deemed admissible under Article 13 of the Law.

Dominant Position

The amendments introduced an addition to the definition of a monopolistically high price. The product price determined at the exchange may not be considered as a monopolistically high price (subject to a number of other criteria listed in the Law). Law also provides that, while determining whether a product price is monopolistically high in certain cases prescribed by Law, FAS shall take into account the exchange-based and out of exchange indicators of prices established on world markets for similar commodities.

In addition, the Law introduces the provision pursuant to which the time period for the commodity market research for the purpose of dominance determination should be not less than one year (except for the circumstances when the commodity market exists for less than one year).

Control over the Economic Concentration

A number of amendments have been made to the provisions of the Law related to FAS control over the economic concentration (i.e. companies' mergers and acquisitions, transactions on acquisition of assets, shares or rights of control, etc.).

In particular, the amendments have specified the extraterritorial application of the Law in order to primarily remove unclear provisions as to the regulation of transactions made abroad with respect to foreign companies without Russian subsidiaries but operating in the Russian Federation. It has now been determined that transactions with respect to such companies are subject to FAS control (subject to the threshold amounts provided under the Law) if: (a) in result of the transaction, either over 50% of the shares of the foreign entity or the rights to determine the commercial activity or perform the functions of its executive body are acquired; and (b) such foreign entity has supplied goods to the Russian Federation in the amount more than one billion rubles within the one calendar year preceding the year of the application to FAS.

Also, the thresholds of assets and sales revenues for the purposes of FAS control over mergers and acquisitions of commercial organizations have been increased. Therefore, a merger or acquisition is subject to FAS control now if: (a) the aggregate book value of the assets of entities involved in the merger or acquisition (including their group) as per the latest balance sheet exceeds 7 billion rubles (as against the previous 3 billion), or (b) the proceeds of such persons (including their group) from sales of goods in the calendar year preceding the year of the merger or acquisition exceeded 10 billion rubles (as against 6 billion previously).

In addition, the amendments establish thresholds applicable to regulation of mutual mergers and acquisitions of commercial and financial organizations (related to the indicators of a financial organization involved in such merger or acquisition).

Furthermore, rules for the calculation of the group assets of the acquired company for the purposes of preliminary FAS control over the transactions have been introduced. In particular, according to the amendments, such calculations shall not include the seller's assets if, as a result, seller's rights (and rights of its group of entities) to determine the commercial activities of the acquired company ceased to exist. However, FAS clarifications will be required to apply this change in practice.

In addition, the amendments specified the issue by FAS of "conditional" approvals of economic concentration. First, FAS is now entitled to determine so-called "conduct terms" (i.e., terms which the entity shall comply with before FAS will issue the approval) with respect to transactions on shares, assets or rights acquisition (by analogy with corporate mergers and acquisitions). Second, with respect to approvals with the simultaneous issue of prescriptions (enumerating the actions to be performed *after* the issue of the FAS approval) right of FAS to revise such prescriptions has been introduced. This may be done by FAS at its own discretion or as per an application from the entity which such directive has been issued to in the event the characteristics of the commodity market have changed, loss by such person of its dominant position or other changes affecting compliance with the prescription.

Other amendments affect the definitions (notion of an "entity being the object of economic concentration" has been introduced) and the list of documents and information to be filed with FAS for the purposes of control over economic concentration (the list was clarified in line with the settled practice).

New Institutions: Precaution and Warning

According to the amendments, precaution is made by FAS *in order to prevent a prospective breach* if, based on a public information or statements of the person about his prospective behavior one can conclude that such conduct may lead to the violation of antimonopoly laws, and there is no evidence of such breach or grounds for the initiation of relevant proceedings.

Unlike a precaution, a warning is issued in the event there is evidence of breach of antimonopoly laws. A warning may only be issued to an entity which has a dominant position and only in the event of two abuses of the dominant position were discovered: (i) imposition on counterparty of unfavorable contractual terms, and (ii) avoidance of entering into a contract with certain customers. The proceedings on the violation of antimonopoly laws may not be initiated unless the warning was issued.

Introduction of these institutions will allow coping with the violations of antimonopoly legislation more effectively, and, on the one hand, significantly reduces the work burden on FAS, and on the other hand, reduces risks for the companies.

Liability for Breach of the Law

Significant changes introduced under the "third antimonopoly package" affect the provisions of Code of Administrative Offences.

Specifically, the amendments have differentiated fines for abuse of dominant market position. From now on, "turnover" fines will only be applied if such abuse has led to a restriction on competition, otherwise (if the abuse infringed on the interests of other parties but no restriction on competition occurred), fixed fine amounts will be charged. This differentiation will not affect subjects of natural monopolies: "turnover" fines will be applied to them in any instance of dominance abuse.

In addition new provisions of the Code of Administrative Offences set a detailed procedure for fine calculation. Pursuant to this procedure, the base amount of a "turnover" fine will amount to 8% of the breaching company's turnover. Further, the amount of the fine will be increased or, respectively, reduced by 1.75% per aggravating or mitigating circumstance. In any event, the final fine may not be less than the minimum fine amount provided under the Code of Administrative Offences (1% of the turnover or 100,000 rubles) or more than the maximum fine amount (15% of turnover).

The list of mitigating and aggravating circumstances to be taken into account in the calculation of fines for breach of antitrust laws has also been significantly changed. The amendments have specified which of the existing circumstances are to be applied to

breaches of antimonopoly laws and new mitigating and aggravating circumstances applicable to such breaches have been introduced.

With respect to the criminal liability, the amendments specify that criminal liability may only be imposed for entering into cartel agreements and not any anti-competitive agreement.

Antitrust Requirements to Tenders

Aside from the above, amendments also made to the provisions of the Law which provide requirements to tenders (which are mandatory under the law) and regulate the procedure for the execution of agreements with respect to public and municipal property. In particular, the requirements for tenders and organizational procedure for the tender or auction on the transfer of the state or municipal property were specified to exclude the potential violations of the Law, and FAS powers in this sphere were significantly expanded.

In particular, the separate article reflecting the procedure of the administration of complains submitted to FAS against violations of the tender procedure and violations of the procedure of agreement execution according to the tender results was introduced to the Law. According to this procedure, the tender is to be suspended as of the date FAS notifies the tender organizer of the acceptance of the complaint for the consideration until the moment the complaint is considered on the merits of the case (which, according to the Law, is to be completed within seven business days). Based on results of the complaint consideration, in case the complaint was proved, FAS issues prescription to the respective persons which may include various requirements, including those on change in the tender documentation, cancellation of the protocols drawn up in the course of the tender and even cancellation of the tender.

Other Amendments

Other amendments made to the Law are related to the list of FAS powers (it has been expanded) and clarification of certain procedural questions matters related to the initiation and consideration of the cases concerning breaches of antimonopoly legislation.

Certain amendments are aimed to remove the excessive administrative barriers to the operation of companies. In particular, the amendments lift the following requirements: (a) for subjects of natural monopolies – to select financial organizations for the provision of services solely based on the results of a tender or auction, and (b) for financial organizations – to notify FAS of agreements made by them.

The federal laws comprising the "third antimonopoly package" entered into force, respectively, on 6 and 7 January 2012.