

Russia

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LEGISLATIVE DEVELOPMENTS

On October 05, 2015 the President of the Russian Federation Vladimir Putin signed the Federal Law "On amending the Federal law "On protection of competition" and separate legal acts of the Russian Federation" (so-called "the Fourth Antimonopoly Package")¹ that provides sufficient amendments to the Federal Law No. 135-FZ "On protection of competition" as of June 26, 2006 (hereinafter – "the Competition Law")².

The draft of the law has been developed by the Federal Antimonopoly Service (hereinafter – "FAS Russia") and prepared in pursuance of the "Road map" on development of the competition and antimonopoly regulation and according to recommendations of the Organization for Economic Co-operation and Development (OECD).

In the enacted law, there are detailed descriptions of actions which can be regarded as unfair competition. According to the amendments made, the main types of unfair competition include defamation; misrepresentation of customers; incorrect comparison of goods or entity with goods of competitor or with competitor itself; use of intellectual property of competitor, for example, know-how during sale or exchange of goods; acquisition and use of exclusive rights to means of individualization of legal entities or goods, works, services impeding implementation of business activity of competitors; mixture with the competitor or with his

¹ "О внесении изменений в Федеральный закон "О защите конкуренции" и отдельные законодательные акты Российской Федерации" No. 275-ФЗ [On amending the Federal law "On protection of competition" and separate legal acts of the Russian Federation No. 275-FZ], *Sobranie Zakonodatel'stva Rossiiskoi Federatsii* [SZ RF] 20.07.2015, No. 29 (1 ч.). Ст. 4376 [Russian Federation Collection of Legislation] 20.07.2015, No. 29 (1 p.). Art. 4376.

² О защите Конкуренции No.135-ФЗ (с изменениями и дополнениями) [On Protection of Competition No. 135-FZ, as amended], *Sobranie Zakonodatel'stva Rossiiskoi Federatsii* [SZ RF]. 2006. № 31 (1 ч.). Ст. 3434 [Russian Federation Collection of Legislation] 2006, № 31 (1 p.). Art. 3434 (Russ.).

goods or services; illegal receipt, use, disclosure of information that is the commercial or trade secret.

Another amendment is that the list of violations at detection of signs of which the antimonopoly service has a right to issue warnings before initiation of the proceedings has been significantly expanded. Thus, besides actions related to abuse of dominance related to imposing of unprofitable terms of the contract and unreasonable refusal of the conclusion of the contract, also such grounds for issuance of warnings as creation of discrimination conditions and unreasonable fixing of various prices are added. Moreover, the warning can be issued in the presence of signs of separate types of unfair competition, and also to the state body / local government in case of existence in its actions of signs of violation of Article 15 of the Competition Law (prohibitions of anti-competitive actions and acts of the state bodies / local governments).

Amendments also specify and develop procedural provisions of the Competition Law. For example, amendments regulate procedures of consideration of cases with participation of experts, specialists and translators, introduce procedure of challenging members of commission considering the case, establish rules of considering the case in an open or closed sessions of commission and contain provisions on types of evidence that may be used in the process.

The law also determines the procedures for reconsidering decisions and orders of the regional offices of FAS Russia by the collegial body of FAS Russia.

Amendments will come into force on January 05, 2015.

MERGERS

Within the adoption of the Fourth Antimonopoly Package, receiving of the preliminary approval of the conclusion of JV agreements by FAS Russia has become obligatory if certain thresholds are met. Thus, all JV agreements concluded by competitors that have combined

assets of over RUB 7 billion (approx. USD 124,4 million, EUR 102 million) or combined revenues of over RUB 10 billion (approx. USD 177,7 million, EUR 146 million) are to be considered by FAS Russia. This provision supplements the existing requirements that the formation of a legal entity must be agreed with the regulator in certain cases.

Moreover, voluntary obtaining of clearance will secure parties to agreement in part of admitting their actions as violating Article 11 of the Competition Law that prohibits conclusion of anti-competitive agreements.

Amendments also introduce provision allowing entities to file with FAS Russia information on proposed transaction (action) before official submission of the relevant application or notification. Under this procedure, entities are entitled to offer terms and conditions aimed at ensuring competition beforehand. It is expected that this procedure will allow antimonopoly authority to take into account opinions of entities when granting clearance or prescription with regard to transaction.

Amendments also foresee the possibility of submission of applications and documents in an electronic form and information on the submitted applications will have to be also published on the official web site of the antimonopoly authority. Purpose of this amendment is enabling entities and other interested persons to send to the antimonopoly authority opinions on proposed transaction (action), and for the antimonopoly authority – to understand possible consequences of transaction (action) before taking the final decision.

CARTELS AND OTHER ANTICOMPETITIVE PRACTICES

Cartel enforcement has significantly intensified in Russia over the past couple of years. The prosecution of cartels has repeatedly been declared by FAS Russia as one of its top enforcement priorities.

One more tendency in cartel enforcement is the large number of bid-rigging cases. This can

be explained by the widespread practice of conducting tenders in various sectors of the Russian economy. According to the Russian legislation, tenders are mandatory in respect of state procurement, selling and leasing state or municipal property, etc. Bid rigging cartels are more focused on identifying artificial conduct of tender participants rather than collecting evidence of their explicit collusion. These cases are generally less dependent on dawn raids than other types of cartels.

For example, FAS Russia found the company Vostok LLC, Roads of Siberia LLC, DEP No. 363 OJSC and DEP No. 364 OJSC liable for participating in bid rigging cartel for maintenance and repair of the road M-54 "Yenisei" from Krasnoyarsk through Abakan, Kyzyl to the boundary with Mongolia. The total amount of fines imposed exceeded RUB 109 million³.

Another example of an important cartel case is the case when FAS Russia has initiated proceedings upon the signs of a cartel agreement in the market of international container shipping against Russian agents of the largest ocean-going container carriers.

The investigation covers container shipping industry and involves all major players within this market like Nyk Line, A.P. Moller-Maersk Group and others. This is the second international cartel investigation in Russia.

It is notable that the antimonopoly authority for the first time in its practice turned for carrying out of the external expertise and analysis of the market while investigating of the cartel case.

In June 2015, FAS Russia received the report (research scientific work) that is a comprehensive study of the market of international container shipping regarding certain routes including the procedure for the formation of prices (surcharges) within rendering the services

³ Press Release, Fed. Antimonopoly Serv. of the Russ, FAS Russia fined cartel participants by more than 109 million rubles (July 17, 2015), http://fas.gov.ru/fas-news/fas-news_36792.html

for the transportation of cargo in containers.

Having received the above said expert report, FAS Russia issued a decision as on reopening the case and prolonged the case hearing until February 06, 2016.

The investigation presumes to be the most global and longest one in Russia.

ABUSE OF DOMINANT POSITION

Fourth Antimonopoly Package adopted also converts provisions related to abuse of dominant position. Such amendments will have serious impact on the practical and theoretical approach to dominance in Russia.

According to the amendments made to the Competition Law, now it would be impossible to consider the company holding a dominant position if its share in the market is less than 35% except of the cases which are directly provided by the federal industry laws (for example, legislation on communication and on power industry) and "collective dominance" cases.

The considered changes covered abolishment of the register of legal entities holding a share exceeding 35% in the market of certain goods. Abolishment of the register is aimed at protection of the interests of persons concerning which cases on abuse of dominant position are considered or with which participation transactions of economic concentration are made.

Inclusion of an economic entity into the register with share exceeding 50% on the market created a presumption on its dominance that in practice was rather difficult to challenge. Moreover, in relation to merger control procedure if someone from participants of the transaction or their groups of any legal entity from their groups of persons was included into the register, it was the basis for getting approval of the antimonopoly authority to the transaction irrespective of the value of assets and revenue of the parties.

The law also gives the right to the Government of the Russian Federation to determine the

Rules of Non-discriminatory Access to goods in the highly-concentrated markets (with share over 70%) in the presence of violations of the antimonopoly legislation.

FAS Russia plans to approve or add RNDA in the field of aircraft, power industry, ports and mail, railway transport.

As for administrative practice, one of the most important case on abuse of dominance is the case on the Android mobile operating system market. Commission of FAS Russia decided that Google abused its dominant position at the market of preset App stores in the Android operating system upon the results of hearing of the case against Google Inc., Google Ireland Ltd., and Google LLC⁴.

This case is considering in several jurisdictions, including European Union (Google's anticompetitive business practices are currently being investigated by eight different regulators). The problems created by Google extend beyond the EU and Russia, impacting innumerable companies. Failure to redress Google's abuse of its dominant position in mobile will allow this monopolist to push competitors out of this dynamic market.

COURT DECISIONS

In 2015, courts upheld decisions in relation to the most significant cases rendered by the courts of lower instances or by the FAS. According to the information from the Head of FAS Russia courts dismiss approximately 16% of FAS Russia decisions challenged by the claimants⁵.

On June 16, 2015 Commercial Court of Moscow Region confirmed legitimacy of the decision rendered by the FAS in relation to Baxter CJSC where the FAS revealed that measures

⁴ Press Release, Fed. Antimonopoly Serv. of the Russ, FAS Russia issued a remedy to Google (October 05, 2015), http://www.fas.gov.ru/fas-news/fas-news_37054.html

⁵ Press Release, Fed. Antimonopoly Serv. of the Russ, Courts dismiss 16% of FAS Russia decisions (June 09, 2015) http://fas.gov.ru/fas-in-press/fas-in-press_40844.html

accepted by Baxter CJSC for the check of contractors within complex examination (due diligence) had not corresponded to the Russian antimonopoly legislation (the due diligence included FCPA compliance) stating that procedures for selection of contractors did not contain clear rules for consideration of offers, performance criteria, and terminations of the contractual relations. Moreover, the courts disregarded the due diligence conducted by Baxter, holding that such matters should be determined only by law enforcement, not a private company.⁶

The courts took the similar approach in respect of TEVA PHARMACEUTICAL INDUSTRIES LIMITED. On October 13, 2015, Moscow Arbitration Court dismissed a claim of TEVA PHARMACEUTICAL INDUSTRIES LIMITED (Israel) against the order of FAS Russia to hold TEVA administratively liable for failure to execute the remedy.

Earlier, in December 2013 the antimonopoly service found that TEVA violated abused its dominant position as a result of refusing to conclude the contract with “BIOTEK” for supplying “Copaxone” medicine without any economic and technological justification and issued an remedy aimed at maintenance of the competition (refuse was based on the fact that the distributor had not passed a special check for FCPA compliance conducted by Teva; there was also a suspicion that the General Director of the distributor was involved in a corruption scandal but there was evidence or decision of law enforcement bodies).

The appeal court and the cassation court confirmed legitimacy of the remedy. In January 2014 “BIOTEK” asked TEVA twice to conclude the contact for supplying “Copaxone” but the company refused to enter into the contract. Therefore, TEVA failed to execute the remedy of FAS Russia and was held administratively liable. Additionally, fine for RUB 300 000 was

⁶ Ruling of the Commercial Court of the Moscow Region as of June 16, 2015 to the case No. A40- 72433/2014, available at https://kad.arbitr.ru/PdfDocument/cfb4466f-2a03-44e6-8979-397c2537ddd0/A40-72433-2014_20150623_Reshenija%20i%20postanovlenija.pdf

imposed⁷.

On August 17, 2015, the Supreme Court of the Russian Federation indicated that the courts of lower instances had correctly established that unscheduled inspections may be conducted without prior initiation of administrative case on violation of antimonopoly legislation. Earlier FAS Russia conducted an inspection in respect of CJSC ARGUS-SPECTR and its 68 dealers on compliance with antimonopoly legislation. CJSC ARGUS-SPECTR challenged the Order of the Head of FAS Russia “On initiation of the unscheduled inspection”⁸.

⁷ Ruling of the Commercial Court of the Moscow Region as of October 20, 2015 on the case No. A40-188580/14, available at: https://kad.arbitr.ru/PdfDocument/53e41bbd-9ab9-441f-86a3-8d48cbce5c50/A40-188580-2014_20151020_Reshenija%20i%20postanovlenija.pdf

⁸ Ruling of the Supreme Court of the Russian Federation as of August 17, 2015 No. 400-ЭС14-2879 available at https://kad.arbitr.ru/PdfDocument/03c64ee3-2062-4cec-9ff4-3f1a550f61dd/VAS-7907-2013_20150817_Opredelenie.pdf