

# Second Antimonopoly Package

September 2009

Russia

On 22 August 2009 so-called “second antimonopoly package” of amendments (amendments to antitrust law) came into effect. The “package” includes amendments to the Federal Law «On Protection of Competition» (hereinafter – the Law), the Code of the Russian Federation on Administrative Violations (hereinafter – Code on Administrative Violations) and to the Criminal Code of the Russian Federation (hereinafter – the Criminal Code).

The amendments were developed in close discussion with business and legal communities and reflect recent FAS practices and concerns. Common practice shows that governmental and municipal officials and monopolies commit most of the violations. Therefore, the amendments are aimed at clarifying and tightening regulation of their activities. However, a number of provisions are also of general business interest.

## Amendments to the Law

The most considerable amendments to the Law are as follows:

- The dominance threshold was reduced regardless of the market share of an economic entity. According to the amendments, the Federal Antimonopoly Service (hereinafter – FAS) may, under certain conditions, recognise a company as dominant, even if its share in the relevant goods market is less than 35% but it exceeds the shares of other entities on the market, provided that that company can exercise a dominant influence on the general conditions of the goods circulation in the relevant goods market.

This is an attempt by FAS to address issues surrounding retailers and pharmaceutical companies, as whilst such entities do not hold 35% of the market share, they have a real market power and are able to influence prices.

- Use of the «cost plus» method (estimating the necessary cost for producing goods plus profit) as well as the «comparable market method» (comparing prices established under competitive conditions on a comparable market) to determine monopolistically high prices of goods. Monopolistically high prices can also be determined using the «retrospective method», which analyses the changes in the cost of producing goods and distribution within a particular period. Monopolistically high prices of goods cannot be recognised if it is achieved through innovative activities: activities resulting in developing a new product that does not have an existing market substitute, or developing a new substitute product and reducing its production costs and /or improving its quality.
- Vertical agreements (agreements between non competing parties) are excluded from “per se” prohibitions of Article 11 p.1 of the Law. The previous version of Article 11 in its part 1 prohibited all agreements and concerted actions that lead or may lead to restriction of competition in the form of specified consequences. The provision was restrictive and potentially encompassed nearly all agreements. The amendment now generally permits

vertical agreements with two exemptions: if they lead or may lead to establishment of resale price; and/or if they contain provisions that prohibit the customer to sell other competitor’s commodities.

- The amendments provide FAS the possibility of conducting unscheduled inspections without prior notification of any such inspection. This amendment was introduced to increase the likelihood of discovering competition-restricting agreements.
- All of the concentration thresholds for acquisition or merger of companies were increased and now amount to the following:

For prior FAS consent:

- 7 billion Rubles (appr. 156 million euros) for aggregate book value of assets of acquirer’s group and target’s group; or
- 10 billion Rubles (appr. 222 million euros) for turnover of acquirer’s group and target’s group; and
- 250 million Rubles (appr. 5,5 million euros) for book value of target’s group assets.

For post-deal notification:

- 400 million Rubles (appr. 9 million euros) for aggregate book value of assets or turnover of acquirer’s group and target’s group; and
- 60 million Rubles (appr. 1,3 million euros) for book value of target’s group assets.

- Introducing notification procedures for transactions within a group of persons, formed under the «structural» basis (a person owns more than 50% of the total voting shares in the authorised (share) capital of an economic entity or a partnership).
- Establishing the right of the FAS to issue conditions for selling a particular amount of goods through a commodity exchange, and a preliminary agreement with the FAS prescribing the reserved price for goods when goods are sold through a commodities exchange in accordance with the procedures established by the Government of the Russian Federation.
- Establishing a three-year preclusive term for violations of the antimonopoly legislation.

## Amendments to the Code on Administrative Violations

The amendments to the Code on Administrative Violations have created several new administrative violations in state and municipal procurement, which will increase efficiency of tenders and reinforce protection of market agents taking part in competitive bidding. The government seeks to facilitate the participation of small and medium businesses in tenders.

In particular, the amendments establish administrative liability for:

- Failure to procure goods works and services from small businesses;
- Failure to meet deadlines for returning financial assets; and infringing the rights of bidders in electronic tenders;
- Continuing procurement if placing the order has been suspended in accordance with the legislation of the Russian Federation;
- Failure to present information on concluding a state or a municipal contract;
- Coordination of economic activities.

In spite of an earlier stated FAS intention to increase the fines for anti-monopoly offences, they remain the same. However, the amendments have introduced a 1-3 year disqualification for the executives of economic entities that have a dominant position on the goods market and that have abused their dominant position.

It should be specially noted that the Notes to Article 14.32 of the Code on Administrative Violations were significantly amended. The Notes address the «leniency programme», which affords cartel participants the opportunity of avoiding punishment. Previously, the Notes allowed the FAS to relieve from liability any offender who voluntarily reported a violation and agreed to eliminate it. This led to a wide practice of entities joining their hands and applying to the FAS for leniency all together. This practice was especially prevalent in the financial market.

The FAS officials stated that the provision was introduced to clear the markets from anti-competitive agreements and concerted actions. However, the stipulated transition period has now ended and after the introduction of the amendments to the Code on Administrative Violations come into force only the first company that approaches FAS will be fully relieved from liability. Moreover, the following conditions must be met:

- (a) At the moment of filing the application the FAS must not have any information or documents regarding the violation;
- (b) The applicant agrees to withdraw from the respective anti-competitive agreement;
- (c) The documents provided by the applicant sufficiently demonstrate the administrative violation.

FAS officials will continue to take advantage of the current leniency program until the law comes into force.

## Amendments to the Criminal Code

Amendments to Article 178 of the Criminal Code of the Russian Federation tighten criminal liability for violations of the antimonopoly legislation. The Article itself existed before, but it didn't contain provisions that would have allowed the FAS to enforce it and thus it was never used. The amendments have introduced real enforcement possibilities in respect of criminal liability for antitrust rules violators.

The violations in question include: preventing, restricting or eliminating competition by concluding competition-restricting agreements or engaging in competition-restricting actions; repeatedly abusing dominant position by fixing and maintaining monopolistically high prices; unreasonably refusing to sign or evading contracts; and restricting market entry; if such actions have resulted in inflicting heavy damages upon physical persons, organisations or the state or in gaining income on a large-scale.

The amendment provides for relief of criminal liability if a violator assisted in investigating the violations, compensated the inflicted damages or transferred the income obtained as a result of the violator's actions to the federal budget, and if the violator's actions did not constitute other crime.

Thus the amendments on the one hand aim to reduce administrative barriers for business, by increasing notification thresholds and excluding vertical agreements from per se prohibitions, but on the other hand toughen the regulations that address offenders and different types of violations, by limiting the possibilities offered by leniency and going away from market share-based approach to determination of dominance. The amendments strengthen FAS official powers, but also give rise to additional questions and may require interpretation or adoption of other regulatory acts.

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