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# ANTITRUST COMPLIANCE AND AMENDMENTS TO ANTITRUST REGULATION IN RUSSIA



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Globally more and more attention is being paid to antitrust compliance which is generally understood to mean that a company complies with the norms of antitrust legislation in the countries where it conducts business.

At present there are no legislative provisions in Russia that directly regulate antitrust compliance. There are, however, a significant number of clarifications and recommendations by the state authorities on adopting and ensuring the effective functioning of an antitrust compliance system.

It is essential that due attention be paid to this area not only for the above-mentioned clarifications and recommendations on the introduction of antitrust compliance systems in companies, but also in connection with the possible employment of such systems to identify violations, and a mitigation of and even complete release from liability for certain antitrust violations.

### **CLARIFICATIONS AND RECOMMENDATIONS BY THE STATE AUTHORITIES ON THE INTRODUCTION AND EFFECTIVE FUNCTIONING OF ANTITRUST COMPLIANCE SYSTEMS**

Recently, Russia's state authorities – namely the Federal Antimonopoly Service of Russia (the “FAS of Russia”) – have adopted the following clarifications and recommendations regarding antitrust compliance:

- Clarification No. 5 of the Presidium of the FAS of Russia “Assessment of the Admissibility of the Business Methods of Subjects Holding a Dominant Position in the Market”<sup>1</sup>;
- Methodical Recommendations on Introduction of Internal Controls of Compliance with Antitrust Legislation, Legislation on the State Defence Order and Legislation Regulating Procurement Activities<sup>2</sup>;
- Methodical Recommendations on the Establishment and Organisation by the Federal State Executive Authorities of a System for Ensuring Internal Compliance with the Requirements of Antitrust Legislation<sup>3</sup>.

Though being addressed to companies in certain sectors or the state authorities, these documents may also be used by private companies. For example, the aforementioned clarifications and recommendations provide for different measures for the establishment and effective functioning of antitrust compliance, which include *inter alia*:

<sup>1</sup> Approved by the minutes of the Presidium of the Federal Antimonopoly Service of Russia, No. 4 dated 24 February 2016.

<sup>2</sup> Approved by Directive No. 795-5 of the Government of the Russian Federation dated 26 April 2017.

<sup>3</sup> Approved by Directive No. 2258-r of the Government of the Russian Federation dated 18 October 2018.

- Adoption of special antitrust compliance regulations;
- Creation of a competent division/appointment of an executive officer who will be responsible for the functioning of antitrust compliance;
- Separation of areas of responsibility between divisions, officers and employees in the field of antitrust compliance;
- Creation of a mechanism to identify and assess the risks of antitrust violations;
- Drafting of actions to mitigate these risks.

The said clarifications and recommendations illustrate the state policy on introducing antitrust compliance and ensuring its effectiveness. They offer examples of specific measures that are recommended to be adopted. For example, it is recommended to analyse identified antitrust violations during the past three years, as well as to develop actions aimed at mitigating the risks of antitrust violations at least once a year.

## **MITIGATION OF AND RELEASE FROM LIABILITY FOR ANTITRUST VIOLATIONS**

Legislation of the Russian Federation stipulates that it is possible in certain instances to mitigate or avoid liability for the following antitrust violations:

- Conclusion of a cartel agreement and participation therein;
- Conclusion of other anti-competition agreements (*inter alia*, prohibited “vertical” agreements) and participation therein;
- Engagement in inadmissible concerted practices.

Here, administrative liability for the commission of the aforementioned antitrust violations may be reduced or avoided, whereas criminal liability can only be avoided solely in respect of the conclusion of a cartel agreement recognised as a crime.

For this purpose, the company must satisfy all of the following conditions<sup>4</sup>:

- At the time when the company filed its appeal, the relevant information and documents on the antitrust violation had not yet been submitted to the FAS of Russia;

<sup>4</sup> Note 1 to Article 14.32 of the Code of the Russian Federation on Administrative Offences (hereinafter the “RF Code on Administrative Offences”).

- The company withdrew (subsequently withdrew) from the cartel or other anti-competitive agreement, or refused to engage in (continue engaging in) the concerted practices;
- The information and documents submitted by the company are sufficient to prove the antitrust violation.

A company is released from liability if it is the first to satisfy all the aforementioned conditions.

Officers of a company may avoid criminal liability for the conclusion of a cartel agreement recognised as a crime if they satisfy all of the following conditions<sup>5</sup>:

1. The officer is the first co-perpetrator to voluntarily report the crime;
2. The officer proactively facilitates disclosure of the crime and/or investigation;
3. The officer provides reimbursement for the damages caused by the crime or otherwise atones for the damages that were caused;
4. The officer's actions constitute no other *corpus delicti*.

Administrative liability of a company for an antitrust violation is mitigated by imposing a minimal fine on the company.

To mitigate liability, a company must satisfy the following conditions<sup>6</sup>:

- The company admits to the commission of the antitrust violation;
- The company withdraws (subsequently withdraws) from the cartel or other anti-competitive agreement, or refuses to engage in (continue engaging in) the concerted practices;
- The information and documents submitted by the company are sufficient to establish commission of the antitrust violation.

The administrative liability of a company for the commission of a violation will be mitigated if the company is the second or third to satisfy all the aforementioned conditions.

<sup>5</sup> Note 3 to Article 178 of the RF Criminal Code.

<sup>6</sup> Note 5 to Article 14.32 of the RF Code on Administrative Offences.

## **DRAFT LAW ON ANTITRUST COMPLIANCE**

On 5 September 2019, draft law<sup>7</sup> No. 789090-7 was published by the State Duma of the Russian Federation, indicating plans to enshrine rules on antitrust compliance in law.

Pursuant to the draft law, antitrust compliance is understood to mean the set of legal and organisational measures stipulated by an internal regulation of a company, and aimed at ensuring compliance of the company with antitrust legislation and preventing violations of such legislation. The draft law does not stipulate that companies are required to introduce such an antitrust compliance system.

Under the draft law, if a company decides to implement an antitrust compliance system, this company (or group of companies) will have to adopt internal regulations containing such measures as an assessment of the risks that the company may commit antitrust violations, the mitigation of such risks, control over the functioning of the antitrust compliance system, the familiarisation of employees with these regulations, and also the appointment of an officer who will be responsible for antitrust compliance. The list of measures mentioned by the draft law is not exhaustive – companies are also entitled to add their own measures to this list. In a final analysis the implementation of such measures will be assessed to determine whether the antitrust system actually functions effectively.

The draft law allows companies to submit draft documents on antitrust compliance to the FAS of Russia to assess whether they meet the requirements of antitrust legislation.

The draft law does not stipulate how the FAS of Russia or the courts will take into account the existence and functioning of antitrust compliance in a company that has still violated antitrust legislation. Specifically, it is not clear whether this factor may reduce or eliminate the liability of the company and/or its officers, namely if the FAS of Russia has analyzed in advance and approved the draft documents on antitrust compliance.

<sup>7</sup> Draft Federal Law “On Amendments to the Federal Law “On the Protection of Competition””.

# Adopted and proposed amendments to the Antitrust Regulation of the Russian Federation

## ADOPTED AMENDMENTS TO THE ANTITRUST LEGISLATION OF THE RUSSIAN FEDERATION

In 2018–2019, the following amendments to antitrust legislation were adopted and entered into force:

- A rule was introduced on the mandatory registration of information with the unified inspections register which is maintained by the Prosecutor General's Office of the Russian Federation, on scheduled and unscheduled inspections by the antitrust authorities, including information on the results of the inspections and on the measures adopted to prevent and/or eliminate the consequences of the violations<sup>8</sup>;
- The grounds permitting an appeal against the actions of organisations operating networks and the competent state authorities in the town planning area were unified<sup>9</sup>;
- A unified procedure for the re-negotiation of state and municipal contracts for a new period was formalised<sup>10</sup>;
- The right of the Government of the Russian Federation to determine the instances where the antitrust authority may not post information on its official website regarding a petition received for the conclusion of a transaction and other action, which requires the preliminary consent of the antitrust authority, was formalised<sup>11</sup>;
- Criteria on the frequency of conducting scheduled inspections at a company as to their compliance with the antitrust legislation of the Russian Federation were introduced<sup>12</sup>;

<sup>8</sup> Federal Law No. 17-FZ dated 19 February 2018 "On the Introduction of Amendments to Article 77 of the Federal Law "On the General Principles for the Organisation of Local Government in the Russian Federation" and Article 25.1 of the Federal Law "On the Protection of Competition".

<sup>9</sup> Federal Law No. 259-FZ dated 29 July 2018 "On the Introduction of Amendments to Article 18.1 of the Federal Law "On the Protection of Competition".

<sup>10</sup> Federal Law No. 572-FZ dated 27 December 2018 "On the Introduction of Amendments to Article 17.1 of the Federal Law "On the Protection of Competition".

<sup>11</sup> Federal law No. 514-FZ dated 27 December 2018 "On the Introduction of Amendments to the Federal Law "On the Securities Market" and Certain Legislative Acts of the Russian Federation regarding Improvements to the Legal Regulation of Securities Issues".

<sup>12</sup> Resolution No. 213 of the Government of the Russian Federation dated 1 March 2018 "On Approval of the Criteria for Classifying the Activities of Legal Entities and Individual Entrepreneurs Engaging in Economic Activities to Risk Categories during the Exercise of State Control over Compliance with the Antitrust Legislation of the Russian Federation".

- New rules have been introduced on the regulation of the economic activity of unitary enterprises<sup>13</sup>.

## **PROPOSED AMENDMENTS TO THE ANTITRUST REGULATION OF THE RUSSIAN FEDERATION**

The FAS of Russia is actively working on developing antitrust regulation further, and plans to ensure the adoption of the following important laws over the next few years.

### **“FIFTH ANTITRUST PACKAGE”**

The draft law, aimed at updating antitrust legislation considering the development of the digital economy, introducing more rigid requirements on the approval of transactions, subject to the preliminary consent of the antitrust authority, and also introducing certain amendments to anti-trust legislation (the so-called “fifth antitrust package”) is a key example of the most recent draft legislation work of the FAS Russia that has been widely discussed<sup>14</sup>.

In particular, it is planned to designate the regulation of digital markets: to introduce the concepts of “digital platform” and “network effects”, rules for establishing the dominant position of a business entity owning a digital platform, etc.

As for the regulation of transactions and other actions subject to preliminary consent by the antitrust authority, the draft law stipulates an extension of time for the antitrust authority to consider petitions for the conclusion of such transactions and other actions (in particular in the case of cross-border transactions). It further provides for the introduction of the institute of “trustee” that to monitor implementation of the remedies issued by the FAS of Russia.

One of the most important and controversial proposals in the draft law is empowering the FAS of Russia to issue compulsory licences on intellectual property of a company. It will further empower the FAS to file a claim in court on prohibiting the turnover of the products of a company in the Russian Federation should the company default on the remedy of the antitrust authority issued as part of conditional approval of the respective transactions or other actions.

### **“INCREASED LIABILITY”**

In 2019 draft laws were submitted to the State Duma of the Russian Federation on increasing liability for a cartel, in particular, the amendments stipulate an increase in criminal liability for collusion in competitive bidding, and also for participation in a cartel for shareholders and members of collegiate bodies and directors of companies. They also propose the establishment of a special register of cartel participants, which should include information on the

<sup>13</sup> Federal Law No. 485-FZ, 509-FZ of the Russian Federation dated 27 December 2019.

<sup>14</sup> Draft Federal Law “On the Introduction of Amendments to the Federal Law “On the Protection of Competition” and Other Legislative Acts of the Russian Federation” (<http://regulation.gov.ru/projects#npa=79428>).

name of the cartel participant, its founders, the members of the collegiate executive bodies, and the persons exercising the functions of chief executive officer of the legal entity<sup>15</sup>.

## **REFORM OF REGULATION ON THE ACTIVITIES OF NATURAL MONOPOLIES**

An important proposal of the FAS of Russia is a plan to change effective regulation of the activities of natural monopolies<sup>16</sup>. At present natural monopolies operate in accordance with the special, but outdated Law On Natural Monopolies<sup>17</sup> which entered into force more than 20 years ago in the context of the completely different economic conditions in the Russian Federation.

The FAS of Russia proposes abolishing the special law and including most of its norms in the Law On the Protection of Competition. As a result, the regulation of subjects operating on competitive markets and natural monopolies will then be based on unified principles.

One of the important proposals of the FAS of Russia is to change the approach used to determine which companies are actually natural monopolies through the introduction of a qualifying criterion as the use of net assets, i.e. technologically related linear infrastructure and commercialisation assets used for the purposes of manufacturing and selling goods.

## **DRAFT UNIFIED LAW ON TARIFF REGULATION**

Further to the proposal of the FAS of Russia, effective tariff regulation in the Russian Federation should also undergo substantial changes<sup>18</sup>. At present the tariff regulation is based on a number of different laws and other regulations in separate sectors. These laws stipulate different tariff regulation goals, principles, approaches and methods.

If this draft law is adopted, it will become the first framework act regulating relations in the area of state regulation of prices (tariffs). It is assumed that this draft law will affect approximately 20 different industries (for example, rail shipments, water supplies, the transportation of oil).

<sup>15</sup> Draft Federal Law "On the Introduction of Amendments to Article 178 of the Criminal Code of the Russian Federation and Article 151 of the Criminal Procedure Code of the Russian Federation" (<https://sozd.duma.gov.ru/bill/848246-7>).

<sup>16</sup> Draft Federal Law "On the Introduction of Amendments to the Federal Law "On the Protection of Competition" and Other Legislative Acts of the Russian Federation and on the Invalidation of the Federal Law "On Natural Monopolies" (<http://regulation.gov.ru/Projects/List#npa=81192>).

<sup>17</sup> Federal Law No. 147-FZ dated 17 August 1995 "On Natural Monopolies".

<sup>18</sup> Draft Federal Law "On the Principles for the State Regulation of Prices (Tariffs)" (<http://regulation.gov.ru/projects#npa=79443>).



## **INTENSIFICATION OF STATE CONTROL OVER FOREIGN INVESTMENTS IN THE RUSSIAN FEDERATION**

Draft laws developed by the FAS of Russia<sup>19</sup> propose applying the special regime used to regulate foreign investments in business companies of strategic importance for the defence of the country and state security to legal entities that are not business companies but engage in strategic types of activities (strategic companies), including in respect of non-commercial organizations. At present this regulation solely pertains to foreign investments in business companies. It may even be extended to cover the conclusion by foreign investors of concession agreements, under which the creation and/or reconstruction of property intended for the performance of strategic types of activities is planned.

## **OTHER DRAFT AMENDMENTS TO ANTITRUST REGULATION IN RUSSIA**

In addition to the above, we would like to draw your attention to the following significant draft laws that introduce amendments to antitrust legislation in Russia:

- The introduction of a new form of administrative penalties for failure to comply with a legal decision or remedy of the antitrust authority in the form of limitation of access to information systems and/or computer software, and also the introduction of administrative liability for the repeated failure to comply with the said decision, remedy<sup>20</sup>;
- The introduction of rules on the frequency of scheduled inspections by antitrust authorities, and also on mandatory use by antitrust authorities of checklists during scheduled inspections<sup>21</sup>.

<sup>19</sup> Draft Federal Law “On the Introduction of Amendments to Certain Legislative Acts of the Russian Federation regarding Improvements to Controls over Compliance with Legislation on the Exercise of Foreign Investments in the Russian Federation” (<http://regulation.gov.ru/projects/List/AdvancedSearch#npa=83472>), and also the draft Federal Law “On the Introduction of Amendments to the Code of the Russian Federation on Administrative Offenses” (<http://regulation.gov.ru/projects/List/AdvancedSearch#npa=83477>).

<sup>20</sup> Draft Federal Law “On the Introduction of Amendments to the Code of the Russian Federation on Administrative Offenses” (<https://regulation.gov.ru/projects#npa=85113>).

<sup>21</sup> Draft Federal Law “On the Introduction of Amendments to Article 25.1 of the Federal Law “On the Protection of Competition” (<http://regulation.gov.ru/Projects#npa=77690>).

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