Russian Antimonopoly Enforcement: Developments for 2018 and Trends for 2019

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Undoubtedly, antimonopoly legislation and enforcement in Russia have overcome significant changes within the recent few years. Please find below descriptions of several trends that we consider to be the most important and challenging.

1. Antimonopoly regulation of digital markets

The digital economy emerged due to the development of modern information technologies that maximized the role of information as a market-development resource. Development of the digital economy is a priority for the Russian government. For instance, a number of general strategies aimed at development of digital economy were adopted in 2017[1]. New economic reality requires modernization of antimonopoly legislation in the digital context becoming one of the main topics for discussions among the Russian authorities and professional community.

That trend affected the contents of the "National Plan for promotion of competition in the Russian Federation for 2018-2020" enacted by the President's Order No. 618, dated December 21, 2017. In particular, among the main objectives of the Russian national policy for promotion of competition, the National Plan lists "improvement of antimonopoly regulation within the development of the digital economy and its globalization, in order to effectively suppress transnational antimonopoly violations and to enhance competitiveness of the Russian companies in global markets".

Following the National Plan, FAS Russia, in collaboration with antimonopoly experts and Skolkovo Institute, produced the draft package of amendments to the Russian Competition Law concerning antimonopoly regulation of digital economy (so-called "*Fifth Antimonopoly Package*"). In spring 2018, the bill was presented for public discussion. Its main provisions cover:

- Lifting restrictions in IP usage[2];
- Adapting current merger control procedure to specifics of digital markets;
- Reconsidering the existing procedure for the establishment of dominant position of companies in the markets, considering the specifics of digital markets, taking into account network effects and influence of big data on competition in Russia;
- Possibility of compulsory licensing in case of non-fulfilment of FAS Russia's IP-related remedies/prescriptions, issued as a result of merger control analysis of transactions.

Amendments are still under discussion and there are no guarantees that all of them will be finally adopted. However, approaches laid the foundation for the "Fifth Antimonopoly Package" had been already tested by FAS Russia in recent cases associated with digital challenges. Examples include merger control cases (*Uber/Yandex*, *Bayer/Monsanto*) and cases on antimonopoly violations (abuse of dominant position by *Google*, coordination of resellers via pricing algorithms by *LG Electronics RUS*, a number of cases regarding cartels on auctions concluded between several competitors using "*auction robots*"). Each of these cases revealed the gaps in the Competition Law and triggered the necessity for particular amendments.

Above we described principal directions of the "*Fifth Antimonopoly Package*" and additional important details of the proposed amendments will also be outlined below.

2. New approaches to market analysis and merger control

Quite recently, FAS Russia faced the need to adapt existing market analysis and merger control procedures to the new market reality. It was triggered by a number of global transactions in innovative digital markets. FAS Russia concluded that big data and network effects should also be estimated as a factor of market power. As a result, the antimonopoly authority elaborated special remedies to prevent restriction of competition in the considered area.

[1] *For example, "Strategy for development of information society in Russia for 2017-2030", Program "Digital economy in the Russian Federation", etc.*

[2] *Currently, IP rights fall within an exemption and are not regulated by antimonopoly legislation.*

For example, in *Bayer/Monsanto* case, FAS Russia applied a new method for analysis of the effects of the transaction on the markets, having stressed several times that the transaction had actually nothing to do with the markets where the parties did have overlaps in Russia (as in "traditional" approach) and even on a global scale, but it was about knowledge, innovations, terms for further development of the agro-industrial complex for future decades.

To mitigate the revealed concerns, the antimonopoly authority decided to use a set of entirely platforms, algorithms and technologies possessed by both companies, enabling them to influence the market conditions, create entrance barriers to other participants and dictate new legal mechanisms such as (i) transfer of technologies, instead of traditional behavioral or structural remedies and (ii) institute of independent trustees to monitor transfer of technologies and obligations imposed on the parties.

The next example is *Uber/Yandex* case where FAS Russia considered the transaction between two main taxi aggregators in the Russian market and issued a conditional decision. Although taxi aggregators do not render transport services as such, they organize trips by connecting drivers with passengers and have serious market power, due to amount of drivers and users of their apps. Therefore, in this case FAS Russia estimated network effects[3] as a factor of market power of the parties to the transaction.

Following practical challenges of enforcement practice, a number of initiatives for the merger control regulation within the "*Fifth Antimonopoly Package*" were elaborated:

- Transaction volume exceeding RUB 7 billion (approx. EUR 95 million / USD 113 million) as an additional threshold, triggering merger control clearance in Russia. It would let FAS Russia control transactions of small market players with significant digital assets and IP rights that may affect competition;
- Powers of FAS Russia to prolong the review period for complicated transactions for up to 5 years, upon the consent of the Russian Government, and to suspend the review period for up to 9 months, for provision of additional information/ documents, or the receipt of expert opinion(s);
- Opportunity for the parties to suggest commitments[4] for consideration of FAS Russia;
- Powers of FAS Russia to prolong the review period for implementing preliminary conditions[5] by the parties up to 3 years, upon the consent of the Russian Government;
- Introduction of "trustee" institute as an authorized third party monitoring and ensuring the most efficient implementation of FAS Russia's preliminary conditions/prescription/remedies (analogous to the European "trustee")[6];
- Introduction of an institute of "findings of fact" and case hearings for merger control cases (that is currently used only with respect to cases on antimonopoly violations).

Professional community and government officials are now actively debating the amendments suggested. There are no guarantees that all of them will be adopted exactly in this version; however, we presume that the main line would be preserved.

It is also important to emphasize that FAS Russia intends to improve the quality of its decisions through conducting market analysis and more in-depth review of almost all transactions. This is only an internal FAS Russia initiative, but this trend could already be observed in practice and potentially might affect the term for consideration of some transactions.

[3] *It is proposed to define network effects as 'dependence of customer value of the product on (i) a number of network users (direct network effects), or (ii) increase of customer value for one network group, in the case of increase of a number of network users of another network group and vice-versa (indirect network effects/network externalities)'.*

[4] *Only in case of extraordinary prolongation of the review period upon the consent of the Russian Government.*

[5] *Preliminary conditions are imposed by FAS Russia and should be fulfilled before clearance.*

[6] *The concept has already been tested by FAS Russia when considering Bayer/Monsanto transaction, in which National Research University of the Higher School of Economics had been appointed as a party monitoring implementation of the remedies imposed by FAS Russia.*

3. Restriction of IP rights to promote competition

Even within preparation of the "*Fourth Antimonopoly Package*", FAS Russia raised the question of excluding IP rights from the list of exemptions from the Competition Law, but that initiative was not supported by business, experts and other agencies. However, emergence of digital markets and recent cases provided that initiative with a new strong profile.

Firstly, FAS Russia considers that big data about customers, products and technologies collected by huge IT companies (*e.g. Google*, *Yandex*, etc.) create significant entry barriers for their competitors and potentially could restrict competition. Therefore, FAS Russia is elaborating the mechanisms to minimize anti-competitive effects of abuse of dominant positions by the companies holding substantial volumes of big data.

Secondly, FAS Russia wants to reconfirm its powers to issue merger control remedies requiring from the parties to provide/transfer their intellectual property in the Competition Law. The non-discriminatory transfer of IP to certain technologies and data to Russian market participants has already been tested by FAS Russia when employing technology transfer approach in *Bayer/Monsanto* transaction in order to support the competition in Russia.

In the "*Fifth Antimonopoly Package*" FAS Russia proposed that, for the cases when an entity does not fulfill such preliminary conditions, FAS Russia will not clear the transaction. Non-fulfillment of remedies after closing will trigger a lawsuit from FAS Russia, seeking to allow the use of intellectual property of the violator by third parties, to ensure competition in the market.

Thus, the "*Fifth Antimonopoly Package*" says that, in certain cases, intellectual property of the parties to the transaction, despite the existing IP protection, may be transferred to their competitors in order to ensure competition in the corresponding markets. However, currently FAS Russia is planning to use this mechanism mainly while assessing pharmaceutical markets (in particular, with regard to life-saving medicines).

4. Stimulation of foreign investments to the Russian Federation

4.1 10 years of application of the Strategic Investments Law: general overview

This year marks the first decade of application of the Strategic Investments Law. According to FAS Russia and the Government Commission for Control over the Foreign Investments (the *"Government Commission"*), over the previous 10 years the Government Commission reviewed 229 notifications of foreign investors for acquisition of Russian strategic companies, and only 13 of them had been rejected, due to the threats for Russian national defense and state security. Due to this, FAS Russia, which acts as an information and analytical center for the Government Commission, emphasizes its significant contribution to the development of the favorable investment climate in Russia.

The combined statistics for 2015-2017, prepared by the Russian Central Bank and FAS Russia, shows that 43.6% of the total amount of foreign direct investments to Russia, for that period, were attracted via the transactions cleared by the Government Commission, under the Strategic Investments Law.

This is more than USD 28 billion in monetary terms. The most popular strategic industries for foreign investments, in the 2015-2017 period, were extraction of mineral resources from the subsoil plots of federal importance, natural monopolies in transport sector and rendering services in Russian seaports. The most popular jurisdictions where the foreign investors of 2015-2017 had been registered were Cyprus, the United Arab Emirates and Singapore.

4.2 Modernization of strategic investments regulation in favor of foreign investors

The law enforcement practice showed that amendments to the Strategic Investments Law, introduced in 2017, led to a number of difficulties hindering foreign investments to the Russian economy. In particular, there was no clear regulation for the process and timing

of making the decision by the Chairman of the Government Commission, to bring a transaction that formally does not fall within the scope of the Strategic Investments Law for the Government Commission's review.

Moreover, previous amendments as of July 2017 to the Strategic Investments Law prohibited offshore companies from acquiring control Russian strategic companies and other restrictions imposed on them that were previously applicable only to public investors (foreign states and international organizations). In practice, those amendments caused a number of difficulties impeding the flow of foreign investments into the Russian economy.

In order to remove these barriers, preventing foreign investments from the Russian economy, FAS Russia established formal procedure and timing for extraordinarily bringing formally "*non-strategic transactions*" for the Government Commission's review by decision of its Chairman (Russian Prime Minister). Moreover, FAS Russia drafted and promoted the law cancelling the special regulation of offshore companies introduced in 2017 and provided for a new concept of "*companies, which do not disclose information on their beneficiaries, beneficiary owners and controlling persons*" instead. According to the amendments, the legal status of the non-disclosing companies is similar to the status of public investors (foreign states and international organizations) subject to stricter regulation and lower thresholds, prescribed by the Strategic Investments Law.

At the same time, amendments are generally aimed at liberalization of access of foreign investments to strategic sectors of the Russian economy and at making strategic clearance process more clear and comfortable.

5. Active de-cartelization of the Russian economy

The President and the Russian Government pay special attention to the problem of cartelization of the Russian economy, as it leads to considerable damage and prevents further economic growth. Due to this, we may observe that counteraction against anticompetitive agreements (cartels) strengthened significantly and FAS Russia has elaborated a number of initiatives in this regard, mostly related to tightening liability and more close cooperation with other law enforcement agencies during investigations.

The following developments should be outlined:

- The Russian President suggested setting up a special commission, comprising officials from FAS Russia, Ministry of Internal Affairs, Federal Security Service, Investigative Committee and General Prosecutor's Office for coordination of activities on combatting cartels. Cartels are often revealed in connection with other white-collar criminal investigations such as bribery, misappropriation, fraud, etc. More close cooperation could help the authorities to share information and evidence, and to use expertise of each other to conduct investigations efficiently. FAS Russia is also planning to gain access to the evidence collected by other law enforcement bodies that may contain signs of antimonopoly violations.
- Moreover, it is proposed to amend Article 178 of the Russian Criminal Code[7]. FAS Russia claims that the amendments should facilitate charging companies' officials with criminal liability. In particular, FAS Russia proposes to introduce liability for shareholders, top managers and members of the board of directors in order to stimulate them to ensure antimonopoly compliance and prevent violations from their side. It is proposed to substantially increase terms of imprisonment and criminal fines for cartels, as well as to introduce additional punishment in the form of confiscation of property, money and valuables received from the cartel (at present, such a penalty is not provided).
- Statistics for the last few years shows an increasing number of criminal cases investigated involving the signs of cartel, and we expect the trend to continue. This is an important development taking into account that before 2014 there was no substantial relevant practice in the law-making process.

[7] *This Article provides for criminal liability for cartels.*

- FAS Russia elaborated a bill on toughening administrative liability for "cartel recidivism/relapse". According to this bill, repeated participation or entry into cartel agreements could result in imposition of a double the amount of the turnover fine, provided for by the current legislation.
- FAS Russia also prepared draft amendments introducing a turnover fine for obstruction at FAS Russia's inspections. If the draft is adopted, the fine for a legal entity could be up to 0.5% of the sum of the total annual turnover of the company that obstruct inspections (currently, the administrative fine for this violation is quite insignificant). This draft is also informally called the "*Lenovo draft*" as it has been triggered by the harsh actions of Lenovo's Moscow office, resisting the dawn raid conducted by FAS Russia.

Therefore, we recommend paying more attention to elaboration and development of efficient systems of antimonopoly compliance for the companies operating in the Russian markets.

6. Enhancing role of antimonopoly compliance in Russia

Undeveloped antimonopoly compliance is one of the main reasons of antimonopoly violations in Russia. Moreover, it hinders the growth of national economy substantially. Due to this, following the global trends of the introduction and development of antimonopoly compliance and in pursuance of the "National Plan for promotion of competition in the Russian Federation for 2018-2020", FAS Russia prepared a draft law on antimonopoly compliance. Earlier, in 2016, FAS Russia had already tried to promote the role of compliance by legislative measures, but the draft was criticized by the authorities and did not receive adequate support.

The current draft provides definition of the term "antimonopoly compliance" that is understood as a "set of legal and organizational measures envisaged by the internal act of the business entity ... and aimed at complying with the requirements of the antimonopoly legislation and preventing antimonopoly violations".

According to the current draft, introduction of antimonopoly compliance will become mandatory for state and local government bodies, but voluntary for business. FAS Russia will only set a number of standards with respect to internal acts of business entities establishing antimonopoly compliance systems.

However, some incentives are proposed to encourage business entities to elaborate and introduce antimonopoly compliance systems. The main incentive is mitigation of administrative punishment for antimonopoly violations committed by companies with enacted antimonopoly compliance systems. In particular, the amount of an administrative fine imposed is proposed to be reduced by one-eighth in case of existence of an antimonopoly compliance. However, existence of antimonopoly compliance will not lead to full exemption from administrative liability for violations.

7. Cooperation of Antimonopoly Authorities within the Eurasian Economic Union (EEU) and BRICS

Taking into account globalization, the EEU is an important platform for cooperation of antimonopoly authorities of the EEU member states within conducting cross-border antimonopoly investigations and clearance of global transactions. In particular, FAS Russia aims to use more often the following cooperation tools provided by the EEU Treaty:

- Notifying of the antimonopoly authority of another EEU member state of the fact of an investigation, or merger control proceedings, that may affect the interests of the relevant state;
- Requesting information/conduct of particular procedural actions with respect to the entities active in the territory of the relevant EEU member state;
- Coordinating antimonopoly enforcement policy of the EEU member states with respect to particular entities from the non-EEU countries, whose actions may affect competition in the EEU;
- Requesting process of antimonopoly enforcement proceedings against entities, active in the territory of another EEU

member state and committing antimonopoly violations, which negatively affect competition in the territory of the applicant.

There are already some examples of the EEU antimonopoly investigations that resulted in holding the companies liable (*Caterpillar case, NMLK case*), and some of them are still ongoing (*Philips case*, etc.) for the breach of the EEU treaty.

Moreover, FAS Russia emphasizes separately its intention to use waivers more broadly, among the EEU antimonopoly authorities. In case of issuance of waivers by companies to the competition authorities, commercially sensitive information/trade secrets etc. are no longer treated as confidential by the relevant authorities specified in waivers. This allows the authorities to cooperate closely and exchange their experience within merger control cases and antimonopoly investigations. FAS Russia used waivers while reviewing *Uber/Yandex* transaction for consultations with antimonopoly authorities of Belarus and Kazakhstan, *Bayer/Monsanto* transaction for consultations with antimonopoly authorities of BRICS countries and EU.

Finally, the EEU is already used as a platform to promote the draft "Convention on combating cartels" and "Tools for international cooperation of competition authorities to combat anticompetitive cross-border business practices and abuses of transnational corporations". If these documents are ratified by the majority of countries, the background for global cooperation of antimonopoly authorities worldwide will be created.

Cooperation of antimonopoly authorities takes place not only within the EEU, but also within the framework of BRICS. For instance, recently the Head of FAS Russia Mr. Igor Artemiev, following negotiations with President of CADE (Brazil), proposed establishment of the expert center for cooperation between the competition authorities of the BRICS countries (hereinafter – the "Center") based at the Russian National Research University of the Higher School of Economics in Moscow.

The Center will have a small staff, consisting of specialists from the competition authority and prominent scholars from large foreign universities. The Center shall monitor major M&A transactions and elaborate common approaches to their assessment. Moreover, the Center shall support information exchange between the competition authorities while considering multinational transactions. The special attention of the Center shall be dedicated to the transactions implemented on IT markets.

The establishment of the Center reflects the willingness of the BRICS countries to harmonize approaches and to expand analytical capabilities.

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