ICLG

The International Comparative Legal Guide to:

Vertical Agreements and Dominant Firms 2018

2nd Edition

A practical cross-border insight into vertical agreements and dominant firms

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1 General

1.1 What authorities or agencies investigate and enforce the laws governing vertical agreements and dominant firm conduct?

The Federal Antimonopoly Service of the Russian Federation (hereinafter – the "FAS") and its territorial bodies investigate and enforce the laws governing vertical agreements and dominant firm conduct.

1.2 What investigative powers do the responsible competition authorities have?

The FAS has broad investigative powers in enforcing the competition rules and regulations. In particular, the FAS: may conduct scheduled and unscheduled inspections; may receive documents upon motivated request, as well as explanations and information in written or oral form (including the information constituting trade secret, state secret and other legally protected secrets); has powers of unimpeded access on the territory and (or) into the premises and buildings of the inspected entity; and has powers of unimpeded examination of the territories, buildings and premises occupied by the inspected entity.

1.3 Describe the steps in the process from the opening of an investigation to its resolution.

The most common form of antitrust investigation is an initiation of the case on the violation of antitrust legislation. The FAS initiates the case, and over three months (with possible prolongation to six months) it analyses all of the circumstances to consider the case. As a result, the FAS may resolve the case by issuing a decision. Herewith, before pronouncement of the final decision, the FAS should issue a statement of objections based on the circumstances of a matter. Before the initiation of this procedure, the FAS may conduct scheduled and unscheduled inspections and issue the request on the provision of documents (information). The FAS often applies such preventive mechanism as an institution of warning.

1.4 What remedies (e.g., fines, damages, injunctions, etc.) are available to enforcers?

In relation to the abuse of dominant position or conclusion of a vertical agreement, the FAS may impose an administrative fine on legal entities and company officers, or disqualify company officers as remedies. It should be mentioned that individuals or legal entities have a right to claim private damages actions, which may be also considered as a remedy.

1.5 How are those remedies determined and/or calculated?

The FAS determines and calculates an administrative fine in accordance with the provisions of the Code of Administrative Offences of the Russian Federation No. 195-FZ of December 30, 2001.

The FAS may impose an administrative fine on legal entities for abuse of dominant position. Generally, the law provides the minimum and maximum amount of the fine. At the same time, if the abuse of dominance leads or may lead to prevention, restriction or elimination of competition, the FAS may impose an administrative fine based on the sum of the offender's turnover on the market on which the administrative offence has been committed (in the amount of 1% to 5% of the sum of the offender's turnover).

Under the law, legal entities that conclude prohibited vertical agreements may face a "turnover-based fine" in the amount of 1% to 5% of the sum of the offender's proceeds from the sale of the product (work or service) in the market on which the administrative offence has been committed.

Russian law provides mitigating and aggravating circumstances that the FAS may take into account when calculating the fine.

1.6 Describe the process of negotiating commitments or other forms of voluntary resolution.

Russian competition law establishes such form of voluntary resolution as a leniency programme (only for anticompetitive agreements or concerted actions).

A company can be discharged from liability if all of the following criteria are met: an antitrust authority had no information regarding the committed administrative offence; the legal entity has refused further participation in the agreement; and information and documents provided are sufficient to establish an administrative offence.

By applying for leniency, a company may have the chance to minimise reputational risks and may provide for information confidentiality. The company may also negotiate the commitments imposed by the FAS, but this would not be applied in an obligatory manner.

However, there is no administrative settlement procedure. The company may settle the dispute in a court during the hearings for challenging the FAS decision on antimonopoly violation and/or imposition of an administrative fine. In this case, the commitments between the FAS and the company are set in the official settlement agreement approved by the court.

1.7 Does the enforcer have to defend its claims in front of a legal tribunal or in other judicial proceedings? If so, what is the legal standard that applies to justify an enforcement action?

The entire procedure is internal (please see question 1.3). The decision of the FAS may be appealed to the court. Further, the decision of territorial offices of the FAS may be appealed to the FAS central office, as well as to the court.

1.8 What is the appeals process?

Complaints may be filed to the FAS, its territorial bodies or directly to the court. The limitation period for such claims is three months from the date of issuing the decision or prescription by the FAS. The court procedure is governed by standard procedural rules. The court appellation may also be filed after the internal FAS appeal process. In such case, the limitation period is one month from the date the decision of prescription entered into force.

The Competition Law also provides for the formation of a collegial body as a part of the FAS. This body may give explanations related to the applicability of the antimonopoly legislation and may consider complaints on decisions and (or) orders of the territorial antimonopoly authorities. Such complaints may be filed by individuals or legal entities involved in the case on violation of the antimonopoly legislation within one month from the date of making such decision or issuing of the order. The collegial body makes the decision within two months from the date the complaint was made.

1.9 Are private rights of action available and, if so, how do they differ from government enforcement actions?

Individuals or legal entities, whose rights and interests are infringed as a result of violation of antimonopoly legislation, can file lawsuits under the established procedures, particularly, lawsuits to restore the violated rights, including lost profit and compensation of damage caused to property. Unlike government enforcement actions, this legal institute is underdeveloped and practice is quite rare.

1.10 Describe any immunities, exemptions, or safe harbors that apply.

Certain anticompetitive agreements and forms of abuse of dominance can be considered admissible if such actions or agreements (i) do not give rise to the possibility of competition being eliminated on the relevant market, (ii) do not impose on the parties or third parties restrictions not corresponding to the purposes of such actions or agreements, and (iii) lead or may lead to the following: (1) improving the production and sale of goods, or promoting of technical and economic progress, or an increase of the competitiveness of Russian goods on the world market; or (2) if the purchasers obtain preferences (benefits) commensurable with the preferences (benefits) obtained by companies as a result of actions (omission) and agreements. There are also market share thresholds applied to safe harbour during assessment of dominant position and vertical agreements.

1.11 Does enforcement vary between industries or businesses?

An enforcement of Russian antitrust law does not vary between industries or businesses. Herewith, retail, banking, electricity, communication and some other industries are specially regulated industries.

In particular, special regulation spreads on the dominant position shares of the companies active in mentioned spheres.

Banking: the financial organisation having a market share of more than 10% on the only market within the Russian Federation, or 20% on the market, where the goods are also traded on other markets within the Russian Federation, is deemed to be dominant.

Electricity: an entity, which has generating equipment with the share exceeding 20%, is deemed dominant.

Communication: the entity that is active in the market of mobile radiotelephone communication services occupies a dominant position if the share in this market exceeds 25%.

1.12 How do enforcers and courts take into consideration an industry's regulatory context when assessing competition concerns?

The FAS usually pays additional attention to industries with regulatory context, for example, tariff regulation industries. The peculiarities of the particular market should be taken into account by the FAS in order to assess the state of competition on the considered market. Special rules are equally important as general competition rules.

1.13 Describe how your jurisdiction's political environment may or may not affect antitrust enforcement.

Practically, the political environment may be a part of a general context that may be taken into account through the consideration of a particular matter and forming the FAS position. We see the tendency to initiate the cases against multinational companies, but consider this as the stage of development of the competition authority rather than a political issue.

1.14 What are the current enforcement trends and priorities in your jurisdiction?

The main law enforcement trend related to vertical agreements and dominant firms is the elaboration of the new FAS approaches to the market analysis in the digital economy, in particular:

- emergence of new markets of certain digital products, such as navigation, electronic document flow, etc. require new approaches for market analysis;
- appearance of new market participants – aggregators rendering specific informational services and which effectiveness depends on the number of users – require the FAS taking into account network effects within the market analysis; and
- the use of big data, IP rights and pricing algorithms is assessed in detail by the FAS as a factor of increasing market power of global corporations.

Moreover, due to globalisation the FAS considers the Eurasian Economic Union (the "EEU") to be an important platform for cooperation of antitrust authorities of the EEU member states within conducting transboundary antimonopoly investigations. There are already some examples of the EEU investigations that resulted in

holding the companies liable (Caterpillar case, NMLK case), and a number of them are still ongoing (Philips case, etc.). Moreover, the Eurasian Economic Commission actively conducts market analysis and sends requests for information to market players. We expect that these trends will continue and the Commission has good chances to occupy a role of proactive Eurasian regulator in antitrust enforcement.

1.15 Describe any notable case law developments in the past year.

LG case (2017–2018)

The FAS reviewed the case against the Russian subsidiary of LG Electronics, Inc., global developer and producer of consumer electronics, mobile communications and home appliances, on anticompetitive coordination of economic activity of resellers in the market of LG smartphones leading to resale price maintenance.

This is the first case where the FAS had to deal with anticompetitive effects of pricing algorithms. According to the FAS qualification, the Russian subsidiary of LG Electronics, Inc. used special software to monitor resale prices for LG smartphones and then used the results of such monitoring to correct prices of resellers up to the recommended level. Within this case, the FAS elaborated an important position according to which "*the use of pricing algorithms as itself does not constitute antimonopoly violation, but may facilitate committing such violation*".

The decision on the LG antimonopoly case was rendered on March 2, 2018 and became a landmark precedent in the FAS law enforcement practice. In particular, this case raised new discussions in the Russian competition regulation regarding the use of pricing algorithms and resulted in the package of amendments related to digital antitrust (the "*fifth antimonopoly package*").

Novolipetskiy Metallurgicheskiy Kombinat (NLMK) case (2017)

Within the year 2017, the Eurasian Economic Commission (the "Commission") of the Eurasian Economic Union (the "EEU") took a more proactive role in the sphere of antitrust enforcement. In 2016–2017, the Commission analysed 16 complaints on antitrust violations and initiated 10 investigations within the EEU markets of railway wheels and concrete sleepers, trucks and cars, tires, metal constructions, and smartphones.

In September 2017, the Commission held NLMK, the only Russian producer of special steel for transformers, liable for violation of the Treaty of the EEU in the form of "economically, technologically or otherwise unjustified establishment of different prices (tariffs) for the same goods and creation of discriminatory conditions".

The Commission concluded that NLMK, holding 99.99% of the EEU market of steel for transformers, supplied steel to Kazakhstan customers up to 23% more expensive than to Russian customers. NLMK with its group of persons a received total fine of RUB 217 million (approx. USD 3.5 million) for antitrust violation.

EVRAZ case (2017)

The FAS recognised Evraz, one of the largest global mining companies, abusing its dominant position within the market of producing wheels for locomotives with a diameter of 1,058 mm. According to the authority, the profitability of producing wheels for locomotives with a diameter of 1,058 mm at the company's plants was unjustifiably overstated. The turnover fine has not been imposed yet.

2 Vertical Agreements

2.1 At a high level, what is the level of concern over, and scrutiny given to, vertical agreements?

It is dependent on the type of agreement. However, there is a different approach: resale price maintenance cases are generally approached as "*per se*", while other cases are usually based on the rule of reason. The FAS considers vertical agreements as less serious violations than cartel agreements. We have seen that the FAS tends to pay more attention to the economic effects of particular transactions and assesses vertical agreements more under the "rule of reason" rather than the "*per se*" doctrine.

2.2 What is the analysis to determine (a) whether there is an agreement, and (b) whether that agreement is vertical?

a) The law supposes that vertical agreements may be concluded not only through civil contracts, the subject matter of which includes the transfer of goods from one undertaking to another (contracts of sale, supply agreements, dealer agreements, distribution agreements and other agreements), but also through oral agreements, implied-in-fact contracts or silent agreements.

b) Vertical agreements are agreements between companies or undertakings at different levels of the technological cycle containing the conditions under which such entities should acquire, sell or resell certain goods or services.

2.3 What are the laws governing vertical agreements?

Vertical agreements are governed by Articles 11 and 12 of the Federal Law from July 26, 2006 No. 135-FZ "On Protection of Competition" (hereinafter – the "Competition Law"), Clarifications of the FAS Board No. 2 "On vertical agreements, including dealership agreements" (approved by the Minutes of the FAS Board from February 17, 2016 No. 3) and Decree of the FAS as of July 16, 2009 No. 583 "On cases of acceptance of agreements between economic entities", etc.

2.4 Are there any type of vertical agreements or restraints that are absolutely ("*per se*") protected?

The Competition Law provides that the following two types of vertical restraints are regarded as the most harmful and protected by rebuttable presumption of "*per se*": (1) the obligation not to sell goods of a legal entity who is a seller's competitor; and (2) resale price maintenance. Herewith, in the past years, we have seen that the FAS tends to use the "rule of reason" doctrine more often than the "*per se*" doctrine.

2.5 What is the analytical framework for assessing vertical agreements?

The general analytical framework is "rule of reason". In contrast to the "*per se*" approach, "rule of reason" needs to prove the restriction of competition. For example, it may be expressed in the reduction of the number of economic entities on the market, or the increase or decrease of prices and other circumstances, which may be considered as a restriction to competition.

2.6 What is the analytical framework for defining a market in vertical agreement cases?

The general analytical framework is "rule of reason". In contrast to "*per se*" approach, "rule of reason" needs to prove the restriction of competition. For example, it may be expressed in the reduction of the number of economic entities on the market, or the increase or decrease of prices and other circumstances, which may be considered as a restriction to competition.

2.7 How are vertical agreements analysed when one of the parties is vertically integrated into the same level as the other party (so called "dual distribution")? Are these treated as vertical or horizontal agreements?

Agreements within "dual distribution" are treated by the FAS as vertical agreements.

2.8 What is the role of market share in reviewing a vertical agreement?

The Competition Law provides "safe harbour" for vertical agreements. According to this rule, vertical agreements concluded between undertakings holding a market share of less than 20% on the relevant market should be regarded as permissible.

2.9 What is the role of economic analysis in assessing vertical agreements?

We may see the increased role of the economic analysis in assessing vertical agreements by the authority within the last months. This tendency is applicable not only for vertical agreements, but also for other institutes of the Competition Law, as merger control, cartel agreements, etc.

2.10 What is the role of efficiencies in analysing vertical agreements?

Improving the production and sale of goods, promoting technical and economic progress, or increasing the competitiveness of Russian goods on the world market may be used by the party as arguments in favour of admissibility of vertical agreements if certain additional requirements are met.

2.11 Are there any special rules for vertical agreements relating to intellectual property and, if so, how does the analysis of such rules differ?

All the agreements granting the right to use or transfer all the rights for intellectual property (licence agreements, etc.) are exempted from the scope of the Competition Law. Moreover, all vertical agreements are permissible in the case that they are franchising agreements (which should be registered), and exclusive dealership is permissible within vertical agreements aimed at the organisation of sale of goods under the trademark of the relevant wholesaler (producer).

2.12 Does the enforcer have to demonstrate anticompetitive effects?

The FAS is not obliged to demonstrate anticompetitive effects in vertical agreements prohibited *per se*, including (i) resale price maintenance agreements, and (ii) exclusive dealership (distribution, etc.) agreements. To prove any other vertical agreements (imposing territorial restraints, aimed at selective distribution, etc.) the FAS has to show the anticompetitive effects of such restrictions. However in practice the authority does not always conduct an analysis to prove the anticompetitive agreements for some types of vertical agreements.

2.13 Will enforcers or legal tribunals weigh the harm against potential benefits or efficiencies?

The FAS may weigh the harm against potential benefits for the customers or efficiencies according to Article 13 of the Competition Law. It provides that vertical agreements can be considered admissible if they (i) do not create an opportunity to eliminate competition in the relevant product market, (ii) do not impose on the parties or third parties restrictions that do not correspond to achievement of purposes of such agreements, as well as (iii) result or may result in the following:

(1) improving the production and sale of goods, promoting of technical and economic progress, or increasing the competitiveness of Russian goods on the world market; and

(2) receiving of preferences (benefits) by the purchasers commensurable with preferences (benefits) obtained by companies as a result of agreements and concerted practices.

2.14 What other defences are available to allegations that a vertical agreement is anticompetitive?

Apart from the "safe harbour" 20% threshold argument, franchising agreement argument, benefits for customers and economic efficiencies for vertical agreements estimated under the rule of reason, the party may provide the FAS with the results of economic analysis in order to prove that the agreement has no anticompetitive effects.

2.15 Have the enforcement authorities issued any formal guidelines regarding vertical agreements?

Yes; Clarifications of the FAS Board No. 2 "On vertical agreements, including dealership agreements" (approved by the Minutes of the FAS Board from February 17, 2016 No. 3) and Decree of the FAS as of July 16, 2009 No. 583 "On cases of acceptance of agreements between economic entities" (amended as of April 29, 2014).

2.16 How is resale price maintenance treated under the law?

Minimum or fixed resale price maintenance is prohibited *per se* (with theoretically rebuttable presumption), while maximum resale price maintenance and communication on recommended resale price are generally permissible.

2.17 How do enforcers and courts examine exclusive dealing claims?

Exclusive dealership agreements are prohibited by theoretically rebuttable presumption "*per se*".

2.18 How do enforcers and courts examine tying/supplementary obligation claims?

Tying/supplementary obligation claims are reviewed on a case-by-case basis and estimated under the rule of reason and taking into account the results of economic analysis.

2.19 How do enforcers and courts examine price discrimination claims?

Price discrimination claims are reviewed on a case-by-case basis and estimated under the rule of reason and taking into account the results of economic analysis.

2.20 How do enforcers and courts examine loyalty discount claims?

The general approach to loyalty discounts is negative, but there are no strong precedents on this issue.

2.21 How do enforcers and courts examine multi-product or "bundled" discount claims?

Multi-product or "bundled" discount claims are reviewed on a case-by-case basis and estimated under the rule of reason and taking into account the results of economic analysis.

2.22 What other types of vertical restraints are prohibited by the applicable laws?

There is no exhaustive list of prohibited vertical agreements. Herewith, we may specify the following restrictions: territorial restraints; sales channel's restrictions; and other vertical agreements leading to anticompetitive effects.

2.23 How are MFNs treated under the law?

The Competition Law does not prohibit MFN clauses directly. However, within vertical agreements, the FAS may assess such clauses under the rule of reason to check whether they have any anticompetitive effects.

3 Dominant Firms

3.1 At a high level, what is the level of concern over, and scrutiny given to, unilateral conduct (e.g., abuse of dominance)?

The FAS closely examines the business conduct of firms holding significant market shares with strong market power. Thus, the dominant position imposes many additional compliance obligations on the company. The FAS permanently renders decisions on notable cases on abuse of dominant position with large turnover fines and broad coverage in mass media.

3.2 What are the laws governing dominant firms?

The Federal Law "On protection of competition" No. 135-FZ as of July 26, 2006 (in particular, Articles 5, 6, 7 and 10).

3.3 What is the analytical framework for defining a market in dominant firm cases?

In accordance with the FAS Order from April 28, 2010 No. 220 "On approval of the procedure of analysis of competition in the market", the FAS shall use a "hypothetical monopolist" test to define the market boundaries.

3.4 What is the market share threshold for enforcers or a court to consider a firm as dominant or a monopolist?

The dominant position of an entity in a particular commodity market is presumed if the market share of the entity exceeds 50%. The entity having a market share of between 35% and 50% is also deemed to be dominant. Herewith, there are some special thresholds set for collective dominance, financial organisations, performers in state procurement and for some other cases (please see question 1.11).

3.5 In general, what are the consequences of being adjudged "dominant" or a "monopolist"? Is dominance or monopoly illegal *per se* (or subject to regulation), or are there specific types of conduct that are prohibited?

Dominance or monopoly is not prohibited *per se*. The Competition Law prohibits the abuse of dominant position; in particular, any abuse of dominant position which leads or may lead to prevention, restriction or elimination of competition and (or) infringement of the interests of other undertakings (economic entities) in the sphere of business activity or indefinite range of consumers.

3.6 What is the role of economic analysis in assessing market dominance?

The role of economic analysis is significant enough. Based on economic approaches in relation to definition of product and geographical boundaries of the relevant market, the FAS may define the market share and, therefore, may establish dominant position. Moreover, the FAS will consider the influence of the dominant company's actions using economic analysis. It should be noted that the dominant company may use economical justifications as evidence that its actions may not lead to restriction of competition on the Russian market.

3.7 What is the role of market share in assessing market dominance?

Market share is one of the most significant criteria for assessing dominance (please see question 3.4).

3.8 What defences are available to allegations that a firm is abusing its dominance or market power?

The firm may use as a defence evidence which indicates lack of the market power, lack of abuse or lack of restriction of competition. Herewith, the company can provide economical and technological justifications in order to prove the absence of violation of the Competition law.

3.9 What is the role of efficiencies in analysing dominant firm behaviour?

The role of efficiencies is similar to the role of economic analysis. The FAS may weigh the efficiencies according to Article 5 of the Competition Law during the assessment of dominance.

3.10 Do the governing laws apply to "collective" dominance?

In general, collective dominance may be defined if the aggregate share of a maximum of three companies with the share of each of

them being more than shares of others in the appropriate commodity market exceeds 50%, or the aggregate share of at most five companies with the share of each of them being more than shares of others exceeds 70%. This provision shall not apply if the share of at least one of the abovementioned companies is less than 8%.

3.11 How do the laws in your jurisdiction apply to dominant purchasers?

Practice of recognition of purchasers as dominant is equally applicable. At the same time, there were some cases where both the FAS and the court established a dominant position in relation to a purchaser.

3.12 What counts as abuse of dominance or exclusionary or anticompetitive conduct?

The Competition Law provides a non-exhaustive list of possible actions that may be qualified as abuse of dominance or market power. For example, the abuse of dominant position includes the following activities:

- setting up and maintenance of a monopolistically high and monopolistically low price;
- withdrawal of a product from circulation which caused the increase of the product's price;
- imposing contractual terms upon a counterparty that are unfavourable or not connected with the subject of an agreement;
- economically or technologically unjustified reduction or cutting off the production of goods in case there is a demand and an ability of profitable production;
- economically or technologically unjustified refusal to enter into the contract with customers in case there is possibility of production (delivery);
- discrimination (setting economically, technologically or otherwise unjustified different prices or other terms of an agreement for different counterparties);
- creation of barriers which block entry into or exist from the market for other economic entities;
- violation of the procedure of pricing established by applicable legislation; and
- manipulation of prices on wholesale and (or) retail markets of electric power (capacity).

3.13 What is the role of intellectual property in analysing dominant firm behaviour?

The Competition Law provides that actions of a dominant firm may not be recognised as abuse if these actions concern the implementation of exclusive rights for the results of intellectual activity, which creates individualisation of a legal entity or individualisation of production, executed works or rendered services.

However, the FAS, following the trend for introducing new regulation of the digital markets, launched reforms to the current antimonopoly legislation. According to the FAS public statements, the reform is aimed, *inter alia*, at the cancellation of these antimonopoly immunities with respect to IP rights.

3.14 Do enforcers and/or legal tribunals consider "direct effects" evidence of market power?

Direct evidence (such as a "hot document", internal correspondence or press release) might be considered as evidence of market power.

3.15 How is "platform dominance" assessed in your jurisdiction?

There are no strong precedents on this issue.

3.16 Under what circumstances are refusals to deal considered anticompetitive?

Refusals to deal are considered anticompetitive if (i) the supplier is dominant, (ii) such a refusal is economically or technologically unjustified, (iii) there is economic and technological possibility to produce (supply) goods/render services, and (iv) such a refusal is not provided directly by applicable laws and regulations or judicial acts.

4 Miscellaneous

4.1 Please describe and comment on anything unique to your jurisdiction (or not covered above) with regards to vertical agreements and dominant firms.

The Russian law details the "abuse of dominant position" quite broadly and the standard of proof of abuse of dominance is low enough, so it is often applied in practice (for about 2,000–3,000 cases per year). As for anticompetitive agreements, there are approximately 400 cases initiated by the FAS per year.

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- Oil & Gas Regulation
- Outsourcing
- Patents
- Pharmaceutical Advertising
- Private Client
- Private Equity
- Product Liability
- Project Finance
- Public Investment Funds
- Public Procurement
- Real Estate
- Securitisation
- Shipping Law
- Telecoms, Media & Internet
- Trade Marks

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