

September 29, 2015

Dear Sir or Madam,

We would like to make you aware of the fact that on September 22, 2015, the draft of 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**") was approved by the State Duma of the Russian Federation in the third reading. On September 23, 2015 the draft of the law has been transferred to the Federal Council for further consideration.

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). It provides sufficient amendments to the Federal Law No. 135-FZ "On protection of competition" as of June 26, 2006 (hereinafter – "**the Competition Law**").

The Fourth antimonopoly package contains a significant amount of essential changes in all spheres of regulation. Below you can find description of all major changes adopted by the Fourth antimonopoly package.

#### **Dominant position**

- ✓ Changes are made to the rules regulating questions related to dominant position of the legal entities. In particular, now it would be impossible to consider the company holding a dominant position if its share in the market is less than 35%. The dominant position of a legal entity with a share of less than 35% in the market can be still established in the cases which are directly provided by the federal industry laws (for example, legislation on communication and on power industry) and also such 35% share provision could be applicable to "collective dominance" cases.
- ✓ The considered changes also 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.

- ✓ According to the adopted changes, some specifications directed on exception from the sphere of control of FAS Russia concerning investigations and prosecutions for abuse of a dominant position in relation to certain natural persons are brought. Abuse of dominant position, which leads or can lead to restriction of the competition, and to infringement of interests of legal entities in the sphere of implementation of business activity or which can harm interests of uncertain set of customers (both legal and natural persons), is inadmissible.

#### **Rules of Non-discriminatory Access (RNDA)**

- ✓ The draft of the law grants the right to the Government of the Russian Federation to establish the Rules of Non-discriminatory Access (hereinafter – "**RNDA**") in the high-concentrated markets that will allow giving open and clear access for consumers to the exclusive markets. Establishment of the rules of non-discriminatory access is foreseen for the companies which share in the market exceeds 70%.

As of today RNDA are applied to natural monopolies and they are used for determination of such terms of the contract as the lists of goods and their prices, procedure of definition of customers, etc.

As of the current moment not only monopolists can be obliged to approve contracts with the state – the Government of the Russian Federation can adopt the act establishing such rules concerning other legal entities with the specified share in the market. The similar act will be adopted in case the antimonopoly authority establishes the fact of violation of a prohibition and abuse of dominance.

In case with financial organizations, it would be necessary to coordinate the actions with the Central Bank.

Recommendations of application of such legal provisions would be formulated by the antimonopoly authority later.

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

### **Anticompetitive agreements**

- ✓ Amendments in part of anticompetitive agreements relate to both cartels and vertical agreements.
- ✓ According to the Fourth antimonopoly package, cartel agreement may be qualified as an agreement concluded not only between competitors selling products but between purchasers buying products as well.
- ✓ As for vertical agreements, it is worth mentioning two main changes introduced by the law.

Firstly, according to the existing legislation, agency contracts are exempted from vertical restraints analyzed by FAS Russia. However, according to the legislative amendments general regulation related to vertical agreements will be applicable to agency agreements after adoption of the changes as well.

Secondly, the Fourth antimonopoly package specifies provision on admissibility of vertical agreements stating that vertical agreements where parties have market share of less than 20% in the market of goods subject matter of such vertical agreement are admissible. Earlier the Competition Law stated that this threshold applied to market share of parties of vertical agreement on any of markets where parties act. Thus, the ambiguity in a question of definition of the commodity market necessary for recognition admissible in respect of vertical agreement has been eliminated.

### **Unfair competition**

- ✓ The articles related to prohibition of unfair competition changed significantly within the adopted Fourth antimonopoly package. In the enacted law, there are detailed descriptions of actions which can be regarded as unfair competition.
- ✓ According to the amendments made, there are the following main types of unfair competition:
  1. Defamation, i.e. spread of false or inaccurate information including with regard to quality or customer performance of goods of competitors, quantity of goods, demand and prices as well as business qualities of competitors (reliability, good faith, etc.);
  2. Misrepresentation of customers, including with regard to quality or customer performance of goods, methods and conditions of production of goods, place of production, price, etc.;
  3. Incorrect comparison of goods or entity with goods of competitor or with competitor itself. It means in particular use of words and expressions “the best”, “the first”, “number one” and other words and expressions that create impression of superiority without indication of concrete factors that are compared and that have objective confirmation;
  4. Use of intellectual property of competitor, for example, know-how during sale or exchange of goods;
  5. Acquisition and use of exclusive rights to means of individualization of legal entities or goods, works, services impeding implementation of business activity of competitors;

For example, when competitor started using the mean of identification identical or mixture, similar to the specified means of individualization before the owner of an exclusive right on it.

As an another example can be considered the following situation: when use of means of individualization can lead to weakening of commercial value of means of individualization of the competitor in other market which gained popularity in Russia by the time of acquisition (priority) of the specified right.

6. Mixture with the competitor or with his goods or services, including use of the mean of identification identical to the trademark, trade name, commercial designation, brand, name of the location of goods of the competitor or similar to them to extent of mixture of designation, copying or imitation of appearance of goods of the competitor, their corporate style in general or copying other elements individualizing the competitor and his goods;
7. Illegal receipt, use, disclosure of information that is the commercial or trade secret or can be considered as the other legally protected secret.

### Merger control

- ✓ According to the amendments the list of transactions controlled by FAS Russia include 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). This provision supplements the existing requirements that the formation of a legal entity must be agreed with the regulator in certain cases.

Thus, the amendments are adopted, receiving of the preliminary approval of the conclusion of JV agreements by FAS Russia will be obligatory if the thresholds are met. Moreover, obtaining 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 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 introduce provision on possibility of submission of applications and documents in an electronic form for simplifying document circulation process. The relevant procedure will be separately introduced by the antimonopoly authority;
- ✓ Information on the submitted applications will be 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.

### Warnings

- ✓ Amendments provided the possibility of issuance of warnings not only to officials of the legal entities but also to officials of the state bodies / local governments if at the disposal of antimonopoly authority there is information on the actions planned by them may lead to violation of the antimonopoly legislation.
- ✓ 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).

## **Procedure of consideration of cases on violation of antimonopoly legislation**

- ✓ One more aspect of the Fourth antimonopoly package is aimed at development of transparency of activity of antimonopoly authority and increasing validity of the decisions taken by FAS Russia.
- ✓ Amendments 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.
- ✓ An important amendment relates to provision by antimonopoly authority of information and documents that were requested by antimonopoly authority and that constitute trade secret to participants of the case against signed acknowledgement and with agreement of possessor of such documents/information.
- ✓ For protection of interests of persons concerning which cases on violation of the antitrust law are considered, the obligation of antimonopoly authority before pronouncement of the final decision to accept the conclusion based on the circumstances of a matter is entered. Such conclusion has to contain including the description of the facts of the case and evidence on the basis of which the antimonopoly authority came to these or those conclusions. In fact, this document will represent the draft decision with which the legal entity can familiarize and present its objections.
- ✓ For the decisions and instructions accepted by the territorial antimonopoly authorities procedure of their appeal is provided in the collegial body which is specially created by antimonopoly authority. The basis for cancellation or challenging of the decision of territorial antimonopoly authority will be violation of uniformity in interpretation and applicability of the antimonopoly legislation. Thus, the legal entity in case of disagreement with the decision and order of territorial antimonopoly authority can still appeal against such decisions directly in arbitration court.

## **Administrative liability**

- ✓ Opportunity of so-called "dual liability" for violation of the antimonopoly legislation is excluded. Now the legal entity to which by the results of consideration of the case the order to transfer to the federal budget of income gained from monopolistic activity or unfair competition was issued cannot be brought to administrative liability if such order was executed by such entity. Thus, a turnover fine cannot be imposed on entity to which an order on transfer the illegally gained income was issued upon results of consideration of the case and such order was executed.
- ✓ The course on stimulation of legal entities to voluntarily confess in conclusion of anticompetitive agreements to FAS Russia is continued. To already available mechanism of release from the liability of the person, which was the first to inform FAS Russia on conclusion of such agreement, the provision on imposition of a minimum penalty for the persons who made it as the second and third was adopted.

## **Collegial body as a part of FAS Russia**

- ✓ The Fourth antimonopoly package provides provisions related to formation of collegial body as a part of FAS Russia. This body will be entitled to give explanations related to applicability of the antimonopoly legislation and consider complaints to the decisions and (or) orders of the territorial antimonopoly authorities on cases on violation of the antimonopoly legislation. Abovementioned complaints may be filed by persons involved into the case on violation of the antimonopoly legislation within one month from the date of making such decision or issuing of orders.

The decision on complaint is made by collegial body within two months from the date of its making. This period may be extended in case of the need of studying of additional documents (information) necessary for consideration of the complaint but not more than one month.

It should be pointed out that the Fourth antimonopoly package established only one basis for the change or reversal of the decision of the territorial antimonopoly authority. This is a violation of consistency in applicability of the antimonopoly legislation by the antimonopoly authorities.

Decisions of the collegial body on appeals shall be effective upon publication on the official website of FAS Russia.

According to the plan, the work of collegial authority of FAS Russia will lead to unification of the practice of territorial antimonopoly authorities that is quite contradictory as of the current moment and will reduce the term for consideration of appeals against decisions of the territorial authorities of FAS Russia.

#### **Amendment for small- and midsize business**

- ✓ Amendments concerning release of small- and midsize business from antimonopoly inspections were introduced into by another law (so-called “anti-crisis”). The law was developed for implementation of the Plan of priority actions for providing a sustainable development of economy and social stability in 2015 provides introduction of immunity concerning abuse of dominant position and conclusion of anticompetitive agreements except cartels for entities with revenue of less than RUB 400 million. Herewith, immunity will not be applicable for natural monopolies, financial organizations and companies with state participation.

The document also reduces the number of grounds for conduction of unscheduled inspections of small business. Inspections initiated basing on claims of individuals and legal entities may be conducted only after obtaining consent of the prosecutor's office. However, inspections in respect of cartels are excluded from this rule.

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We hope the information above is helpful for you. For more information on ALRUD Competition practice, please visit our **Web-site** or contact directly Senior Partner, Head of ALRUD Competition practice **Vassily Rudomino**, [vrudomino@alrud.ru](mailto:vrudomino@alrud.ru).

Kind regards,

**ALRUD Law Firm**

*Note: All information was obtained from publicly available sources. The author of this information letter assumes no liability for the consequences of decision-making based on such information.*