

**RUSSIAN ANTITRUST ENFORCEMENT:
TRENDS AND DEVELOPMENTS FOR 2016**



FRAMEWORK

Undoubtedly, for the last several years role of antitrust legislation has been increasing significantly. Antitrust law-enforcement practice formed by the Federal Antimonopoly Service (the FAS), courts and Russian antitrust legislation itself have been in the process of constant development and improvement for the past decades.

Below you can find several significant trends appeared during the recent years that we suppose are the most important and challenging in the Russian practice.

1. FAS CONTINUES INVESTIGATIONS ON HIGH-PROFILE CASES AGAINST GLOBAL COMPANIES

OVERVIEW

The FAS is empowered to investigate activities of foreign companies having impact on competition in Russia since Russian competition legislation has extraterritorial effect. With this regard, Part 2 Article 3 of the Competition Law states that its provisions are applicable to agreements and activities of foreign entities if these agreements and activities influence competition in Russia.

After analysis of the current practice, we may conclude that investigations conducted in Russia become more complex and really have extraterritorial/trans-border character. The Russian competition authority has started analysis of the investigations initiated abroad and often follows the same approach while initiation and considering cases on antitrust law infringement in Russia.

SHIPPING INVESTIGATION

Following international trend, the FAS started investigation of the case with respect to major international container-shipping companies in 2013.

The FAS investigated the abovementioned case in Russia within 2013-2015 and found that 6 major container-shipping companies violated Russian antitrust legislation. Actions committed by the companies have been qualified as concerted actions that led to fixing surcharges (extra payments) to existing freight rates on the liner container shipping market in 2012-2013¹. The FAS decision is being challenged with the court.

GOOGLE CASE

Another example is a Google case on abuse of dominance when conditions of app store provision included obligatory pre-installation of Google apps (including Gmail, Google Play etc.) as well as its searching engine and their obligatory location on the main screen of a mobile device².

The FAS imposed a significant fine on Google Inc. in the amount of RUB 438 million (approx. USD 6,8 million).

¹—<http://fas.gov.ru/press-center/news/detail.html?id=33195>

²—<http://fas.gov.ru/press-center/news/detail.html?id=44956>

2. INCREASING COOPERATION BETWEEN COMPETITION AUTHORITIES

OVERVIEW

Another trend refers to increasing cooperation between the FAS and competition authorities of foreign countries. Cooperation is aimed at increasing capabilities of the FAS on investigation of infringements influencing competition in Russia.

BRICS MEMORANDUM OF UNDERSTANDING

BRICS representatives signed the Memorandum of Understanding for cooperation in the field of competition law and policy on May 19, 2016 at the VI Petersburg International Legal Forum. The main purpose of this document is to organize a cooperation between BRICS countries in competition law and policy through information and experience exchange.

RUSSIA-CHINA JOINT STATEMENT

During the mentioned Forum, representatives of the competition authorities of the Russian Federation and the People's Republic of China also signed a Joint Statement. The document highlights the results of 20-year collaboration under the frame of Russia-China efforts and an intention for further cooperation.

COOPERATION WITHIN THE EURASIAN ECONOMIC UNION (EEU)

Moreover, increasing of cooperation between the FAS and competition authorities of the Eurasian Economic Union member states is expected in light of starting functioning of the EEU from the January 01, 2015 as well as start of activities of the Eurasian Economic Commission that, among all, is a supranational antitrust authority in the EEU.

3. COMPLIANCE

OVERVIEW

Work on development and implementation of compliance procedures is currently being conducted all over the world. In Russia discussion of this question has started approximately since 2011, and in 2013 the FAS included antitrust compliance in the long-term strategy as the independent direction of further work of the authority and has accurately designated it as a priority for development of the antitrust legislation and law enforcement practice because the main objective of the authorities is not only suppression of violations committed, but also their prevention.

Any measures aimed at prevention of antitrust violations are encouraged by the competition authority. Adoption of compliance procedures is efficient mechanism of establishing correct behavior models and allows mitigating risks of committing antimonopoly violations.

DRAFT LAW ON COMPLIANCE

Although currently implementation of internal compliance procedures is not a ground for release from liability, there is an ongoing discussion on possibility of introduction to legislation provisions regarding mitigation of liability upon existence of effective compliance procedures in a company.

With this regard, recently, the FAS has developed the draft law aimed at implementation in companies of special antitrust compliance measures and possibility of mitigation of liability in case compliance measures in accordance with the draft law were introduced in companies before committing the violation.

4. INCREASING INFLUENCE OF STRATEGIC INVESTMENTS LEGISLATION

OVERVIEW

Certain industries in Russia are considered as strategic ones. If the company conducts one of the statutory strategic activities in Russia, the transaction on acquisition of control over this company (both direct and indirect) should also be approved by the special Governmental Commission on Control over Foreign Investments headed by the Prime Minister of the Russian Government.

Increased attention of foreign investors to strategic industries in Russia subsequently led to increase of amount of applications related to strategic clearances considered. For example, according to the FAS, in 2014, only 34 applications were under consideration of the Governmental Commission. In 2015, the number of applications grew and amounted to up to 44 applications³. Growing number of applications is expected in 2016 as well.

SCHLUMBERGER/EDC CASE

One notable case should be mentioned when the FAS got interested in the transaction and informed that the receipt of preliminary consent of the Government Commission is required however, the company did not conduct the types of statutory strategic activities, its activity was rather related.

At the end of January, 2015 one of the world's largest oilfield services company Schlumberger reported that it has agreed on acquisition of 45,65% of the shares of EDC approximately for USD1,7 billion. The FAS became interested in the transaction. Having studied documents related to the transaction, the antimonopoly authority concluded that from the point of view of the competition legislation merger control clearance was not required; however, the transaction had to be approved by the Governmental Commission. However, the case is considered to be influenced by the general negative trend in 2014-2015 caused by sanctions imposed on Russia.

ENFORCEMENT OF STRATEGIC INVESTMENTS LEGISLATION

One more trend refers to growing challenging by the FAS of transactions concluded without obtaining the clearance under Russian strategic investments legislation. For example, in 2011 the Iranian companies illegally established control over the Russian strategic company – Astrakhan Port OJSC without obtaining the clearance to the transaction with the Governmental Commission. Consequently, the FAS filed the lawsuit. In the beginning of 2016, in the court of the cassation instance, the FAS and the Iranian companies concluded negotiated settlement agreement under which the Iranian companies should alienate all shares acquired in Astrakhan Port OJSC⁴.

³—See, for example, <http://en.fas.gov.ru/press-center/news/detail.html?id=44615>

⁴— <http://en.fas.gov.ru/press-center/news/detail.html?id=44661>

5. CODES OF CONDUCT AND GOOD PRACTICES

OVERVIEW

Various codes of conduct and policies are considered as a soft regulation in Russia. Adoption of these documents is an efficient mechanism of suppression of offenses and establishing correct behavior models in the industries where the competition authority pays close attention.

Codes of conduct developed in different industries are important in law enforcement. Often they are created when the competition authority is particularly active in the market and adoption of codes is the result of the reached compromise: players in a particular market change their behavior according to such rules while the FAS decreases the level of its supervision over them.

⁵<http://fas.gov.ru/press-center/news/detail.html?id=45438>

⁶<http://fas.gov.ru/press-center/news/>

CODE IN PHARMACEUTICAL INDUSTRY

Among the most interesting examples of the codes already elaborated are the Code of Good Practice between Retail Chains and Suppliers of Consumer Goods and the Code of Conduct between Vehicle Manufacturers and Auto-Distributors on the Markets of Sale of New Vehicles and Spare Parts to them. Moreover, on April 19, 2016 Association of European Business presented the Code of Good Practice in the Pharmaceuticals Industry, i.e. in the market that historically remains under the close supervision of the FAS⁵.

The FAS has also recently suggested involving more actively the companies of member states of the Eurasian Economic Union in development of rules of self-regulation in those markets where now a large number of violations of the antitrust law could be observed⁶.

6. WARNINGS FOR VIOLATION OF RUSSIAN COMPETITION LEGISLATION

OVERVIEW

In Russia, there is a special statutory mechanism for prevention of antimonopoly violations. If the FAS finds out signs of possible infringement in respect to some types of violations indicated in the competition legislation (generally, some kinds of abuse of a dominant position), it is obliged to issue the special warning without initiation of administrative proceedings.

Generally, warnings contain certain actions to be done by an entity within the specified term. Issuance of the warning does not mean that the violation took place, however, if an entity does not fulfill actions from the warning within the specified time, the FAS is entitled to initiate an administrative case.

INCREASED SCOPE OF APPLICATION OF WARNINGS

Recent amendments to the competition legislation (so-called “Fourth antimonopoly package”) that came into force on January 05, 2016, expanded the list of violations at detection of signs of which the competition authority has a right to issue warnings before initiation of administrative proceedings.

Besides actions on abuse of dominance related to imposing of unprofitable terms within the contract and unreasonable refusal to conclude the contract, also such grounds for issuance of warnings as creation of discrimination conditions and unreasonable fixing of different prices were 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.

7. PRIVATE ENFORCEMENT

OVERVIEW

Russian competition legislation provides for possibility to file private claims by parties whose rights were violated as a result of commitment of violation. The practice of filing such claims has been increasing over the last year.

BIOTEK/TEVA CASE

For example, the Supreme Court of the Russian Federation ruled that damages claimed by Biotek CJSC as a result of abuse of dominant position by Teva are lawful. The court recovered approximately RUB 410 million of damages calculated as a bonus that should have been paid by Teva as a result of deliveries by Biotek to its counterparties basing on the previously concluded agreements⁷.

METRO CASH AND CARRY CASE

Another case relates to retail industry where courts recover damages for violations established by the FAS. For example, in April 2016 the court of cassation instance upheld position of courts of lower instances on recovery of approximately RUB 10 million damages from Metro Cash and Carry LLC for creation of discriminatory conditions for one of its suppliers⁸.

EXPLANATION OF THE FAS ON RECOVERY OF DAMAGES

Moreover, recently Presidium of the FAS issued Explanations No. 6 as of May 25, 2016 regarding provision of evidence and calculation of damages related to cases on antitrust law infringement⁹. Though Explanations have more advisory nature and cannot be regarded obligatory as law, they are drafted to elaborate and clarify the mechanism of justifying of existence and calculating of damages caused by infringement of the competition legislation within the court proceedings. We presume that with adoption of the current Explanations number of claims for recovery of damages caused by violations of the competition legislation may increase.

⁷—The Ruling of the Supreme Court № 123-ПЭК16 as of May 10, 2016

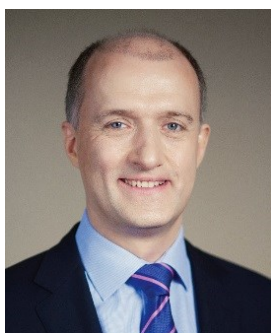
⁸—The Ruling of the Arbitration Court of the Moscow Region as of April 27, 2016 to the case No. A40-79025/14

⁹—<http://fas.gov.ru/documents/documentdetails.html?id=14664>

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.

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