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**RUSSIAN ANTITRUST ENFORCEMENT:  
TRENDS AND DEVELOPMENTS FOR 2017**



## FRAMEWORK

Undoubtedly, antitrust legislation and enforcement in Russia have overcome significant changes within the recent few years. Please find below the description of several trends of 2017 year that we suppose are the most important and challenging.

### 1. INCREASING ENFORCEMENT AGAINST GLOBAL PLAYERS

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*Some transnational corporations consider Russia to be a “banana republic”. They conduct business in Russia basing on outdated practices which are no longer allowed in developed countries and civilized markets”.*

*Mr. Igor Artemiev, Head of the Federal Antimonopoly Service*

The Federal Antimonopoly Service (the “**FAS**”) is empowered to investigate activities of foreign companies having impact on competition in Russia. Recently, the FAS has started investigations against several global companies. Investigations conducted in Russia become more complex and the number of unscheduled inspections against them increases year by year.

Following the trend, the FAS conducted a range of inspections and started investigations with respect to worldwide companies mainly in IT and electronics industries. For example, the FAS investigated Russian activities of such companies as Google, Apple, Microsoft, HP, Lenovo, LG, etc. For informational purposes, below we briefly describe some examples.

#### **Apple case (2016)**

The investigation started upon an application from an individual with information about fixing by resellers the same retail prices for Apple iPhone 6s and iPhone 6s Plus.

The investigation conducted by the FAS showed that from the start of official sales of Apple iPhones in Russia, most of resellers fixed the same prices for the products, as recommended by Apple Rus LLC, and maintained them for approx. 3 months.

Compliance with the recommended retail prices was reached through provisions of contracts concluded between Apple Rus LLC and its resellers: Apple Rus LLC could terminate a contract at any moment without explaining the reasons.

Thus, the FAS found that Apple Rus LLC coordinated economic activities of resellers that resulted in fixing and maintaining prices for Apple smartphones.

#### **HP-Lenovo case (2017)**

Upon results of the investigation and unscheduled inspections, in August 2017 the FAS held resellers of HP and Lenovo computers liable for participation in a cartel agreement aimed at bid rigging within procurement of computers for a couple of Russian federal authorities. HP Russian subsidiaries were held liable for coordination of economic activity of resellers.

The investigation was accompanied by negative PR in mass-media initiated by the

FAS upon the actions of HP and Lenovo aimed at impeding the FAS investigation (hindering the FAS officers within unscheduled inspection in HP and Lenovo premises, refusal to provide information and provision of false/ misleading information upon the FAS request). Such actions of HP and Lenovo subsequently led to preparing amendments to Russian competition legislation by the FAS. Draft amendments propose to impose turnover fines in cases of impeding the FAS inspections.

## 2. INFLUENCE OF DIGITAL TECHNOLOGIES ON ANTITRUST ENFORCEMENT

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*In recent two years we have faced the fact that as a result of digitalization of economy - creation of large information storage centers, the Internet, various modern technologies - our law becomes only partly applicable to these new technologies. For example, robots conclude cartel agreements and all this causes damages for consumers.”*

*Mr. Igor Artemiev, Head of the Federal Antimonopoly Service*

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*To effectively combat new challenges, we will improve our internal regulatory framework and our working methods”.*

*Mr. Andrey Tsarikovskiy, Deputy Head of the Federal Antimonopoly Service*

Following the general trend towards “digitalization of economy” proclaimed by the Russian government in 2017, the FAS paid more attention to regulation of IT markets. Apart from investigations against global IT and electronics companies, the FAS focuses on new technologies in IT industry facilitating sales process. Price intelligence programs such as Competera, Metacommerce, Priceva, Revionics, Oracle Retail Regular Price Optimization and others raised particular antimonopoly concerns from the FAS side. In the view of the FAS, use of algorithm programs allows producers and suppliers to control activities of their resellers as well as may lead to prohibited anticompetitive practices among resellers.

During the Competition Week 2017 – the major annual international event held by the FAS – the FAS officials paid great attention to this matter. For example, the FAS stated that in LG Electronics case resellers used price intelligence programs to monitor prices of competing resellers, to identify deviations from the recommended prices and then to ask vendor (LG) to correct prices.

Moreover, the FAS expressed its concerns towards “auction robots”, software for automated participation in procurement that may be used for bid rigging, and presented the first case in which one of the FAS territorial divisions held several recycling companies liable for cartel aimed at bid rigging on state procurement implemented through “auction robots”.

The FAS presented a set of ideas for amendments to the Competition Law aimed at strengthening control over companies’ anti-competitive practices implemented through innovative IT tools, in particular, increase of penalties for use of such tools, introduction of liability for developers of such tools, introduction of concept of anti-competitive agreements concluded by “mutual actions”, etc. The FAS working group including antimonopoly experts and specialists from Skolkovo is currently working on preparation of the draft amendments regulating this new sphere.

## 3. STRENGTHENING OF THE ROLE OF EURASIAN ECONOMIC UNION (EEU) IN ANTITRUST ENFORCEMENT

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*Upon results of consideration of complaints, as well as by its own initiative basing on the collected materials and researches within the EEU markets, the Eurasian Economic Commission has initiated 10 investigations by signs of anticompetitive agreements, abuse of dominant position and unfair competition”.*

*Mr. Marat Kusainov, the EEU Minister of Competition and Antimonopoly Regulation*

Within the year 2017, the Eurasian Economic Commission of the EEU took more proactive role in the sphere of antitrust enforcement. In 2016-2017, the Commission analyzed 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, smartphones.

## Novolipetskiy Metallurgicheskiy Kombinat (NLMK) case (2017)

In September 2017, the Commission held NLMK, the only Russian producer of special steel for transformers, liable for violation of the Treaty on the Eurasian Economic Union as of May 29, 2014 (the “EEU Treaty”) 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 received total fine of RUB 217 million (approx. USD 3,7 million) for antitrust violation.

## Philips case (2017)

In February 2017, the FAS conducted unscheduled inspections in the Moscow offices of LG Electronics and Philips. Upon the results of inspections, FAS initiated antimonopoly case against LG and sent to the Eurasian Economic Commission collected evidence and other materials against Philips. The FAS suspects Philips in coordination of prices on smartphones within the EEU

market. The EEU Minister of Competition and Antimonopoly Regulation Mr. Marat Kusainov commented that the investigation is actively ongoing.

Taking into account the current geopolitical and economic situation, we believe that this trend will continue within the next years.

## 4. ACTIVE ROLE OF STRATEGIC INVESTMENTS LEGISLATION

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*The Federal Antimonopoly Service acts as an information and analytical center of the Government Commission for Control over the Foreign Investments which decides on the strategic clearance. Within the 9 years of application of the Strategic Investments Law, the Government Commission reviewed 218 applications of foreign investors and only 13 of them were not satisfied. A favorable investment climate is the key to enhancing competition”.*

*Mr. Andrey Yunak, Head of the FAS Department for Control over Foreign Investments*

### General overview of foreign investments within the past few years

According to the FAS and the Government Commission, number of applications on strategic clearance is constantly increasing. In 2014, 34 applications were considered by the Government Commission, and in 2015 the number of applications grew to 44. By the end of the first quarter of 2016, the FAS and the Government Commission were considering approximately 15 applications. Particularly, applications were submitted by investors from Japan, the United States, Norway and Cyprus. The total number of applications considered by the Government Commission in 2016 exceeded the total number reviewed in 2014–2015.

The most important transactions recently approved by the Government Commission include clearance of acquisition of the shares of Severneftegazprom, which is controlled by Gazprom, that amounted to 1.808 billion euros. In general, natural monopolies, companies rendering services in Russian Federation seaports and those carrying out activity in the nuclear industry have been the most popular strategic businesses for foreign investors seeking strategic clearance in Russia in recent years.

## Recent amendments to foreign investments regime

With the increase of foreign investments into Russian business, due to the geopolitical situation and risks connected with offshore legal entities, it became clear that the process of investment in strategically important sectors of the economy requires stricter control by the state authorities. Herewith, the legislators' priority now is specification of the rules and compliance with global best practices. The main aim is to make foreign investment easier, to limit administrative barriers and to guarantee a comprehensive and non-discriminatory approach to foreign investors initiatives in Russia. Thus, significant amendments were adopted and entered into force during summer of 2017. Amendments introduce several significant updates to foreign investment regulation, which may influence structuring of global deals.

The most significant innovation is the right of the Chairman of the Government Commission for Control over Foreign Investments in the Russian Federation to present to the Government Commission for consideration transactions conducted by foreign investors with respect to any Russian business entities, not just "strategic ones". The Prime Minister on its own discretion might choose these transactions if he believes that these transactions might influence national security and defense of Russia.

Moreover, if earlier certain restrictions of the Russian strategic investments legislation related to foreign states, international organizations and companies under their control only, 2017 summer amendments provided for additional restrictions in respect of offshore companies and companies under their control as well.

## 5. CONTROL OVER FOOD PRODUCT RETAIL

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*Inspections showed that the majority of harsh violations of trade legislation were committed by regional and local retailers. We will continue monitoring compliance with the provisions of the Trade Law. Cases will be initiated upon all the facts of violations revealed during inspections. If practice of imposing excessive fines on suppliers by retailers is not restricted by market participants on their own, amendments to the Trade Law will be required.”*

*Mr. Andrey Kashevarov, Deputy Head of the Federal Antimonopoly Service*

In the Russian Federation there is the Trade Law regulating relations between retail chains and suppliers. Existence of this law may be explained by the fact that food retail is the special area and regardless provisions of the Competition Law, retail chains (or suppliers) are presumed to have strong market power/ buying power despite of the market share. For mitigation of negative consequences of this strong market power presumption, the Trade Law contains special provisions aimed at regulation of cooperation between retailers and suppliers.

The general trend of strengthening regulation and enforcement under the Trade Law including by direct initiatives of the President and the Government of the Russian Federation should also be outlined. Currently the trend may be illustrated by adoption of serious amendments strengthening regulation under the Trade Law on summer 2016, aimed at stricter rules of cooperation between retail chains and suppliers. Among the most

interesting ones were provisions prohibiting retro-bonuses from suppliers over 5% of the total price of products supplied. Moreover, any additional services (promotional, marketing, logistics) rendered by retail chains to suppliers cannot exceed this 5% aggregate threshold as well.

Due to the importance of the issue for the Russian Government, shortly afterwards it initiated all-Russia inspections by the FAS in respect of all retail chains over the country during January-May 2017 in order to ensure the compliance of retail chains with summer amendments. Upon the results of these inspections the set of antimonopoly cases were initiated by the FAS against major retail chains, including Metro C&C, Lenta, Magnit, Azbuka Vkusa, Dixy and others.

Further FAS initiatives on development of clarifications and/or additional legislatives restrictions as a result of the conducted inspections should also be outlined.

## 6. INCREASING ROLE OF PREVENTIVE MEASURES

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*Upon Implementation of the terms of settlement agreement [between the FAS and Google] will be an efficient mechanism for ensuring competition among developers of mobile applications”.*

*Mr. Igor Artemiev, Head of the Federal Antimonopoly Service*

### **The FAS warnings**

Mechanism of warnings has become a widespread and effective means for prevention of antitrust violations. If the FAS finds out signs of possible infringement with respect to some types of violations indicated in the competition legislation, it is not empowered initiate an antimonopoly case on these particular types of violations before issuance of special warning.

The FAS official statistics shows that the amount of issued warnings increased steadily within 2012-2016 years.

For instance, in 2016 the FAS issued 2,3 times more warnings than in 2015. The FAS emphasizes that in average 75% of warnings are implemented because companies usually take proactive position in order to avoid initiation of a formal FAS investigation. In case the warning is implemented, the FAS does not initiate an investigation, which helps the overloaded antimonopoly authority to reduce the number of cases. Thus, both the FAS and business community are interested in further development of an institute of warnings.

### **Settlement with the FAS**

It also should be noted that, following the most progressive foreign practices, the FAS becomes more active in introducing settlement agreements in antitrust cases. Such agreements provide conditions eliminating consequences of violation and ensure competition in the market. For example, the two large antimonopoly cases - Google case (on abuse of dominant position by restricting pre-installation of competing

search engines and applications on its Android operating system in Russia) and case of container shipping lines (on concerted actions of global shipping lines in form of synchronous increase in freight rates after publishing information about general rate increase (GRI)) - were settled with the FAS in 2017.

### **The FAS initiatives aimed at enhancing compliance**

Increasing role of preventive measures may also be illustrated by the FAS initiative to introduce amendments to the competition legislation encouraging economic entities to introduce effective internal compliance systems, which may result in mitigation of liability upon violation of antitrust legislation.

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