Antitrust Compliance in Russia

Preventing the violation of the antimonopoly legislation has been one of the priorities of the Federal Antimonopoly Service of Russia (hereinafter – "**the FAS**") in the recent years. This function of the FAS is expressly provided by section 3 Article 2 of the Competition Law[1].

Among different methods of preventing the antimonopoly violations, antitrust compliance might be separated as the most advanced and progressing in Russia. The Russian legislation does not have an official definition of antitrust compliance, which appeared in Russian practice only with the arrival of foreign companies, which regard the compliance is an integral part of their activities.

Therefore, antitrust compliance in the competition culture of the Russian Federation still remains an unexplored area in respect of which there is no unified understanding.

Activities aimed at development and implementation of compliance procedures is currently being conducted all over the world. In Russia, the history of this question has begun in 2011 when the necessity of introducing the antitrust compliance was discussed on the round table within the Organization for Economic Cooperation and Development (OECD).

1 The benefits of implementation of compliance program

It should be noted that implementation of compliance programs in Russia is regarded as beneficial both for the business community and the FAS.

From the FAS perspective, implementation of compliance procedures in Russia creates benefits for the antimonopoly authority due to the fact it allows preventing or revealing violations of the antimonopoly legislation at an early stage that makes it possible to reduce number of violations and, therefore, the administrative burden on the antimonopoly authorities.

From the companies' perspective, compliance programs may help detecting and minimizing the risks of violations of the antimonopoly legislation, including unintentional ones, as well as the risks of antimonopoly investigations (minimization of the risk of imposition of turnover-based fine and reputational risks). Moreover, it enables the companies to avoid or mitigate administrative liability.

At the same time, the positive effect of introduction of antitrust compliance is not so unambiguous. The benefits of encouraging the implementation of antitrust compliance for competition and for consumers are not obvious, while the violators can obtain the possibility of reducing the fines due to observance of formal requirements related to antitrust compliance only. It means that the company having the formal compliance program (without the actual effective compliance with the competition law) may rely on the benefits provided by the antimonopoly legislation.

In order to avoid such effect of introducing antitrust compliance, the antimonopoly authority should consider all circumstances of the case, going beyond formal requirements only, as well as assess the guilt of the company within the committed offence.

2 Discussions regarding antitrust compliance among business and expert communities in Russia

[1] Federal Law No. 135-FZ as of 26 July 2006 "On Protection of Competition".

In 2013, the FAS included development of antitrust compliance into the "Strategy of development of competition and the antimonopoly legislation for the period of 2013 – 2024"[2] as the independent direction of further activity of the authority and designated it as the priority for development of the antimonopoly legislation and law enforcement practice.

After that, the companies, as well as the antimonopoly experts from business and academic community, have expressed the interest to antitrust compliance and started the discussions of possible ways for implementation of antitrust compliance in Russia.

Thus, the key issues of discussion regarding the antitrust compliance in Russia have been the following:

2.1 Whether provisions on antitrust compliance should be implemented in the Competition Law or the separate clarifications and methodological recommendations developed by the FAS or expert community are required

Except for changes to the Competition law, which would most likely be required, the expert and business community also recognized that the existence of standards will make it possible to avoid a situation where a compliance systems in companies are built on different principles, whereby some companies create an entirely ostentatiously program, while others introduce a truly effective program.

The existence of standards would allow the company to be assured that, if there is the standard, it will thus be exempted from punishment and obtain certain benefits. However, the question as to which organization should formulate this standard, remained open.

2.2 Which benefits should be established by the antimonopoly legislation with respect to the companies that have the effective compliance programs (reduction of liability (fines) or release from liability)

In this regard, the FAS recognized that implementation of antitrust compliance programs within the companies inevitably entailed additional expenses of the company, because it requires formation of a special business unit, development of the relevant internal local acts, as well as introduction of training programs for employees. Therefore, the FAS officials have repeatedly stated that creation of internal systems for preventing the violations of the antimonopoly legislation would be promoted by the state. However, the form of such promotion (reduction of fines or release from liability) remains rather controversial.

2.3 Whether the certification of antitrust compliance should be implemented

With this regard, two main options have been proposed:

(A) Certification of antitrust compliance by independent organizations such as trade associations and associations of lawyers (for example, non-commercial partnership "Association of corporate lawyers", non-commercial partnership "Association of Antimonopoly Experts", etc.);

(B) Certification of antitrust compliance by the FAS.

3 Current legislative amendments

[2] Full text is available in Russian only: http://fas.gov.ru/netcat_files/File/Str_razv_konk_i_antimonop_reg_13-14.pdf.

Following the discussions described above, on 14 July 2016, the draft amendments to the Competition Law and the Code on administrative violations[3] relating to antitrust compliance were published on the federal portal containing the information on the legislative bills.

The current proposed amendments includes the following:

3.1 *The definition of antitrust compliance*

According to the bill, "antitrust compliance" is a complex of legal and organizational measures, establishing by the normative local acts of the business entity or other company from its group of person, having obligatory effect on the business entity, aimed at compliance with the antimonopoly legislation and prevention of the antimonopoly violations.

As we may see from the definition, the compliance program should be adopted as a normative local act within the company. Moreover, other company from the group (e.g. group parent company) might have the obligatory compliance program, and that would also be regarded as performance of the Competition law requirements.

3.2 *The requirements to the antitrust compliance program*

Pursuant to the bill, the antitrust compliance documents should contain:

(A) Requirements to the risk assessment of company's activity;

(B) Measures aimed at minimizing the risks of antitrust violations;

(C) Measures aimed at control over the implementation of antitrust compliance;

(D) Procedures for familiarization of employees with compliance documents (local acts, politics, codes of ethics, etc.)

(E) Information on company's officer responsible for functioning of antitrust compliance within the company.

3.3 *Reduction of liability*

It is proposed that the fines for antimonopoly violations might be reduced in case of existence of effective antitrust compliance within the company. Pursuant to the bill, the existence of the antitrust compliance procedure would be regarded by the FAS as a mitigating circumstance within defining the size of the penalty.

3.4 *Obligatory antitrust compliance for state-owned companies*

According to the bill, antitrust compliance will be obligatory for the state-owned companies since 01 January 2017. That means all state-owned companies and corporation, natural monopoly entities, state and municipal unitary enterprises, as well as the companies, where the Russian Federation have more than 50% shares (interest) shall adopt the compliance programs, while private companies will be entitled to implement antitrust compliance on its's own initiatives.

[3] "Code of the Russian Federation on Administrative Violations" № 195-FZ as of 30 December 2001.

4 The practice of implementation of antitrust compliance in Russia

In spite of the fact that the current Russian legislation does not contain any provisions regarding antitrust compliance, in practice there are examples of development and implementation of system and (or) separate elements of antitrust compliance. The reasons of its introduction were, primarily, the remedies of the FAS issued within the antimonopoly proceedings or receiving preliminary approval of the FAS to the transactions. For example, the compliance procedures have been implemented in such companies, as Uralkali, Rosneft, Gazprom Neft, RUSAL, Novo-Nordisk, EVRAZ Group, Knauf Gips, etc.

In addition, the elements of compliance were introduced as the commitments of the companies as a result of negotiated settlement agreements concluded with the FAS.

Some companies have made the decision to implement antitrust compliance on its's own initiative. Thus, in December 2015, MTS PJSC announced that the system of antitrust compliance has been created.

Therefore, currently there are no obstacles either for the FAS within its competence, or for companies, to develop and implement systems of antitrust compliance on its's own initiatives with purpose of reduction or prevention of risks of violations of the antimonopoly legislation.

However, the absence of any formal documents (acts, clarifications) regarding the elements of compliance system as well as obligations for the companies. Moreover, the regulatory authority could potentially make it harder for companies to use antitrust compliance as the argument for reduction of fines within administrative or judicial proceedings.

As an example of implementation of antitrust compliance in Russia, the case of Uralkali might be discussed in more details.

This company used the compliance program in order to minimize the risk of bringing to responsibility for increase of prices on concentrated carnallite market where Uralkali was the sole producer and, therefore, held the dominance position.

According to the circumstances of the case, Uralkali has decided to increase the price on concentrated carnallite in order to compensate the expenses for production, modernization and extension of capacities. The total amount of investments has been approved by the consumers before actual increase of price.

Moreover, within the compliance procedure Uralkali carried out the economic expertise in order to decide whether inclusion of investments element to the price on concentrated carnallite would lead to establishment of monopolistically high prices. As a result of expert investigation, such increase has been recognized as complying with the antimonopoly legislation.

However, in 2014 the FAS received the complaint from one of the largest consumers of concentrated carnallite regarding increase of prices on concentrated carnallite by Uralkali without economic and other justifications. According to the applicant's opinion, Uralkali unreasonably includes the investment element into the price, which led to the price increase.

Subsequently, the FAS started the investigation in respect of Uralkali on signs of violation of the antimonopoly legislation in the form of abusing its dominance position on the market of concentrated carnallite. However, the FAS has decided to cease consideration of the case taking into account the fact that Uralkali had used the compliance procedure during price determination.

This example proves that development of antitrust compliance and its effective implementation is beneficial for the company because it allows to mitigate the risk of violation of the antimonopoly legislation, as well as to avoid liability. The described case also underlines the fact that under the current legal framework the FAS investigates the essence of the issue and does not check whether the companies' behavior complies with its obligations undertaking under compliance procedure.

5 Suggestions for Implementation of Compliance Program

The companies which are intended to implement the compliance program in Russia, should conduct compliance due diligence of the internal activities of the company, in particular verify the contracts with the contractors and other documents in order to identify risks of offenses beforehand and to avoid criminal and administrative liability.

The compliance program should be implemented in the form of the public policy (public commitments of the company) or in the form of the non-public policy (internal guidance or clarifications for the employees) with the indication of the main risks and consequences of the violation of the Competition Law.

The principal characteristics of a credible compliance program are the subject of broad discussion. There are the following main elements that an effective compliance program needs to contain (subject to variation of details):

(A) **Code of corporate compliance and ethics.** The code of corporate compliance and ethics is the basic documents of the compliance program, which should contains the main elements, required by the law (see section 3.2 above), as well as other information describing the company's approach to due antitrust behavior of employees. Usually, the code includes the description of main antitrust violations and guidelines for the employees on how to avoid possible risks in similar situations (e.g. relationships with competitors, including within trade associations; relationships with suppliers and customers; liability; etc.)

Such a code should be adopted as a local normative act of the company. Information on the adoption of the code should be published on the company's website.

(B) **Appointment of a compliance expert.** Depending on the company`s size it is possible both to create a special department and to appoint a certain expert responsible for development and implementation of anti-corruption measures and cooperation with law enforcement authorities. Such an expert should possess necessary resources to implement compliance measures and should have an opportunity to take an independent position in the case of a conflict.

(C) **Training programs.** The company`s staff is recommended to visit training sessions aimed at understanding of the Competition Law, rules of behavior and cooperation with clients and competitors. There are no specific requirements on frequency of holding such trainings. Herewith, in practice companies prefer holding antitrust compliance trainings no less than once or twice a year.

(D) Implementation of **effective reporting systems** for employees to report on violation of the Competition Law. This usually includes opening the hot line or creation of special web-portal, where the employees could refer their messages on non-compliance with antimonopoly requirements.

(E) **Monitoring process.** This includes establishment of disciplinary and other sanctions for employees for violation of the internal processes and procedures.

(F) **"Tone from the top".** Commitment from senior management regarding developing and implementing measures to prevent violation of the Competition Law is a key-point for the program success. This measure helps to increase the level of compliance culture in the company and leads to responsible attitude of staff towards the compliance.

6 Conclusion

The antimonopoly legislation of the Russian Federation is developing steadily in order to implement the effective compliance procedure in the business activities of the economic entities.

Effective competition compliance programs, based on the fundamental standards attributable to the business, must become a valuable addition to other enforcement instruments of competition authorities to prevent the violation of the antimonopoly legislation, along with turnover-based fines, criminal sanctions, warnings and leniency program.