

Third Time's the Charm?: Russian Federal Antimonopoly Service Presents Its Third Antimonopoly Package

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This year, the Federal Antimonopoly Service of the Russian Federation (“FAS”)¹ celebrated two decades of service. Over the twenty-year period, FAS focused on clearly identifying its enforcement agenda and creating a comprehensive set of rules. As an active enforcer, it is no surprise that FAS would try to clarify its rules as much as possible in order to ensure predictable outcomes.

This quest for a perfect set of antitrust rules is, of course, an iterative process. Over the span of little less than two years FAS introduced several amendments to clarify the law.

Evolution of the Law

FAS started its overhaul of the antitrust enforcement system in August 2009, when the main Russian antitrust law, the Federal Law “On Protection of Competition” (the “Competition Law”),² underwent significant changes. FAS proposed amendments to the Competition Law, the Code of Administrative Offences, and the Criminal Code. All amendments were adopted in July 2009³ and became known as “the Second Antimonopoly Package.” Amendments to the Competition Law and the Code of Administrative Offences became effective in August 2009, while amendments to Article 178 of the Criminal Code⁴ became effective in October 2009.⁵ The

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¹ In Russian, Федеральная Антимонопольная Служба (Federal Antimonopoly Service), <http://www.fas.gov.ru/>.

² Federal Law “On Protection of Competition,” No. 135-FZ, July 26, 2006 (as amended), ROSSIISKAIA GAZETA [ROS. GAZ.] No. 162, July 27, 2006, <http://base.garant.ru/12148517.htm>.

³ Federal Law on Amending the Federal Law on Protection of Competition and Certain Legislative Acts of the Russian Federation, No. 164-FZ, July 17, 2009; Federal Law on Amending the Code of Administrative Offences of the Russian Federation, No. 239-FZ, July 27, 2010, <http://base.garant.ru/12177586/>.

⁴ The Criminal Code of the Russian Federation, No. 245-FZ, June 13, 1996 (as amended), ROSSIISKAIA GAZETA [ROS. GAZ.] No. 113, June 18, 1996; No. 114, June 19, 1996; No. 115, June 20, 1996; No. 118, June 25, 1996, <http://base.garant.ru/10108000.htm>.

Second Antimonopoly Package covered all sections of the antitrust legislation including those governing mergers, cartels, restrictive agreements, and dominance.

The Need for More

After promulgation of the Second Antimonopoly Package, it was then necessary to further clarify and develop the new rules, and, shortly thereafter, FAS started drafting yet another set of amendments. To explain these immediate revisions, Igor Artemyev, the Head of FAS, noted that after the Second Antimonopoly Package was adopted, FAS did not want to change anything else; rather, it wanted to focus on the actual enforcement and implementation of the rules.⁶ However, pursuant to comments on FAS’s report to the Organization for Economic Co-operation and Development on the state and development of competition in Russia, FAS determined that it was necessary to develop additional amendments,⁷ which

⁵ Federal Law on Amending Article 178 of the Criminal Code of the Russian Federation, No. 216-FZ, July 29, 2009, <http://base.garant.ru/12168662/>.

⁶ Press Release, Federal Antimonopoly Service, Igor Artemyev: We Expect that by the End of This Year the “Third Antimonopoly Package” of Laws Will Be Introduced to the State Duma (Oct. 22, 2010), http://en.fas.gov.ru/news/news_30946.html.

“After the ‘second antimonopoly package’ was adopted we did not want to change anything in the law and instead wanted to build-up enforcement practice. The Government of Russia, however, honoured FAS Russia to be the first government body to start the procedures for joining the Organization for International Co-operation and Development. Last year we reported to the OECD Competition Committee about the state of competition in the Russian Federation and its development, and were given some comments and recommendations regarding desirable changes to our law. That’s why the ‘third antimonopoly package’ of laws became necessary,” explained Igor Artemyev.

⁷ *Id.*

would amend the Competition Law and the Code on Administrative Offences.⁸

The Third Antimonopoly Package

Thus, on October 4, 2010, FAS turned over for consideration to the Government of the Russian Federation the latest version of the rules in what is now known as “the Third Antimonopoly Package.”⁹ This Package, if adopted, would again introduce a broad range of changes.

First, these amendments would further clarify merger enforcement guidelines. Second, they would reduce the number of horizontal *per se* offences in Russia to include only cartels¹⁰ and would eliminate criminal penalties for coordinated actions and vertical agreements. Also, a market-share safe harbor will be implemented on all concerted actions, including cartel-type behavior.¹¹ Third, FAS is proposing to amend a few provisions on unilateral conduct, while leaving the main body of unilateral conduct law unchanged. Finally, some amendments would introduce fast-track procedures to resolve administrative disputes.

Below we describe in some detail the most important of the proposed changes contained in the Third Antimonopoly Package.

Merger Enforcement

The Competition Law applies to agreements or actions executed by Russian and foreign legal entities, if such agreements or actions are concluded or conducted in relation to assets located in Russia. FAS also has jurisdiction over transactions acquiring shares or rights of commercial companies carrying on business activity within the territory of Russia, or that have any other

⁸ The Code on Administrative Offences of the Russian Federation, No.195-FZ, Dec. 30, 2001(as amended), ROSSIISKAIA GAZETA [ROS. GAZ.] No. 256, Dec. 31, 2001, <http://base.garant.ru/12125267.htm>.

⁹ Press Release, Federal Antimonopoly Service, Igor Artemyev: We Expect that by the End of This Year the “Third Antimonopoly Package” of Laws Will Be Introduced to the State Duma (Oct. 22, 2010), http://en.fas.gov.ru/news/news_30946.html.

¹⁰ In addition, two types of vertical restraints remain *per se* illegal.

¹¹ Safe harbor would apply to concerted actions of companies whose total combined market share does not exceed 20 percent, and the separate market shares of each such companies do not exceed 8 percent.

effect on the state of competition in Russia.¹² This means that Russian antitrust regulations may be applicable to an agreement or transaction executed outside of Russia, provided one of the parties involved carries on its activity in Russia.

Notification Threshold Changes

The Third Antimonopoly Package will increase the general notification thresholds for mergers and takeovers.¹³ A pre-acquisition filing will now be required if the aggregate book value (total assets) on a worldwide basis of the companies participating in the transaction and their respective groups exceeds 7 billion Russian roubles (previously, 3 billion Russian roubles).¹⁴

Also, the aggregate turnover value (or aggregate yearly revenue) for the named transactions will also be increased. No notification will be required unless the aggregate turnover on a worldwide basis of the companies participating in the transaction and their respective groups exceeds 10 billion Russian roubles (previously 6 billion Russian roubles).¹⁵

In addition, the Third Antimonopoly Package will amend the section on acquisition of more than 50 percent of voting shares or other rights of a foreign company by another foreign company, to require providing notification to FAS if the stocks, shares, or rights are acquired in a foreign company that has supplied goods, services or works to Russia in the amount of more than 1 billion Russian roubles¹⁶ during the year, preceding the date of filing. This is necessary only when such an acquisition enables the acquirer to dispose of more than 50 percent of voting shares or determine the terms of business activity in the acquired foreign company or exercise the functions of its executive body.

¹² The new proposed amendments to the Competition Law do not define the term “effect on the state of competition.”

¹³ Generally, notification is necessary if any of the grounds for filing (described above), as well as one of the thresholds described in this paragraph (assets or turnover), are met. The Third Antimonopoly Package would increase thresholds for mergers and takeovers. Thresholds for acquisitions of assets, shares, and rights were increased to the same level by the Second Antimonopoly Package.

¹⁴ Approximately \$225 million (previously, \$96 million).

¹⁵ Approximately \$322 million (previously, \$193 million).

¹⁶ Approximately \$32.2 million.

Defining “Control”

The merger notification law would also be amended to define the term “control,” which will in turn narrow the law’s application to a group of entities. Control would be defined as the ability to make decisions (directly or through a third party) by way of the following: (1) holding more than 50 percent of voting shares in a company; (2) enjoying the right to determine business activities of the company; and (3) functioning as the executive body of the company.

Documentation Requirements

Finally, the amendments would add notification documentation requirements. For example, if the target is a foreign company, all corporate documents, including Articles of Incorporation or Articles of Association, Charter, etc., must be notarized as well as carry an apostille.

At the moment, the law requires the corporate documents of the acquirer to be apostilled and notarized, and the amendments propose to establish such requirements for the corporate documents of the target.

Additionally, the proposed amendments would add a new requirement when submitting financial data for merger review. The new law would now require an applicant to provide two sets of numbers for each financial requirement (e.g., balance sheet statement and valuation of assets): (1) financial data for the last reporting period, preceding the notification and (2) financial data on the date when the deal closed.

Implementation

These amendments are supposed to enhance the efficiency and accuracy of investigations and decisions, while at the same time minimizing the workload of FAS and its territorial offices in the sphere of merger control. It is expected that when the proposed amendments to the Competition Law come into effect, only major international transactions, which can objectively affect the state of competition in Russia, will be subject to merger control.

Cartels and Concerted Actions

Generally, detection of cartels is the principal priority of FAS. According to Igor Artemyev, concentration on detection of cartels will result in a reduction of the

number of cases initiated by FAS in the sphere of abuse of dominant position.¹⁷

The Third Antimonopoly Package will change the regulation of restrictive agreements and concerted practices significantly. In fact, FAS redrafted Article 11 of the Competition Law almost entirely.

Limiting Per Se Prohibitions

Provided the proposed amendments come into force, the application of the *per se* prohibitions will be limited to horizontal agreements. This is notable, because in instances where agreements and concerted practices fall under the *per se* prohibitions, FAS does not have to prove any anticompetitive effects of such an agreement or action. However, pursuant to the amendments, the law is not triggered unless the combined market share of the agreement participants is 20 percent. Agreement participants whose individual market share is less than 8 percent are also exempt.

These amendments would provide a more accurate definition of agreements prohibited *per se* to only relate to horizontal agreements that: (1) result in a setting or maintaining of prices (price fixing); (2) result in a manipulation of price in bidding situations (bid rigging); (3) divide the market based on geographical territory, volume of sales, or assortment of goods; (4) result in a manipulation of supply; or (5) result in a refusal to deal with certain sellers or buyers, unless these refusals are allowed by federal laws (boycott). In addition, two types of vertical restraints are considered *per se* unlawful: (1) minimum (but not maximum) resale price maintenance and (2) any ban on a buyer’s ability to sell a competitor’s goods are also *per se* illegal (unless the goods are distributed under the trade mark or other means of individualization of the seller).

Single-Entity Exemption

Further, agreements and actions executed within one group of entities will be excluded from the Competition Law provisions concerning restrictive agreements and concerted practices. The law will not cover actions of economic entities that comprise one group of persons or that are controlled by one person, bringing Russian

¹⁷ Under the Russian competition law, an agreement between competitors is categorized as a type of monopoly.

cartel law in line with the *Copperweld* doctrine in the United States.¹⁸

Parallel Conduct

Thirdly, parallel conduct would be further defined by the amendments. In order to prevent unsupported investigations of situations where competitors are acting in the market without an illegal purpose, the amendments provide some factors to consider when determining whether competitors' actions constitute parallel conduct or a concerted action.

Specifically, if competitors publicly announce their intent to act in a certain manner with respect to price, and the remaining competitors follow suit, then this could serve as a basis to conclude that these actions are concerted. Similarly, after *Twombly*,¹⁹ these same factors, if alleged, could be indicative of a conspiracy in U.S. (provided other structural factors are met). For example, in a recent case *Delta/Airtran Baggage Fee Antitrust Litigation*, the district court found that plaintiff's allegations of "how and when the alleged conspiracy was reached, who was involved in the alleged collusive communications, the content of the communications, the changed business practices following the collusive communications, and the pretextual reasons for the changed business practices"²⁰ were sufficient to prevent the claim from being dismissed.

One important difference, however, is the role played by the combined market share of the conduct participants. Pursuant to the Russian amendments, the concerted actions law will be triggered when participants have a 20 percent combined share of the market. This is different from the U.S. law.

Specifically, under U.S. law, in order to state a claim for conspiracy based on parallel conduct, at a minimum, an allegation of a dominant market share of the participants also must be alleged. For example, in *Delta/Airtran*, the combined market share of the two participants was ninety-two percent. This would be different in Russia, where, presumptively, several firms with a combined

market share of 20 percent could be found to be violating antitrust law by engaging in parallel conduct.

Monopolization

Provisions regarding abuse of dominant position remain largely unchanged with the Third Antimonopoly Package. The few amendments requested by FAS are aimed at increasing the level of availability of information for consumers and at defining terms for access to goods and services of natural monopolies. The new amendments specifically cover what is considered abuse of dominant power in the case of an electricity power provider, namely market manipulations.

Finally, FAS is proposing to amend provisions on unilateral conduct to clarify that any price set by a commodity exchange will not be considered monopolistically high, provided its rules require execution of all the conditions prescribed by the Competition Law. Additionally, FAS has specified administrative fines that will be applicable to any company found to abuse its market power.²¹

Tenders and Auction Dispute Resolution

As part of the Third Antimonopoly Package, FAS drafted amendments introducing fast-track procedures to resolve administrative disputes regarding the outcome of tenders and auctions that are mandatory under the law.²² Currently, complaints related to the signs of antimonopoly violations are usually considered within thirty days, and then an antimonopoly case has to be opened, which can last several months. However, for auctions, time is of the essence, and if a determination is made that a violation occurred, FAS needs to have the ability to issue its decision before contract is awarded.

Under the amended rules, FAS will consider such complaints within only seven working days. The fast-track administrative disputes will be applied first of all to tenders and auctions for allocating state and municipal property, and also to land and natural resources.²³

²¹ This rule will not apply to natural monopolies, which will continue being fined using a "turnover test."

²² Press Release, Federal Antimonopoly Service, FAS Russia Plans to Investigate Complaints Regarding Tenders and Auctions Within Seven Working Days (Sept. 27, 2010), http://en.fas.gov.ru/news/news_30881.html.

²³ *Id.*

¹⁸ *Copperweld v. Independence Tube*, 467 U.S. 752 (1984); *see also* *Am. Needle, Inc. v. Nat'l Football League*, 130 S. Ct. 2201 (2010).

¹⁹ *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

²⁰ *In re Delta/Airtran Baggage Fee Antitrust Litig.*, 733 F. Supp. 2d 1348, 1362 (N.D. Ga. Aug. 2, 2010).

Additionally, starting at the beginning of 2011, a single site (www.torgi.gov.ru), containing information about various tenders and auction, will be available. For instance, if an investor is looking for land for construction purposes, he or she will be able to see all plots of land in a particular region regardless of which body is organizing the competitive bidding.²⁴

CONCLUSION

The proposed amendments are meant to increase the efficiency of competition regulations and improve the quality of Russia's antitrust authority functions. Using Artemyev's own words, "in general the third antimonopoly package can be called liberal and aimed at reducing administrative barriers for business. . . . [FAS] tried to take into account all the comments provided by the Russian business community, international experts and colleagues from OECD."²⁵ Additionally, over the last several years, Russian antitrust regulation was substantially brought in line with its European and U.S. counterparts.²⁶ Introduction of the Third Antimonopoly Package is aimed at further convergence between these regulatory systems.

It is expected that the Third Antimonopoly Package will be finalized and adopted in its final form in Spring 2011. Generally, the proposed provisions could be changed in the course of the parliamentary readings; however the substantive essence of these amendments, in our opinion, will not be modified.

²⁴ *Id.*

²⁵ *Q&A With Igor Artemyev, Russian Antimonopoly Head*, LAW360 (June 23, 2010), http://www.law360.com/articles/176661_3/8.

²⁶ *See, e.g.*, Press Release, Federal Antimonopoly Service, FAS Russia and the European Commission Are Launching a New Project for Approximation of Russian and EU Approaches to Legislative Regulation of Natural Monopolies (Oct. 2., 2010), en.fas.gov.ru/news/news_30885.html.