News on the latest developments in antitrust law

In the issue:

Our news on LinkedIn ........................................................................................................ 2
Adopted laws .......................................................................................................................... 2
  Investing in strategic companies has become easier ......................................................... 2
Draft legal acts ....................................................................................................................... 2
  Compensation to a party whose rights have been infringed upon as a result of a violation of antitrust law ................................................................. 2
  “Fourth antitrust packet” adopted in first reading ......................................................... 2
Activities of the Federal Antimonopoly Service (FAS) ........................................... 3
  Is criminal liability for cartel activities now a reality? ................................................ 3
  Rates to be economically and technically justified ...................................................... 3
Court practice ....................................................................................................................... 3
  Warning notice may be served without evidence of actual violation ... .................... 3
  Antitrust prohibitions to apply regardless of patent protection ......................... 4
  Circumstantial evidence sufficient in cartel cases .................................................... 4
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Adopted laws
Investing in strategic companies has become easier

Key changes:

► Activities involving the use of infectious agents by economic entities whose core activity is the manufacture of food products has left the list of strategic activities.
► Previously issued decisions giving prior approval for a transaction may now be extended.
► The criteria for including the activities of an editorial office, a publisher or a founder of a periodical print publication on the list of strategic activities have been revised.
► Law No. 57-FZ is now applicable to transactions involving the property of a strategic company constituting at least 25% of the total book value of the company's assets.
► Certain qualifying intra-group transactions conducted by foreign investors, as well as transactions conducted by organizations that are controlled by a region of Russia, are no longer subject to the provisions of Law No. 57-FZ.

Draft legal acts
Compensation to a party whose rights have been infringed upon as a result of a violation of antitrust law
A draft law envisaging a new type of liability for violation of antitrust law was published on the regulation.gov.ru website for public discussion.

Those whose rights have been infringed upon as a result of a violation of antitrust law will be able to claim that, instead of reimbursing losses, the infringer pay compensation in the amount of 1%-15% of the value of goods sold in violation of the law. The value of goods would be determined at the discretion of the court, depending on the nature of the violation.

It should be noted that a filing of such a claim by a concerned party does not rule out the possibility that a company will be charged a turnover-based fine for the violation.

“Fourth antitrust packet” adopted in first reading
The “fourth antitrust packet” was adopted by the Duma on 22 October.

Key changes:

► The Government will establish rules for non-discriminatory access to commodities produced and sold by a market player that has a dominant (but not a monopolistic) position on the market in which it holds more than 70%, provided that the market player has abused its dominant market position.
► The definition of cartel has been clarified to the effect that a cartel agreement may be concluded not only by sellers, but also by purchasers of goods.
► The cases where vertical agreements are allowed have been clarified: the cumulative market share of parties to a vertical agreement must not exceed 20% of the market for commodities that constitute the subject matter of the agreement, rather than of any other commodity market.
► The Federal Antimonopoly Service will no longer maintain a register of companies holding more than a 35% share of a particular commodity market or having a dominant position on a particular commodity market.
► Under certain circumstances, a joint activity agreement between competitors will have to be approved by the FAS.
► It is planned to establish a Presidium of the FAS, which is authorized, among other things, to review the decisions of regional antimonopoly bodies.
Activities of the Federal Antimonopoly Service (FAS)

Is criminal liability for cartel activities now a reality?

The FAS found that the federal state institution, the Procurement Office of the Commandant Headquarters under the Commander-in-Chief of the Internal Troops of the Russian Ministry of Internal Affairs, had violated antitrust law by giving preferences to certain bidders when seeking bids and quotations.1

It also found that Global Stroy, Monolit Company and Vozrozhdeniye Construction Company, acting as a cartel, had concluded and implemented an oral agreement that resulted in price support in a tender. The total value of contracts with violators exceeded RUB 240 million.

In its ruling, the FAS noted that, in proving the presence and actual implementation of a non-compete agreement between business entities, an antimonopoly body should analyze their business behavior based on the principles of reasonableness and fairness. A non-compete agreement between cartel members other than the initiators of such a cartel may be made either orally, by electronic communication, or by an implied undertaking.

The FAS decided to refer the case to law enforcement bodies for a decision on whether to initiate a criminal investigation into alleged offenses committed by the officers of Global Stroy, Monolit Company and Vozrozhdeniye Construction Company. According to the FAS,2 courts are now beginning to rule that cartel members be held criminally liable.

Rates to be economically and technically justified

In examining the activities of UGMK-Telecom and Kuzbassvyazugol, the FAS found that the above companies had committed a violation by imposing rates for short-distance connection and interconnection services at a level that was neither economically nor technically justified. Setting a charge for a connection point at RUB 300,000 rather than RUB 30,000 was regarded as the violation.

The FAS served a warning notice to the above companies requesting them to remedy the violation by establishing an economically and technically justified rate in the relevant contracts. Both companies, however, reported that they were unable to do so.

The hearing is scheduled for 8 December 2014.3

Court practice

Warning notice may be served without evidence of actual violation

In April 2014, the FAS served a warning notice to Aeroflot Russian Airlines, Rossiya Airlines, UTair Airlines, Transaero Airlines and a number of other airlines to the effect that the recipients could be in violation of the Competition Law by imposing rates without taking into account changes in consumer demand as the flight date approaches (i.e., without offering last-minute flight bargains).4

The recipients were requested to improve their ticket sale systems so that rates should not only increase but also decrease as the flight date approaches, taking into account changes in consumer demand and the number of tickets sold in a given period (percentage of seats filled).

Aeroflot Russian Airlines lodged an appeal against the warning with the Arbitration Court of Moscow. The court, however, dismissed the company’s claims on formal grounds without considering the merits of the claims. According to the court, as the warning notice was served only in connection with indications rather than evidence of a violation, it may only investigate into whether such indications exist based on the information that became available to the antimonopoly body and the documents underlying the notice served to the

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claimant. At the same time, the actual violation of antitrust law is not, and may not be, established in the warning notice.

**Antitrust prohibitions to apply regardless of patent protection**

In December 2013, the FAS found that Teva Pharmaceutical Industries Limited (“TEVA”) had violated the Competition Law as a result of an economically and technically unjustified refusal to sign an agreement with the Biotek Interregional Pharmaceutical Production and Distribution Corporation to supply the drug Copaxone. TEVA received a warning notice, but did not act on it.

TEVA successfully appealed to the Arbitration Court of Moscow against an instruction and a resolution imposing a fine. The court accepted the arguments put forward by TEVA to the effect that goods protected by patent rights should be entirely exempt from the provisions of Article 10 of the Competition Law.

However, on 23 September, the Ninth Arbitration Appeals Court ruled in favor of the antimonopoly body, upholding its position that the activities of a dominant market player should not violate antitrust law, regardless of whether any patent rights have been exercised by the market player in the production and distribution of goods. 

The court stated that the procedure regulating the release of TEVA-branded goods for circulation in Russia may not substitute the legal substance of the agreement, it being the supply of the Copaxone drug by TEVA. There were neither economic nor technical grounds behind the refusal to sign an agreement with Biotek, as TEVA merely intended to distribute the Copaxone drug via its Russian subsidiary, Teva LLC, on a tender basis, and to exclude any other local distributors from this process.

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**Circumstantial evidence sufficient in cartel cases**

The Arbitration Court of Moscow upheld the charges of collusive bidding brought by the FAS Moscow Administration against MTK and Chento in connection with the provision of ground ambulance support services to hospitals in the South-Eastern Administrative District of Moscow. The companies offered just a minor discount on the highest contract price and took turns in winning auctions on the most beneficial terms. The FAS Moscow Administration imposed a fine of more than RUB 5 million on each of the aforementioned companies.

MTK argued that the antimonopoly body had not proved the alleged collusion occurred and simply assumed there had been one. This argument, however, was not accepted by the court.

In its statement, the FAS noted that no documentary evidence was needed to prove the collusion occurred, as a host of circumstantial evidence supports the assumption that both MTK and Chento were capable of competing fairly. In those auctions where MTK and Chento competed on par with others, the contract price went as far down as 58%, while in the case of 16 auctions involving two bidders there were no signs of real competition, which is proof that the bidders had acted in collusion.

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