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NEWSLETTER

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What to Expect from the THIRD ANTITRUST PACKAGE

On September 9, 2011 the State Duma of the Russian Federation passed a new package of amendments to the antitrust laws in the first reading. The proposed draft of the "Third Antitrust Package" produced many questions and the work on the amendments may require more time. In expectation of the innovations, the FAS assures that the antitrust prohibitions will become more liberalized and the liability of companies will become softer. How realistic are these forecasts?

Agreements and Concerted Actions

- It is proposed to split up the notion "Agreements" and "Concerted Actions". The FAS also proposes to shorten the list of per se prohibitions applicable to the agreements between companies. How well this change will perform in practice depends on how demanding the courts will be to the quality of evidence presented by the antitrust authority.
- According to the new version of the law, an intragroup agreement will not be subject to prohibition if one of the group persons controls another person within this group. Meanwhile, an opinion previously existed in the legal community that group members are in principle not proper entities under Article 11 of the Law, notwithstanding the ground on which they form this group. Therefore, the approach to the agreements/concerted actions in a group legalized by the law-maker, in fact, extends the area of responsibility.
- The "Concerted Actions" allocated to a separate article (Article 11.1) by the proposed amendments mean only those actions that are in advance known to each party through a public announcement of such actions (new version of Article 8.1 of the Law). At the same time it is not clear what is to be treated as a "public announcement", who must make this announcement, and what powers the announcer needs to have. It appears that the FAS may face certain difficulties in proving a verbal agreement and subsequently protecting its position in court.
- The bill unambiguously limits the applicability of prohibitions to agreements that restrain competition and concerted actions only of competing companies, i.e. those which sell goods on the same product market. Previously, "vertical" concerted actions (i.e. actions of non-competing companies) were rather senseless. However, this innovation is of course an example of liberalization.
- Initiatives of the Third Antitrust Package also limit the applicability of prohibitions to the concerted actions of companies with the total share in a product market of more than 20% and the share of each of them of not more than 8%. However, there is still the risk that actions of these companies may be qualified as 'coordination'.

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- The liability for the concerted actions that violate per se prohibitions is technically eliminated if there is a threat of the competition restraint: the actions should effectively entail the implications listed in the respective article of the Law. In fact, the proposed loosening is leveled down, because the antitrust authority may qualify any per se prohibition according to the Article 11.3 by additionally referring to the restriction of competition.
- An important innovation is that prohibitions to enter agreements that restrain competition will no longer apply to the intellectual property agreements (Article 11.8 of the Law in the new version).

Coordination. The bill limits the opportunity to qualify as coordination only those concerted actions of companies agreed by a third party, which does not operate on the same product market, in which the concerted actions take place, i.e. only non-competing companies can be coordinated.

Concept of Warnings. The antitrust authority will have the right to send "warnings" to officials of companies who publicly announce that they plan to act "anti-competitively" in a product market, to ensure the compliance with the antitrust laws. Given its legal uncertainty, competent authorities may use the concept of warnings as a tool for putting market pressure on companies, if it becomes available to the general public.

Economic Concentration. Financial figures will increase, which, if achieved, require approval when creating or reorganizing a commercial company: the total asset value has increased from three to seven billion Russian roubles, and the total revenue went up from six to ten billion Russian roubles.

Tenders. One of the innovations that the Third Antitrust Law proposes is to introduce how to deal with complaints for tender and contracting procedure and how to assess administrative fines based on the tender value. It was proposed to fix sanctions for agreements and concerted actions in a tender.

Additionally, it is expected to make it impossible for the government-owned corporations and companies to enter into contracts that imply transfer of rights to the governmental (municipal) property outside tenders or auctions. In turn, the list of such persons in Article 17.1 is extended by invoking the opportunity to make contracts for the governmental (municipal) property outside a tender or auction with a person who filed only one bid.

The tender/ auction process will be adjusted and in certain cases the parties will be entitled to increase the contractual price and make a new lease contract after its expiration without additional tender or auction.

The Third Antitrust Package also covers expected amendments to the regulations related to the liability for breaching the Competition Protection Law. Primarily, there will be no criminal **liability** for the concerted actions.

Significant amendments were also made to the administrative liability for offences set out in the Russian Code of Administrative Offences:

- fixed fines for the abuse of dominance, which did not entail prevention, limitation or elimination of competition. At the same time, actions, which triggered these implications, will still be penalized by turnover fines;
- new element of the administrative offence will be manipulation of prices in the wholesale and/or retail electricity (capacity) markets;
- liability under Article 19.8 of the Russian Code of Administrative Offences not only for failure to disclose information to the antitrust authority, but also for the delay in doing so;
- "mitigating" and "aggravating" circumstances that are taken into account when trying administrative cases in the area of competition.

Specifically, the bill treats the following circumstances as "mitigating": compliance with the instruction before proceedings come to an end, written acknowledgement of a breach and cessation of an offense, and cooperation with the antitrust authority during the investigation. Each of the above circumstances reduces the administrative fine by a quarter of the minimum applicable administrative fine. In turn, the "aggravating" circumstances include: continuity of an offense, significant damage, repetition of an offense and etc.

Therefore, implications of the Third Antitrust Package are two-fold: a favorable trend can be seen in the issues related to the liability of companies and economic concentration. At the same time, in respect of legal regulation of agreements and concerted actions, these innovations may in practice be only of cosmetic nature: only through practical implementation the quality and applicability of the amendments will become clear.