

Client Update

Fourth Antimonopoly Package Is Passed

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On October 5, 2015, the President of the Russian Federation signed into law the Fourth Antimonopoly Package.¹ It enters into force within 90 days from its official publication.²

The Fourth Antimonopoly Package continues the further liberalization of Russian antitrust legislation that began with the Third Antimonopoly Package.³

For M&A transactions, the most important amendments are an expanded scope for the type of joint ventures requiring notification and various changes to the procedure for obtaining merger control approval. In addition, there are a number of important changes to the regulation of anti-competitive agreements.

Below we provide a more detailed overview of the new arrangements.

¹ Federal Law No. 275-FZ on Amendments to the Federal Law on Protection of Competition and Certain Legislative Acts of the Russian Federation (the “Fourth Antimonopoly Package”).

² The Fourth Antimonopoly Package was officially published on October 6, 2015 on the Official Internet Portal of Legal Information (<http://www.pravo.gov.ru>).

³ Federal Law No. 401-FZ on Amendments to the Federal Law on Protection of Competition and Certain Legislative Acts of the Russian Federation dated December 6, 2011 and Federal Law No. 404-FZ on Amendments to the Code of Administrative Offenses of the Russian Federation dated December 6, 2011 (the “**Third Antimonopoly Package**”).

ECONOMIC CONCENTRATION

The Scope of Transactions Subject to Antitrust Clearance by FAS Russia Has Been Broadened

The Fourth Antimonopoly Package has widened the range of transactions that are potentially subject to mandatory prior clearance by the Federal Antimonopoly Service (“FAS”) and now brings within its scope all joint venture agreements⁴ concluded between commercial entities that are competitors where the joint venture agreement contemplates there being joint activity in the Russian Federation.⁵

This is irrespective of whether a separate joint venture entity is established and will also now catch cooperative arrangements that fall short of a merger and which would previously have been subject to *ex post* regulation under the general restriction relating to anticompetitive agreements and concerted practices.

Such agreements will now require mandatory antitrust clearance by FAS if:

- the total balance sheet value of the assets of the parties to the agreement and their group companies exceeds RUB 7 billion globally as of the last reporting date;⁶ or
- the total revenue of the parties to the agreement and their group companies from the sale of goods for the calendar year preceding the year that the agreement is concluded exceeds RUB 10 billion globally.⁷

⁴ As FAS clarified in August 2013, joint venture agreements are defined as Russian or foreign law governed agreements between commercial entities, including agreements that contemplate the creation of a new legal entity or the joint participation of the parties in an existing legal entity, as well as other agreements providing for joint activity by the parties and contemplating that the parties to such agreement will combine their resources to achieve the goals of the joint activity and/or will make joint investments for the purposes of achieving the goals of the joint activity and will jointly bear the risks associated with the joint activity, and that information on the joint activity or the creation of the joint venture is public knowledge (http://fas.gov.ru/netcat_files/232/180/h_462d91ed1ff34f8857124ce4f73bbcfb).

⁵ In accordance with Article 11 of the Law on Protection of Competition as amended by the Fourth Antimonopoly Package, competitors are commercial entities that sell or purchase goods in the same product market.

⁶ \$107.5 million at the exchange rate of the Central Bank of Russia as at October 7, 2015.

⁷ \$153.6 million at the exchange rate of the Central Bank of Russia as at October 7, 2015.

If the thresholds for these indicators are not exceeded, the parties will not be required to obtain approval for the respective agreement. The parties may also apply for such approval on a voluntary basis.

Governmental Control Has Been Reduced for Transactions by Natural Monopolies, as Well as Transactions with Shares/Interests in Natural Monopolies

The Fourth Antimonopoly Package:

- envisages governmental control over transactions and investments by natural monopolies only if their revenue from natural monopoly activities exceeds 1% of their total revenues; and
- no longer requires notifications on transactions for the acquisition of shares/interests in natural monopolies.

The List of Criteria Whereby a Transaction Requires Clearance by FAS Russia Has Been Reduced

Pursuant to the Fourth Antimonopoly Package, the register of entities with a more than 35% share of a market in a particular product has been abolished. Thus, the sole criterion requiring that a transaction receive FAS clearance will be that the thresholds for total balance sheet value of assets and total revenue from the sale of goods have been reached.⁸

New Means of Liaising with FAS Russia on Economic Concentration Have Been Introduced

The Fourth Antimonopoly Package provides for additional ways that entities can liaise with FAS for merger control purposes. In particular:

- entities may provide information on an anticipated transaction before applying for clearance with FAS, and may set forth conditions that will ensure competition on the affected market;⁹ and
- merger control application/notification filings with FAS may be made in electronic form as prescribed by FAS.

⁸ Currently, these thresholds amount to RUB 7 billion (\$107.5 million at the exchange rate of the Central Bank of Russia as at October 7, 2015) and RUB 10 billion (\$153.6 million at the exchange rate of the Central Bank of Russia as at October 7, 2015), respectively.

⁹ FAS will take such information into consideration when making its decision on the application for clearance.

Information on the filing of submissions will be published on the official website of FAS so that interested parties can provide their opinion on the impact of the anticipated transaction on the state of competition.

ANTI-COMPETITIVE AGREEMENTS

Cartel Definition Expanded

The Fourth Antimonopoly Package expands the concept of a cartel to include, in addition to agreements between sellers, agreements between purchasers of goods. It also specifies that the prohibition on cartels does not apply to joint venture agreements cleared by FAS.

Agency Agreements Classified as Vertical Agreements

The Fourth Antimonopoly Package repeals the former exemption whereby agency agreements were not treated as vertical agreements. Agency agreements now also fall under the prohibitions and restrictions established for vertical agreements. This contrasts with the approach taken under EU competition law where agency agreements typically fall outside of the scope of the law on the basis that the selling or purchasing function of the agent forms part of the principal's activities.

Scope of Permissible Vertical Agreements Has Been Expanded

The Fourth Antimonopoly Package expands the scope of permissible vertical agreements between entities with a small market share. Such agreements will now be allowed if the market share of each of its participants in the market for the goods that are the subject of the agreement does not exceed 20%. The previous 20% market share threshold that applied to any market on which the participants were active no longer applies.

OTHER CHANGES

The Fourth Antimonopoly Package also introduces the following changes:

- the criteria defining dominance have been limited (an entity with a market share of less than 35% may be qualified as dominant only as prescribed by federal law and not as determined by FAS) and the scope of the prohibition on abuse of dominance has been narrowed;
- the existing regulation of unfair competition has been expanded and clarified; in particular, unfair competition will include the illegal use or disclosure of information constituting a trade secret or other information protected by

law, both as a result of the violation of the terms of an agreement with a party that was entitled to the use of such information, and should such information be received from a party that had access to such information by virtue of his/her employment duties;

- the scope of application of preventative measures, such as warnings and cautions, has been expanded;
- a new leniency option for filing administrative charges against participants of a cartel that are the the second and third cartel participants to contact the antimonopoly authority has been introduced;
- the procedure for examining cases on violation of antimonopoly regulations has been revised;
- decisions of FAS territorial bodies may now be appealed to boards within the central office of FAS;
- boards within the central office of FAS Russia may summarize practice on antitrust cases and issue the respective guidelines;
- the Law on Protection of Competition will no longer apply to relations governed by unified competition regulations on cross-border markets that come under the criteria established in accordance with a treaty to which the Russian Federation is a party;
- the Government of the Russian Federation has been granted the right to establish the rules for non-discriminatory access to goods sold by an entity that is not a natural monopoly but is a dominant entity on the market;
- antitrust compliance in respect of tenders has been updated; and
- an entity may no longer be charged with an administrative offense while fulfilling a compliance order to transfer to the federal treasury revenues received as a result of a breach of antimonopoly law.

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Please do not hesitate to contact us with any questions.