

THE STATE SHOULD NOT BE CONSIDERED AS AN AFFILIATE OF ECONOMIC ENTITIES

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To Our Clients and Friends:

On December 6, 2011, the Presidium of the Higher *Arbitrazh* Court of the Russian Federation issued Ruling No. 11523/11, which has streamlined Russian court practice in respect of the treatment of the state and other public entities as affiliates of other entities. The court reached the conclusion that the Russian Federation cannot constitute an affiliate of other entities. This conclusion is of significance for a number of corporate matters, including the requirement to issue a mandatory tender offer pursuant to Art. 84.2 of the Federal Law On Joint Stock Companies, and the question of interested parties in transactions where such interest arises by virtue of the participation of the state in the charter capital of the company.

In this case, a shareholder of an open joint stock company acquired shares in a company above a threshold, which triggered the requirement for a mandatory tender offer to be made to all other shareholders pursuant to Art. 84.2 of the Federal Law On Joint Stock Companies. However, the shareholder failed to make such an offer, and argued, *inter alia*, that the transfer of shares had been concluded between affiliates (the shareholder itself and the Russian Federation, holding over 75% of the shares of such a shareholder). It followed, by the shareholder's argument, that no duty to make a mandatory tender offer arose.

The lower courts had rejected the shareholder's arguments, and found that the regulations on affiliation and group of persons do not apply to the Russian Federation as a public entity on the following grounds: (a) the Russian Federation as a whole is not ascribed to any economic entities defined by antimonopoly law: regulations on affiliates and groups of persons are not expressed to apply to public entities, and it would not be appropriate to apply the law by analogy in this regard; and (b) affiliation assumes commercial relations between economic entities, which is why the Russian Federation as a public entity and as a whole cannot be an affiliate of economic entities.

However, upon referring the case for consideration to the Presidium, the panel of judges opined that the courts had not taken into account the legal status of public entities in private law relations. This was because in private law relations the public entities come out on equal terms with other participants. According to the law, such parties ought to be subject to regulations that

determine the legal status of legal entities unless otherwise provided for by law or by their nature.

The Presidium dismissed the arguments of the shareholder and the panel of judges, and agreed with the opinion of the lower courts. The Presidium noted, that the lower courts supported the position held by the Russian Federal Service for Financial Markets, by which affiliates are defined as natural persons and legal entities able to exert influence on the activities of any other legal entity and/or natural person involved in commercial relations, and by which the Russian Federation is neither a natural person nor a legal entity. In addition, the Presidium stated that characterizing the Russian Federation as an affiliate would lead to uncertainty in respect of the accountability of each legal entity qualifying as an affiliate of the Russian Federation. The rulings of the Presidium are binding on all arbitration courts of the Russian Federation.

This precedential ruling of the Presidium finally provides clarity as to the characterization of the state and other public entities as affiliates of other entities. Moreover, this ruling may give rise to the reconsideration, on the “revision due to newly exposed facts” procedure, of court decisions in cases with similar facts, which were decided on the basis of a different interpretation of statutory provisions.

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We would be happy to discuss any questions you may have in relation to the above or to any other matters of Russian civil law or antimonopoly regulation.

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