

THIRD ANTIMONOPOLY PACKAGE IN RUSSIA

March 19, 2012

To Our Clients and Friends:

In January, Federal Law No. 401-FZ on Amendments to the Federal Law on Protection of Competition¹ and Certain Legislative Acts of the Russian Federation² and Federal Law No. 404-FZ on Amendments to the Code of Administrative Offenses of the Russian Federation³ (the so-called “Third Antimonopoly Package”) came into effect.

The Third Antimonopoly Package is aimed at liberalizing the antimonopoly regulatory framework and reducing administrative barriers.⁴ To some extent, the Third Antimonopoly Package aligns Russian competition law with the law of other major jurisdictions such as the European Union.

Below we provide a comparative outline of the principal changes related to:⁵

- basic concepts;
- economic concentration;
- monopoly activity; and
- liability for violation of antimonopoly law.

¹ Federal Law No. 135-FZ on Protection of Competition dated July 26, 2006 (the “**Competition Law**”).

² Dated January 6, 2012.

³ Dated January 7, 2012.

⁴ The First Antimonopoly Package (2006) and the Second Antimonopoly Package (2009) were aimed at tightening the antimonopoly regulatory framework.

⁵ Other changes are primarily concerned with the determination of monopolistically high prices, prohibitions on behavior, acts/ omissions, agreements, coordinated actions of governmental authorities, or antimonopoly criteria pertaining to auctions that restrict competition, specific features of agreements with financial institutions and the procedure for entering into agreements involving state and municipal property, and the powers of the antimonopoly body.

MAIN DEFINITIONS

Group of Persons

The Law on Competition defines a group of persons. This definition is widely used in competition and corporate law analysis. It includes the criteria based on which the entities are considered as forming a group.

The Third Antimonopoly Package reduced a number of such criteria by deleting those criteria that were generally inapplicable or which defined a group of persons by virtue of an overlap of groups (see Annex 1, paragraph 8). A list of criteria defining a group of persons, indicating those that have been deleted, is given in Annex 1.

EU competition rules do not generally define what constitutes a group. They apply to “undertakings,” a term that has been interpreted by the EU courts to relate to economic units and not to legal entities. Broadly speaking, several legal entities form a single economic unit, if they do not enjoy real autonomy in determining their course of action in the market, but are controlled by the same parent company. Depending on the facts of each individual case, control may exist even below “the fifty percent plus 1” approach.⁶

Control

The Law on Competition did not previously contain a definition of control. The Third Antimonopoly Package introduced a definition of control only for the purposes of Article 11 (prohibition on agreements between commercial entities restricting competition), Article 11.1 (prohibition on commercial entities acting in concert to restrict competition), and Article 32 (persons filing applications and notices of transactions and other actions subject to governmental oversight, as well as documents and information, with the antimonopoly body).

Under the newly introduced definition of control, for the purposes of these articles control is exercised when an individual or legal entity is able to directly or indirectly (through another legal entity or several legal entities) direct the decisions adopted by another legal entity through one or more of the following actions:

⁶ Certain EU regulations, such as the so-called block exemption regulations and the EU Merger Regulation, provide for reasons of legal certainty for more formalized definitions which are similar to the Russian law definition, subject to certain exceptions.

- disposition of more than 50% of the total number of votes attributable to the voting shares/participatory interests constituting the charter/share capital of the legal entity;
- exercise of the functions of executive body of the legal entity.

We note that for the purpose of the merger control the Law on Competition continues to use the concept of “acquisition of rights to determine the commercial activity” which is aimed to regulate the acquisition of control rights. In this case control may be interpreted very broadly.

Pursuant to Article 3(2) EU Merger Regulation (the “EUMR”), which defines acquisitions of control, control is defined as the possibility of exercising a decisive influence on another undertaking. Such possibility can exist on the basis of rights, contracts or any other means, either separately or in combination, and having regard to the considerations of fact and law involved. An acquisition of control may therefore occur on a legal or a de facto basis and it may take the form of sole or joint control. In particular, control may be conferred by the possibility to veto strategic decisions in another undertaking (so-called negative control).

ECONOMIC CONCENTRATION

The aim of the Third Antimonopoly Package is to reduce the number of transactions requiring the prior approval of the antimonopoly authorities.

Extraterritoriality

The Third Antimonopoly Package reduces the number of transactions performed outside the Russian Federation requiring approval from the Russian antimonopoly authorities.

Prior to the amendments, transactions performed outside the Russian Federation required antimonopoly approval from the Russian Federation if they exceeded the established thresholds and resulted in the acquisition of:

- rights to define the terms under which a commercial entity incorporated in the Russian Federation conducts its business or rights to exercise the functions of executive body of the legal entity;
- shares/participatory interests in a foreign entity conducting operations in the Russian Federation;
- main production or intangible assets located in Russia;

- rights to define the terms under which a foreign entity conducting operations in the Russian Federation conducts its business or rights to perform the functions of its executive body.

The Law on Competition did not include a definition of the term “conducting operations in the Russian Federation” or establish any special thresholds for the acquisition of shares/participatory interests in foreign entities. As a result, technically speaking, approval from the Russian antimonopoly authorities was required for the acquisition of shares/participatory interests (if the thresholds established for the acquisition of shares/participatory interests were exceeded) or rights in respect of foreign entities with a minimal presence in Russia.

Following the entry into force of the amendments, approval of Russian antimonopoly authorities (if thresholds are exceeded) is, as previously, required for transactions performed outside the Russian Federation resulting in the acquisition of rights to determine the terms of commercial activity of an entity incorporated in the Russian Federation or rights to exercise the functions of its executive body, acquisition of main production or intangible assets located in Russia.

Additionally, approval of Russian antimonopoly authorities (if thresholds are exceeded) is also required for transactions in respect of foreign entities resulting in the acquisition of:

- more than 50% of the voting shares/participatory interests in the foreign entity, or
- other rights to define the terms under which such legal entity conducts its business or its executive body performs its functions

provided that this foreign entity supplied goods to the Russian Federation for a value exceeding 1 billion rubles (approximately EUR 25,000,000)⁶ over the year preceding the date of the transaction.

The application of EUMR to foreign-to-foreign transaction also does not depend on whether the target of the transaction has a subsidiary incorporated in the EU. Similar to the amended rules, the application of the EUMR depends on the level of sales of the participating undertakings worldwide and in the EU. However, at least two of the participating undertakings must have sales in the EU. Given that the thresholds apply on a

⁶ Here and elsewhere the exchange rate of 40 rubles to the euro is used.

worldwide basis, the level of the local nexus is still very low when compared to other jurisdictions. Foreign-to-foreign transactions of parties that meet the worldwide turnover threshold but only have insignificant sales in the Russian Federation, may still require clearance.

Threshold values

The Third Antimonopoly Package reduces the number of transactions requiring prior approval of the antimonopoly authorities by raising certain thresholds and changing the way some of them are calculated.

Corporate reorganizations

The Third Antimonopoly Package has raised the threshold for prior approval of mergers and accessions in respect of:

- assets: from 3 billion rubles (approximately EUR 75,000,000) to 7 billion rubles (approx. EUR 175,000,000) on a worldwide basis;
- revenues: from 6 billion rubles (approximately EUR 150,000,000) to 10 billion rubles (approx. EUR 250,000,000) on a worldwide basis.

Acquisitions

The Third Antimonopoly Package has changed the way that assets are calculated for the purposes of applying the threshold values to the acquisitions.

For the calculation of the threshold based on the balance sheet value of assets the following is calculated:

- acquirer and target: the aggregate asset value according to the most recent balance sheets of the buyer, its group of persons, the target company and its group of persons; and
- target: the aggregate asset value according to the most recent balance sheets of the target company and its group of persons.

The Third Antimonopoly Package excludes from the calculation of assets in item (i) (acquirer and target)⁷ the assets of the seller and its group of persons if as a result of the transaction the seller and its group of persons ceases to be entitled to define the terms under which the target company conducts its business.

The amendments coincide with the EU approach. The increased thresholds are a welcome development as they will decrease the number of transactions requiring notification in the Russian Federation even though they are unlikely to result in appreciable competitive effects within its territory.

Financial Institutions

The Third Antimonopoly Package:

- introduces provisions governing the merger of a commercial entity into a financial institution and vice-versa;
- abolishes the requirement to notify the competent authority of any written agreements between financial institutions and between financial institutions and federal executive bodies or executive bodies of constituent entities of the Russian Federation;
- abolishes the requirement for natural monopolies⁸ to conduct tenders to select the financial institutions that will be providing certain financial services to them (such obligation is imposed only on federal executive bodies, executive bodies of constituent entities of the Russian Federation, municipal bodies and state extrabudgetary funds); and
- deletes from the list of financial services for which a tender must be announced by the bodies specified in item (iii) the provision of loans and services on the securities market. A tender need only be conducted for: placement of funds in term accounts and term

⁷ *Absence of similar exclusion from Item (ii) (target) follows from the literal reading of the amendments. It may well be the case that it was planned to be applied to Item (ii) as well. However, it requires confirmation with antimonopoly authorities.*

⁸ *The regulatory framework for the procurement of goods, work and services by natural monopolies was not abolished: the relevant provisions are set forth in Federal Law No. 223-FZ on Procurement of Goods, Work and Services by Certain Types of Legal Entities dated July 18, 2011.*

deposits, opening bank accounts, settlements through such accounts, securities registrar services, management of securities in trust and non-state pension arrangements.

Procedure

The Third Antimonopoly Package introduced changes to the requirements for documents and information to be filed with the antimonopoly authority for approval or notification of transactions.

In particular, the Third Antimonopoly Package has reduced the scope of disclosure of the applicant's and target company's groups of persons, limiting it to entities and persons that control and are controlled by the applicant/target company, entities and persons that form one group of persons with the applicant/target company and conduct operations on the same commodities markets on which the applicant/target company operates and entities and persons under their control. In certain cases a group of persons also excludes individuals.

MONOPOLY ACTIVITY

Dominant Position

The principal innovations of the Third Antimonopoly Package in respect of the regulatory framework concerning dominance in the market are as follows:

- establishment of a number of criteria that, if all met, exempt the price of goods set by an entity with a dominant position from being deemed monopolistically high;
- introduction of a warning system (see Section 4 below);
- reduction of liability for certain types of the violations (see Section 4 below); and
- inclusion of price manipulation on the wholesale and/or retail markets for electricity/capacity, constituting price manipulation on the wholesale market for electricity/capacity as one of the criteria defining abuse of a dominant position,⁹

⁹ *The definition of price manipulation on the wholesale market for electricity/capacity was introduced by the Third Antimonopoly Package by way of the amendment of Art. 3 of Federal Law No. 35-FZ on Electrical Energy dated March 26, 2003.*

Agreements and Acting in Concert

2.1 Cartel

The Third Antimonopoly Package introduces the concept of a cartel and exemptions similar to its equivalent in the EU, pursuant to Article 101 of the Treaty on the Functioning of the European Union (the “TFEU”). A cartel is an agreement between commercial entities that are competitors selling goods in the same market that leads or could lead to:

- setting up or maintenance of prices (or tariffs), discounts, surcharges (or premiums) and/or mark-ups;
- increase, decrease or maintenance of prices at auctions or tenders;
- division of the market by territory, volume of sales or purchase, range of goods sold, or type of vendors or buyers/customers;
- reduction or cessation of production of goods;
- refusal to enter into contracts with certain vendors or buyers/customers.¹⁰

Such agreements are prohibited and cannot be deemed permissible unless they are:

- joint venture agreements that do not empower certain entities to eliminate competition on a respective market for goods and do not impose restrictions on third parties, and if as a result of such agreements the following occurs or may occur:
 - improvement of production and sales of goods, promotion of technical and economic progress or direct investment by the participants in the Russian Federation; or
 - buyers receive advantages/benefits comparable to the advantages/benefits received by the commercial entities as a result of their actions/omissions, agreements and actions in concert or transactions.

This exception is aimed at encouraging investment in the Russian economy. We note that the decision on whether or not these joint venture agreements are

¹⁰ Please note that these agreements were also prohibited prior to the amendments.

permissible is adopted by the Russian antimonopoly authorities when the agreement is pre-cleared by them.

- intragroup agreements (see paragraph 2.4.); or
- agreements on the provision and/or alienation of rights to intellectual property or means of individualization (see paragraph 2.5.).

2.2 Other Agreements

Together with the cartel agreements discussed in paragraph 2.1, prior to the amendments the following agreements were also prohibited and could not be deemed permissible:

- agreements imposing unfavorable contractual terms and conditions on the counterparty or terms and conditions not related to the subject matter of the contract, such as an unjustified requirement to transfer monetary funds or other property, including property rights, or a consent to enter into an agreement subject to the inclusion in such agreement of provisions relating to goods that are of no interest to the counterparty, and other requirements);
- agreements setting different prices (or tariffs) for the same goods for no economically, technologically or otherwise justified reason;
- agreements creating obstacles for other entities to enter or exit the market;
- agreements establishing membership conditions in professional and other associations.

The Third Antimonopoly Package provides that such agreements may be deemed permissible if they do not empower certain entities to eliminate competition on the respective market, do not impose restrictions on third parties, and if as a result of such agreements both of the following occur or may occur:

- improvement of production and sales of goods, promotion of technical and economic progress or increase in the competitiveness of goods of Russian origin on the world market;
- buyers receive advantages/benefits comparable to the advantages/benefits received by the commercial entities as a result of their actions/omissions, agreements and actions in concert, or transactions.

We note that the decision on whether or not these agreements are permissible are adopted by the Russian antimonopoly authorities when the agreement is pre-cleared by them.

From an EU perspective, such agreements would violate Article 101 TFEU, if they involve a restriction of competition by object or effect, unless they can be exempted. However, such practices could violate Article 102 TFEU, if the undertaking imposing such conditions holds a dominant market position.

2.3 Agreements for the Purchase or Sale of Electricity/Capacity

The Third Antimonopoly Package provides that agreements resulting in price manipulation on the wholesale and/or retail markets for electricity/capacity between wholesale and/or retail vendors or buyers of electricity/capacity are prohibited. Such agreements may be deemed permissible if they bring about the consequences set forth in paragraph 2.2.

2.4 Intragroup Agreements

The Third Antimonopoly Package provides that the prohibitions on agreements restricting competition (including cartel agreements) do not apply to agreements between commercial entities that constitute a group of persons if:

- one of the commercial entities controls the other commercial entity; or
- such commercial entities are both controlled by one entity;

unless they are agreements between commercial entities whose operations fall under the definition of operations that may not simultaneously be carried out by one commercial entity in accordance with the laws of the Russian Federation.

Similarly, Article 101 TFEU only applies to agreements between independent undertakings.

2.5 Agreements in Respect of Intellectual Property

The Third Antimonopoly Package provides that the prohibitions on agreements restricting competition (including cartel agreements) do not apply to agreements on the provision and/or alienation of rights to intellectual property or means of individualization.

2.6 Agreements Between the Buyer and the Seller of Goods (Vertical Agreements)

The Third Antimonopoly Package:

- provides that agency agreements are not vertical agreements; and
- deletes the setting of a maximum resale price for goods from the prohibitions applying to vertical agreements that are not permissible.

2.7 Acting in Concert

Actions in concert are defined as actions of commercial entities in the market that have not entered into a formal agreement where:

- the result of such actions is in the interests of each such commercial entity;
- such actions are known in advance to each commercial entity involved in such action by virtue of a public announcement made by one of the participants that such actions are to be carried out;
- the actions of each such commercial entity have been triggered by the actions of other commercial entities participating in the actions in concert and are not consequent upon circumstances influencing all commercial entities in the relevant market in equal measure.

The Third Antimonopoly Package separates the regulatory framework pertaining to actions in concert and that pertaining to agreements and adds a separate section dealing only with actions in concert. Prohibitions are laid down on competitors acting in concert that are the same as the prohibitions relating to agreements (see Sections 2.1-2.3). Acting in concert may be deemed permissible if it gives rise to the consequences set forth in Section 2.2.

The prohibitions established in respect of actions in concert do not apply to:

- commercial entities acting in concert, where their combined share of the market does not exceed 20% and the share of each on the market does not exceed 8%; or
- commercial entities acting in concert that are part of the same group of persons, if one of the commercial entities controls the other commercial entity, or such commercial entities are both controlled by one entity.

Article 101 TFEU also applies to “concerted practices.” This concept refers to forms of coordination between companies which do not reach the level of an agreement but

nevertheless establish a practical cooperation between them. There are no market share-based exemptions that would specifically apply to concerted practices.

LIABILITY

The Third Antimonopoly Package introduced tools allowing a commercial entity to voluntarily remedy or prevent a possible infraction of antimonopoly law in certain cases and limited liability for certain violations of antimonopoly law, as well as expanding the list of circumstances mitigating the burden of liability.

Caution

The Third Antimonopoly Package empowers the antimonopoly authority to serve a notice of caution in writing on any company officer on the impermissibility of undertaking actions that could lead to a breach of antimonopoly law. The objective of the caution is to prevent a breach of antimonopoly law. A caution may be sent if a company officer makes a public announcement on proposed activity in the market if such behavior could lead to a breach of antimonopoly law and there are no grounds to initiate a formal investigation into the breach of antimonopoly law.

In the EU there is no specific provision to that extent, but the Commission has a wide range of measures at its disposal and could, for instance, issue an order asking an undertaking to stop a certain infringement.

Warning to a Commercial Entity with a Dominant Position

The Third Antimonopoly Package empowers the antimonopoly authority, should it identify any cases of:

- the imposition of unfavorable contractual terms and conditions on a counterparty or terms and conditions not related to the subject matter of the contract (economically or technically unjustified and/or not expressly provided for in applicable law); or
- the economically or technically unjustified refusal to enter into or avoid entering into a contract with certain buyers/customers if the relevant goods can be produced or supplied or if such refusal or avoidance is not expressly provided for in applicable law,¹¹

¹¹ *Articles 10.1(3) and 10.1(5) of the Competition Law.*

to serve on the company officer of a commercial entity with a Dominant Position a warning in writing to:

- cease the actions/omissions defined as a violation of antimonopoly law;
- remove the reasons and conditions facilitating the triggering of such violation; and
- take remedial action to eliminate the consequences of such violation.

The antimonopoly authority is not permitted to open an investigation into any of the above violations without first having issued a warning and until the grace period of such warning has expired.

No investigation is opened into the violation of antimonopoly law if the warning is heeded, and the entity in question is not charged with administrative liability for violation of antimonopoly law.

In the EU there is no specific provision to that extent, but the Commission has a wide range of measures at its disposal and could, for instance, issue an order asking an undertaking to stop a certain infringement.

Liability

The Third Antimonopoly Package limits recourse to:

- criminal liability for the prevention, restriction or elimination of competition, and applies criminal liability only to cartels; and
- fines on turnover for abuse of a dominant position to those cases where such abuse leads or could lead to the restriction or elimination of competition, or the performance of actions by a natural monopoly deemed abuse of a dominant position and impermissible pursuant to the laws of the Russian Federation.

While certain EU Member States' laws also provide for criminal law sanctions for competition law infringements, the system at the EU level is an administrative one. Generally, sanctions that can be imposed by the European Commission include fines, periodic penalty payments and injunctions. As regards fines for an abuse of a dominant position, no similar restrictions apply under EU competition law.

The European Commission may impose fines of up to 10% of an undertaking's total turnover in the preceding business year. For setting the amount of a fine, the European Commission will first set a basic amount, calculated as a percentage of the value of the sales connected with the infringement, multiplied by the number of years the infringement has been taking place. The percentage of the value of sales may be as much as 30%, determined according to the gravity of the infringement. For certain infringements (such as hardcore cartels), the European Commission will add a sum between 15 and 25% of the value of sales. The basic amount may then be adjusted upward or downward taking into account mitigating and/or aggravating circumstances.

Circumstances Mitigating Administrative Liability

The Third Antimonopoly Package expands on the circumstances mitigating administrative liability. *Inter alia*, it treats as mitigating circumstances: obtaining of binding instructions to participate in the anticompetitive agreement or concerted actions; not being an organizer of agreements restricting competition or of actions in concert to restrict competition; etc.

The European Commission may decrease the basic amount of a fine, *inter alia*, where the infringement has been committed as a result of negligence or has been authorized/encouraged by a public authority or by legislation, where the involvement in the infringement was substantially limited or where the undertaking effectively cooperates with the European Commission. In addition, fines may be lifted or reduced for undertakings applying for leniency; fines may also be reduced for undertaking agreeing to a settlement.

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EXHIBIT 1

CRITERIA DEFINING A GROUP OF PERSONS IN ACCORDANCE WITH THE THIRD ANTIMONOPOLY PACKAGE

A group of persons is deemed to be an aggregate of individuals and/or legal entities meeting one or several criteria specified below:

- being a business entity (partnership, economic partnership) and an individual or a legal entity, if such individual or such legal entity holds, by virtue of his/her/its participation in this business entity (partnership, economic partnership) or pursuant to the powers vested in them, *inter alia*, by virtue of an agreement in writing by other persons more than fifty percent of the total number of votes attributable to the voting shares/participatory interests constituting the charter/share capital of this business entity (partnership, economic partnership);
- being a business entity (partnership, economic partnership) and an individual or a legal entity, if such individual or such legal entity exercises the functions of a sole executive body of this business entity (partnership, economic partnership);
- being a business entity (partnership, economic partnership) and an individual or a legal entity, if such individual or such legal entity is, by virtue of the constituent documents of, or an agreement concluded with, this business entity (partnership, economic partnership), entitled to give binding instructions to this business entity (partnership, economic partnership);
- being a business entity (partnership, economic partnership) in which the same individuals constitute more than fifty percent of the membership of its collegial executive body and/or board of directors (supervisory board, board of the fund);
- being a business entity (economic partnership) and an individual or a legal entity, if the sole executive body of this business entity (economic partnership) is appointed or elected upon nomination by such individual or such legal entity;
- being a business entity and an individual or a legal entity, if more than fifty percent of the membership of this business entity's collegial executive body or board of directors (supervisory board) is elected upon nomination by such individual or such legal entity;

- being an individual, his/her spouse, parents (including adoptive parents), children (including adopted children), brothers and sisters of the whole blood and half blood;
- being persons who each form a group with one and the same person, as based on any criteria set forth in Clauses 1 through 7, as well as others who are part of the same group with any of such persons, as based on any criteria set forth in Clauses 1 through 7 above;
- being a business entity (partnership, economic partnership), individuals and/or legal entities belonging, as based on any of the criteria set forth in Clauses 1 through 8 above, to a group of persons, if such persons, by virtue of their participation in this business entity (partnership, economic partnership) or pursuant to the powers vested in them by other persons, hold more than fifty percent of the total number of votes attributable to the voting shares/participatory interests constituting the charter/share capital of this business entity (partnership, economic partnership).

The Following Criteria Have Been Deleted

- being business entities (partnerships), in which one and the same individual or one and the same legal entity, by virtue of his/her/its participation in these business entities (partnerships) or pursuant to the powers vested in them by other persons, holds more than fifty percent of the total number of votes attributable to the voting shares/participatory interests constituting the charter/share capital of each of these business entities (partnerships);
- being business entities, in which one and the same individual or one and the same legal entity exercises the functions of their sole executive body;
- being business entities (partnerships), in which one and the same individual or one and the same legal entity is, by virtue of the constituent documents of, or and agreement concluded with, this business entities (partnerships), entitled to give binding instructions to this business entities (partnerships);
- being business entities, with their sole executive body appointed or elected upon nomination by one and the same individual or one and the same legal entity;
- being business entities, in which more than fifty percent of the membership of their collegial executive body and/or board of directors (supervisory board) is elected upon nomination by one and the same individual or one and the same legal entity;

- being business entities, in which the same individuals constitute more than fifty percent of the membership of their collegial executive body and/or board of directors (supervisory board);
- being persons who participate in one and the same financial and industrial group.