



THE FOURTH ANTIMONOPOLY PACKAGE: WHAT SHOULD MARKET PLAYERS EXPECT?

For the attention of companies' CEOs, in-house lawyers and compliance officers.

Pepeliaev Group advises of substantial amendments to the Law "On Protection of Competition" ¹.

The fourth antimonopoly package contains a number of substantial amendments which may affect the operations of all market players. Most of the amendments to Federal Law No. 135-FZ dated 26 July 2006 "On Protection of Competition" (the "Law") and certain legislative acts of the Russian Federation are to come into effect on 5 January 2016. We have analysed the most important of these amendments.


Main changes

Sphere of application of the Law

The Law has been brought into line with the international treaties of the Russian Federation which are the basic documents governing the activity of the Eurasian Economic Union ("EAEU"). In particular, the amended version of the Law does not govern the relations regulated by uniform rules of competition on cross-border markets. The Eurasian Economic Commission is responsible for ensuring compliance with such rules.

Basic definitions used in the Law

The regulation stipulating that an agency agreement is not a vertical agreement has been excluded from the Law.

 In technical legal terms, the reservation included in the current version stipulating that an agency agreement is not a vertical agreement is excessive. An agency agreement falls outside the definition of a vertical agreement by virtue of its legal nature, not by virtue of the Law. The legislature's approach to the antimonopoly regulation of this type of agreement has remained unchanged, i.e. antimonopoly legislation is still applicable to agency agreements.

A definition of a "consumer" has been included in the Law. According to the definition, a consumer is a legal entity or an individual purchasing goods. This definition is applicable only to relationships subject to antimonopoly legislation and is not to be applied to relations governed by other branches of law.

Dominant position

The legislature has excluded from the Law the regulation that allows the Federal Antimonopoly Service ("FAS Russia") and/or its regional bodies to acknowledge that an economic entity occupies a dominant position if such economic entity has a share of less than 35 % on a market for a particular product market. This regulation will not apply to the cases of collective dominance and to the exceptions provided for by federal laws.

¹ Federal Law No. 275-FZ dated 5 October 2015 "On Amending the Federal Law "On Protecting Competition" and Specific Legislative Acts of the Russian Federation".

As of today such exceptions include the service markets for mobile wireless communication and electric power. Also, the amendment will not apply to the procedure of recognizing as dominant the position of financial organizations.

The legislature has excluded from the Law the prohibition on the abuse of a dominant position which results (may result) in a detriment to the interests of certain individuals and legal entities that are not related to entrepreneurial activity.

The legislature has introduced into the Law a regulation stipulating that the Russian Government may establish rules of non-discriminatory access to products on a certain market if FAS Russia decides that an economic entity with a share larger than 70 % on the market of a specific product has abused its dominant position.



This amendment shows that the state has increased its control over companies that are not natural monopolies.

The legislature has introduced into the Law amendments eliminating the Register of business entities that have a share of more than 35% on the market of a specific product.



The positive side of this amendment is that FAS Russia will identify that economic entities have a dominant position in accordance with information that is up to date as of the date when the case is considered, and not in accordance with the information from the Register, which is often out of date. However, companies will have to monitor their share on relevant markets themselves to timely identify that they need to comply with the prohibition on abuse of a dominant position .

Under the current version of the Law, entities in the Register must obtain the FAS's consent to conclude transactions relating to economic concentration. The abolition of the Register implies that such entities will no longer be obliged to obtain the FAS's consent regardless of the amount of their assets.

Anti-competitive agreements

The legislature has introduced into the Law an amendment which defines a cartel as an agreement concluded not only between sellers on one product market, but also between purchasers.



This amendment shows that the state has increased antimonopoly control over "horizontal" agreements.

Now the law allows vertical agreements between economic entities that have shares above 20 % not on any product market, but on the market which is the subject matter of the vertical agreement .



This amendment appears to be logical and justified, as, in order to determine whether a vertical agreement is permissible, it is reasonable to take account of the parties' shares on precisely the markets which are the subject matter of such vertical agreement.

Unfair competition

The legislature has substantially changed the structure of the rules prohibiting unfair competition. However, the contents of the rules prohibiting unfair competition have remained unchanged. It is just that the existing forms of unfair competition have been specified more clearly and in more detail

Warnings and cautions

The amendments empower FAS Russia to forward warnings not only to the economic entities' officers (as in the current version of the Law), but also to public and municipal officials.

The legislature has significantly extended the list of antimonopoly offences with respect to which FAS Russia must issue a notice to stop the acts (omissions) that contain signs of such antimonopoly offence. Thus, in addition to the abuse of a dominant position by imposing unfavourable terms or terms not relating to the subject matter of the contract and refusing or avoiding concluding a contract without justification, the amended list contains abuse of a dominant position by fixing different prices for the same product and creating discriminatory conditions as well as individual types of unfair competition and anticompetitive acts (omissions) of public and municipal authorities.



The extension of the list of antimonopoly offences with respect to which FAS Russia is bound to issue a warning is certainly a positive development. Owing to this amendment, economic entities will be able to avoid antimonopoly liability if they comply with the warning.

State control over economic concentration

The amended version of the Law stipulates that competing economic entities must obtain the consent of FAS Russia to enter into a joint venture agreement in the Russian Federation if the total value of their assets is over the threshold amount² provided for by the Law.

The procedure for obtaining consent to such agreements is the same as for transactions relating to economic concentration. Economic entities retain the right to voluntarily file with FAS Russia an application to obtain the relevant consent if the total value of their assets does not exceed the specified values. If economic entities obtain consent to conclude a joint venture agreement, the prohibition of agreements limiting competition will not apply to such agreement (article 11 of the Law).

Considering cases relating to antimonopoly offences

The amended version of the Law stipulates that if FAS Russia detects elements of an antimonopoly offence in the defendant's actions, it is to issue a *statement of circumstances surrounding the case* before it finishes considering the case



In effect, such document will represent a draft decision with respect to the case. This amendment will allow the parties to the case to provide the commission with comments, evidence, arguments with respect to the circumstances surrounding the case before the consideration of the case is completed and thus, to affect the final decision on the case .

The amended version of the Law determines the structure of a court decision with respect to a case relating to an antimonopoly offence. Such decision consists of an introduction, a description, the grounds for and the operative part of the decision. Such structure is stipulated by the Law, meaning that FAS Russia is bound to comply with it.

The amended version of the Law contains a detailed description of the status of other parties to an antimonopoly case (experts, interpreters, persons aware of the circumstances being considered by the commission).

² The total value of the assets of such economic entities (or groups of entities), according to the latest balance sheets, exceeds RUB 7 billion or the total revenues of such economic entities (or groups of entities) from the sale of goods for the calendar year preceding the year when the agreement was concluded exceeds RUB 10 billion.

The amended version of the Law determines the procedure for producing evidence under an antimonopoly case. In particular, it defines the notion of evidence with respect to the antimonopoly case, provides for the classification of such evidence (written, verbal, material, expert opinions, audio and video records, other documents and materials) and determines the procedure for producing evidence.

The amended version of the Law determines the procedure for the parties to an antimonopoly case to access materials of the case that contain a trade secret. Now, the Parties to the case may review all the materials provided at the discretion of other parties to the case except for applications to be exempted from administrative and/or criminal liability. Such materials may not be treated as a trade secret.



These amendments make the procedure for considering antimonopoly cases more transparent. They are aimed at protecting the rights of parties to the case and are expected to ensure that antimonopoly cases are considered without bias.

Internal appeal

The amended version of the Law provides for collegiate bodies to be established within the central office of FAS Russia. Such collegiate bodies are to fulfil two main functions:

- to consider the materials relating to the analysis of antimonopoly case law and to clarify the issues relating to the application of antimonopoly legislation;
- to revise decisions and/or instructions of regional offices of FAS Russia with respect to antimonopoly cases if such acts are in violation of the uniform procedure for antimonopoly authorities to use when applying antimonopoly legislation.

It is intended that two bodies within the central FAS Russia office will fulfil these functions: the Presidium and the Board of Appeals.

The option to file an appeal with the collegial bodies of the central office of FAS Russia office is an alternative. The option is still available of going to court to file an appeal against the decisions and/or instructions of regional bodies of FAS Russia. It is intended that the decisions of such collegiate bodies may be appealed against in court.

Liability for an antimonopoly offence

If a person has transferred to the federal budget income earned from monopolistic activity or unfair competition in compliance with the relevant instructions of the antimonopoly authority, such person shall not be held administratively liable for an antimonopoly offence in respect of which instructions were issued.



The amended version of the Law eliminates the possibility of "double liability" for the same offence.

The amended version of the Law introduces a provision setting a minimum fine for the persons (except for the organiser) who voluntarily appear before FAS Russia second or third to declare that they have entered into an agreement in violation of antimonopoly legislation (a cartel). The amended version retains the provision stipulating that a person who voluntarily appears before FAS Russia first, shall not be held liable for the antimonopoly offence.

What to think about and what to do

In connection with the above amendments, we recommend that all economic entities do as follows:

- monitor their share on Russian product markets to identify a dominant position;
- monitor their activity on markets as purchasers to ensure that no violation has been committed of the prohibition on concluding a cartel by purchasers;

- analyse all draft joint venture agreements to ensure that the consent of FAS Russia is not required;
- identify the markets on which the Company is operating and which may be considered cross-border markets in accordance with EAEU standards, and monitor their shares on EAEU markets

Help from your adviser

Pepeliaev Group's lawyers possess significant experience in advising clients on antimonopoly matters. Our lawyers will give you expert legal advice with respect to various antimonopoly issues including the following:

- an antimonopoly audit of a company's activity with respect to compliance with "*the fourth antimonopoly package*";
- an antimonopoly audit of the company's activity with respect to compliance with the international antimonopoly standards adopted by the EAEU;
- holding training sessions for a company's employees with a view to excluding/minimising antimonopoly risks.

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