News on the latest developments in antitrust law

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Draft legal acts

Fourth Antimonopoly Packet: Sometimes They Come Back

A new packet of amendments to the Law on the Protection of Competition, prepared by the Federal Antimonopoly Service, would make significant changes to some aspects of antimonopoly regulation.

For more detailed information, see our review of this draft law (in Russian and English) at the following links:

Method of analyzing joint venture agreements published by the Federal Antimonopoly Service (FAS)

On 7 August, clarifications of the procedure and method of analyzing joint venture agreements were posted on the FAS’s official website. The method applies to agreements that could have the effects of a cartel, as indicated in the Law on the Protection of Competition, as well as to other agreements that could restrict competition.

The FAS defines a joint venture agreement as an agreement (including between actual or potential competitors) that may involve the formation of a new legal entity or joint participation in an existing legal entity and envisages:

- pooling the parties' resources for the purposes of joint activity or mutual investments
- sharing the risks involved in joint activity
- publicizing information on joint activity or the formation of a joint venture

The clarifications provide a number of criteria of acceptability for such an agreement, including the parties' undertaking not to compete with each other or with the joint venture.

There is also a procedure for analyzing the acceptability of an agreement as well as a method of assessing how an agreement could potentially restrict competition.

Draft rules for non-discriminatory access to postal infrastructure

The Federal Antimonopoly Service invites discussion of a code of rules for non-discriminatory access to Russian Post infrastructure. A draft government decree approving these rules has been posted on the central portal for the public discussion of draft laws. According to the portal, the rules are to take effect in February 2014.

These rules are designed to create conditions for enhanced competition on Russian postal service markets by ensuring that other postal operators have non-discriminatory access to this unique infrastructure.

Russian Post will be required to provide alternative postal operators with access to its international mail locations and centers for processing and sorting packages and freight - in effect, to its entire logistics chain.

It will also have to publish a list of services and prices and a list of infrastructure to which access will be granted as well as requirements with respect to received postal items, timing and delivery.

The rules prohibit Russian Post from denying access to these facilities without serious economic or

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1 http://fas.gov.ru/clarifications/clarifications_30419.html
technical reasons. If it has to deny an alternative operator, it must offer that operator a list of other facilities that can be accessed. The cost of access to Russian Post infrastructure should cover compensation for "economically justified expenses involved in providing access" as well as the "requisite profit."

The attempt to make the postal market competitive and so improve service quality is undoubtedly a good decision, but it takes the load off of one link in the postal chain while straining another to the limit - sorting hubs - especially since the new rules will allow Russian Post to refuse an alternative operator's request if it believes it has insufficient capacity to handle a batch of letters. In certain cases, Russian Post will be able to suspend access to its infrastructure or terminate an agreement.

On the whole, the adoption of these rules will certainly be a progressive step in developing market relations and will help to de-monopolize the market of public postal services, enhance competition and service quality and reduce prices for the end users of services.

Activities of the Federal Antimonopoly Service (FAS)

Russian Post restricted competition in tenders

The FAS found that Russian Post tenders had violated antimonopoly requirements.  

The FAS found that Russian Post unjustifiably restricted competition between suppliers in public electronic auctions for the right to supply bags, printed blanks, envelopes and packing materials for its branches.

In 2011 Russian Post conducted two pre-selection processes - for a supplier of printed blanks (worth a maximum RUB 340 million) and a supplier of packing materials and stamping tools (worth a maximum RUB 853 million). According to the FAS, the requirements that Russian Post made of suppliers limited the range of companies that could take part in the tenders. Only suppliers able to supply products throughout Russia were allowed to participate. Based on the results of the selection process, Russian Post signed general agreements with three future tenderers.

The FAS stated that these terms violate antimonopoly law by eliminating suppliers that deliver within specific territories (individual regions of Russia, federal districts) and instructed that the results of the first stage be disregarded at the second stage and that no limits be placed on the number of participants.

Is there administrative liability for not having a regulation on procurement?

Under Federal Law No. 223-FZ, a purchaser subject to this law must formulate and be guided by a regulation on procurement containing procurement requirements, including a procedure for preparing and conducting procurement processes and the conditions for their implementation as well as a procedure for concluding and performing agreements.

A purchaser that does not approve a regulation on procurement must be guided in making purchases by Federal Law No. 94-FZ "On State Procurement."

The Administrative Offenses Code does not stipulate liability for offenses involved in making purchases under Federal Law No. 223-FZ, but Article 7.29 of the Code does establish liability for failing to comply with the requirements of Federal Law No. 94-FZ. Regional administrations of the FAS (e.g. the administrations for Belgorod and Ivanovo regions) have recently begun initiating administrative cases under this article of the Code for failure to comply with Federal Law No. 223-FZ.

FAS officials take a favorable view of this practice, noting that purchasers that ignore the provisions of Federal Law No. 223-FZ "will face administrative cases and fines under the Code's article on noncompliance with the law on state contracts."  

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Different prices may be charged for the same goods

On 21 June, the Federal Antimonopoly Service (FAS) issued a decision in the case of rail manufacturers Evrazholding, Evraz ZSMK and Evraz NTMK, concluding that different rail prices may be charged to different purchasers.¹

These companies sold rails to Russian Railways OJSC, Russia's main rail customer, at a price more than 10% below prices charged to other purchasers.

The FAS found the difference in prices to be warranted in this case for the following reasons:
- Russian Railways accounts for 75% of rail purchases
- Russian Railways has longstanding contractual relations with the rail manufacturers
- Other buyers account for an insignificant volume of rail purchases
- Russian Railways and the other buyers operate on different markets

This decision is of interest in terms of its economic justification of an entity with a dominant position that charges different prices to different buyers for the same goods – especially the argument that the buyers operate on different markets.

The Federal Antimonopoly Service (FAS) continues to expose fish cartels

The FAS found the Federal Service for Veterinary and Phytosanitary Control and the nonprofit Association of Manufacturing and Trading Companies on the Fish Market to be in violation of Article 16 of the Law on the Protection of Competition because of an anti-competitive agreement between them that led or could have led to sharing of the Russian market of certain kinds of salmon. As a result, the Federal Service for Veterinary and Phytosanitary Control restricted or prohibited supplies of Norwegian fish from plants that failed to meet the Association's conditions.

In addition, a number of economic entities (companies in the Russian Sea Group, companies in the Northern Company Group, Profibusiness LLC, Northern Company Kalingrad, Atlant Pacific CJSC) were found to have entered into a cartel agreement. The cartel operated by means of exclusive "strategic partnership agreements" with various Norwegian suppliers that were not allowed by the agreements to sell to other importers.

The Association of Manufacturing and Trading Companies on the Fish Market was found to have violated antimonopoly law by coordinating the economic activity of business entities.

This is of course not the first fish cartel to be exposed by the FAS. In December 2012 the FAS found the pollock fishers' association guilty of forming a cartel on the pollock market. In August 2013, the FAS determined that a number of entities had entered into a cartel agreement involving price manipulation in a tender for snow crab fishing quotas in November 2010. In the same month, the FAS announced that it was investigating the Primorsky Regional Administration of the Federal Fishery Agency, which is suspected of having entered into an agreement to ensure that certain suppliers win auctions to buy shares of crab fishing quotes in the Russian Far East. In December 2012 a case was also initiated against suppliers of swai from Vietnam for concluding a cartel agreement.

Retail chain found to have violated the Law on Trade

On 9 July the Leningrad Regional Administration of the FAS found that Intertorg Trading House (Narodnaya SemYA brand) had violated the Law on Trade by obstructing access to the market.²

The FAS administration believes that the chain used unclear and ambiguous criteria in selecting suppliers. It analyzed Intertorg's Regulation on the Procedure for Considering Commercial Proposals from Counterparties and found that it lacked selection criteria that were measurable and clear to suppliers. The administration thus concluded that potential suppliers lacked full information on such criteria, thus preventing them from taking

measures to meet the requirements. This gave an advantage to suppliers that already had experience in working with the chain and hindered access by new suppliers to the retail network of Leningrad Region.

Note that the Law on Trade requires retail chains to give potential suppliers access to information on the conditions for concluding an agreement to supply food products as well as on the essential terms of such an agreement.

The position of the FAS administration is in line with current judicial practice. On 2 August 2012, for example, the Supreme Arbitration Court declined to refer a case to the Presidium on the violation of Article 13 of the Law on Trade by Lev LLC, owner of the Kirovsky retail chain in Sverdlovsk Region.

The courts found that the information on the chain's website was too general for the formulation of proposals on terms of supply. In the opinion of the courts, such generalized conditions misled suppliers regarding the chain's real needs and created a situation in which any proposal by a supplier could be regarded as not meeting those conditions.

Court practice

The Federal Antimonopoly Service's position in a dispute with Auchan over delay tactics in talks with suppliers is upheld in arbitration court

On 15 July the Rostov Regional Arbitration Court upheld a decision and instruction of the FAS Administration for Rostov Region that had found the hypermarket Auchan to be in violation of the Law on Trade due to its delay in concluding an agreement for supplies of canned fruits and vegetables.

In August 2011 Donskoy Canning Plant sent Auchan an offer to conclude a supply contract. The plant's offer was turned down only in July 2012, and no information was provided on the selection procedure or documents required in order to conclude a contract. The FAS found that this obstructed suppliers' access to the market.

The court stated that Auchan's yearlong delay in talks with the supplier and the procedure's lack of openness and transparency indicate that the trade network created market entry conditions that discriminated against Donskoy Canning Plant.

An appeal lodged by Auchan has been accepted for consideration by the Fifteenth Arbitration Appeals Court.7

Russian Railways, accused of coordinating activity on the cable and wire market, exhausts its legal options

On 11 July the Supreme Arbitration Court denied Russian Railways a supervisory review of lower courts' arbitration decisions.

As we wrote in the winter issue of our newsletter, Russian Railways sent telegrams to contractors working on rail electrification, forbidding them to buy contact wires produced by Transkatkabel CJSC. Instead, contractors were to acquire products from Transkat CJSC, which belongs to the same group as Russian Railways and is a direct competitor of Transkatkabel.8

Russian Railways justified this demand by claiming that Transkatkabel's products do not meet its quality requirements. This argument was rejected by the courts, inasmuch as Transkatkabel's products had all the necessary certificates, and buyers could refuse any products with defects or demand replacements. The Supreme Arbitration Court found no grounds for reviewing the lower courts' decisions.

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