

Russian legal alert

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Alert on changes in Russian antimonopoly legislation

Federal Act No. 164-FZ dated 17 July 2009 "On Amending Federal Act "On Protection of Competition" and Other Legislative Acts of the Russian Federation" entered into force on 23 August 2009. A number of material amendments are introduced into the Federal Act "On Protection of Competition" ("Competition Act"), as well as other laws relating to competition and antitrust matters.

The amendments are mostly aimed at adjusting a number of provisions and eliminating certain gaps in the Competition Act, as well as at expanding the scope of its applicability and authority of the Federal Antimonopoly Service ("FAS").

SCOPE OF THE COMPETITION ACT

The amendments broaden the scope of the application of the Competition Act to foreign-to-foreign transactions as compared to the previous version. The new rule is that any transaction in respect of a non-Russian target that has activity in the Russian Federation or may affect competition on the Russian market (types of activity or specific forms of influence are not specified) is subject to the Competition Act, in particular, to its merger control rules.

DOMINANT POSITION

The amendments introduce specific criteria for qualifying companies with a market share of less than 35% as having dominant position on a certain product market (which implies a number of limitations applicable to such companies). Previously the Act required having at least 35% for such purposes.

VERTICAL AGREEMENTS

According to the amendments, restrictions applicable to agreements and co-ordinated actions that may affect competition do not apply to vertical agreements save for vertical agreements that establish a price of re-sale of goods to customers or require customers to refrain from purchasing competitive goods. As a general rule, vertical agreements are allowed if entered into between companies which individually have a market share of 20% or less or if the agreement is a franchising agreement.

RESULTS OF INNOVATIVE ACTIVITY

The Competition Act prohibits certain actions that are considered as monopolistic activity or unfair competition. However, the amendments have allowed such actions as establishing or maintaining prices of goods provided that such goods were produced as a result of “innovative activities” (defined as manufacturing a new product or implementing a new technology).

PROHIBITION OF ACTS OF STATE BODIES LEADING TO RESTRICTION OF COMPETITION

The Competition Act contains an express prohibition for state bodies to establish unreasonable obstacles to the business activity of companies. The amendments specify that such obstacles may not be in the form of establishing requirements to goods and services which are not expressly provided for by Russian legislation. The amendments also prohibit granting preferential access to information, as well as granting state or municipal preferences in violation of the procedure established by the Competition Act.

COMPETENCE OF THE FEDERAL ANTIMONOPOLY SERVICE

The scope of authority of FAS has been extended. FAS is now entitled to control transactions involving the use of land, subsoil resources, water and other natural resources. FAS is also entitled to require a company to sell a certain part of its products at a commodity exchange and obtain prior FAS consent to the method of establishing starting prices for products to be sold at a commodity exchange.

In order to control compliance with the antimonopoly legislation FAS has the authority to carry out scheduled and unscheduled audits. Every three years FAS may carry out a scheduled audit provided that the “target” is informed of such audit three days in advance. FAS may also carry out an unscheduled audit with a 24 hours prior notice (except for cases where a concerted action or an agreement restricting competition is suspected). During such audits FAS may examine premises, request any information, make photographs and copy documents.

MERGER CONTROL

The amendments introduced higher thresholds for merger control. Although the increase of thresholds is aimed at facilitating econo-

mic concentration, the material drop of the exchange rate of RUB over the last 9 months has made the difference not very significant for foreign investors.

A transaction is subject to FAS prior approval if:

- (a) (i) the aggregate book value of assets of an acquirer, a target and their groups exceeds RUB 7 billion (appr. EUR 155 million), or (ii) the worldwide turnover of the acquirer, the target and their groups for the last year exceeds RUB 10 billion (appr. EUR 223 million), and, if criterion (i) or (ii) above is met, the aggregate book value of assets of the target and its group exceeds RUB 250 million (appr. EUR 5.5 million), or
- (b) either the acquirer, or the target, or one of the members of their groups is included in the Register of companies having a share exceeding 35% of a certain product market.

The thresholds were also changed in respect of certain transactions requiring subsequent notification of FAS.

According to the amendments only the purchaser may apply for FAS prior approval. The amendments also extend the list of documents which must be filed together with the application. If certain documents or information listed by the Competition Act are missing at the stage of filing, the application will not be accepted. Previously it was possible, as a matter of practice, to provide FAS with the missing information after the filing of the application and thus save time.

A purchaser is now obliged to provide information about its beneficiaries for whom nominees hold more than 5% of the purchaser's shares including, inter alia, where such beneficiaries are registered in offshore jurisdictions.

STATUTE OF LIMITATION

The amendments establish a three-year statute of limitation in respect of breaches of the antimonopoly legislation, as compared to a one-year term applicable previously.

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