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Major Russian legislation changes for 2013

Competition

The Fourth Antimonopoly Package – intention and reality at the third reading

The latest amendments to Federal Law No. 135-FZ on the Protection of Competition, dubbed the Fourth Antimonopoly Package, were debated throughout 2013. The Fourth Package was expected to make major changes, among them the introduction of an obligation for dominant entities to establish and publish commercial policies in order to prevent discrimination, the extension of antimonopoly prohibitions to acts and transactions with intellectual property, substantial changes to the regulation of agreements between companies, and tighter controls over intragroup transactions. The amendments were also expected to strengthen efforts to prevent regional monopolies and to bring uniformity of practice across territorial authorities by empowering the central Federal Antimonopoly Service ("FAS Russia") authority to issue binding guidance to its territorial bodies and to review their decisions in the Presidium.

Most of the intended amendments met with active resistance and criticism from experts and the business community. As a result, the draft Federal Law on Amendments to the Federal Law on the Protection of Competition adopted in the third reading is limited to abolishing notifications for a number of M&A transactions for medium and large commercial organizations. The new rules are a significant reduction in the burden on medium enterprises and will allow the antimonopoly authorities to concentrate on major transactions genuinely capable of affecting competition.

The Russian Government decided not to introduce controversial provisions on which no consensus had been reached with the business community in the State Duma. However, it is obvious that the issues raised have not been resolved and that discussions will continue this year.

FCS Law

Federal Law No. 44-FZ on the Contract System for Procurement of Goods, Works, and Services for State and Municipal Requirements of April 5, 2013 ("**FCS Law**") entered into force on January 1, 2014.

The FCS Law represents a significant expansion of the available forms for tendering, and introduces new rules and requirements for both the state contract procedure and participants in the state procurement process.

Contractors participating in major state contracts will be required to disclose their beneficiaries and co-providers, to confirm their right to conclude the contract, that they or their directors have not been entered in the register of bad faith suppliers, and that their management teams do not include people previously prosecuted for economic crimes. Security provisions in the new FCS Law now include antidumping measures for bids with contract prices 25% or more below the starting (maximum) contract price, which are intended to be a tool to discourage bad-faith suppliers. These provisions set the size of the bid deposit and security for performance of the contract, including rules on the provision of bank guarantees intended to provide an additional layer of credibility to suppliers.

However, it should be noted that secondary legislation to provide procedural rules will be necessary for the implementation of many provisions of the FCS Law. Once the law is fully operational it will enable greater control over state purchases, avoidance of bad-faith suppliers and fly-by-night companies, and a more scrupulous approach to the quality of goods.

Amendments to the Administrative Penal Code ("APeC")

New rules have been introduced allowing turnover fines to be calculated on the basis of the cost of acquiring a good, as well as on the basis of revenue from the sale of goods on the corresponding market. This rule closes a loophole that had allowed goods purchasers to avoid turnover fines by not having revenue on the respective goods market.

Administrative liability has been introduced for failure to submit or promptly submit the information necessary to calculate an administrative fine to FAS Russia upon request, as well as for the submission of false information (up to 15,000 rubles for corporate officers and 500,000 roubles for legal entities). This rule is intended as a tool against offenders, which frequently attempt to avoid submitting the required information or submit false information.

At the same time, the minimum administrative fine for failing to submit or promptly submit information to FAS Russia, or for submitting false information, has been reduced. The minimum administrative fine imposed on legal entities for this offense has been reduced from 300,000 rubles to 50,000 rubles. This rule was introduced in response to RF Constitutional Court Ruling No. 1-P of January 17, 2013, which held that the respective APeC article was unconstitutional. The Constitutional Court ruled that the minimum administrative fine was not in all cases fully commensurate to the nature of the administrative offense, the material and financial status of the legal entity, and other material factors.

December 2013 also saw amendments to the APeC extending the period for administrative prosecution of foreign investors that break Russian Federation laws on foreign investment enter into force. The applicable period is now one year. The previously applicable two-month period did not always enable the antimonopoly authority to make full use of fines against offenders under Russian foreign investment legislation.

Amendments to antimonopoly legislation

There were significant amendments in 2013 to the Federal Law on Advertising and associated regulatory acts. In particular, on July 23, 2013, Law No. 200-FZ on Amendments to the Federal Law on Advertising and Article 14.3 of the APeC took effect banning the advertisement of medicinal properties of any consumer goods. The practical result of this is likely to be a wave of disputes this year concerning advertising claims such as "eliminates dandruff", "honey is good for colds", and so on. If FAS Russia and commercial courts take a conservative and restrictive approach to the new rules, many companies will be forced to revise their advertising strategies. For the first time, liability for these offenses has been extended to the media, as well as the advertiser, which has already led to media companies tightening requirements for advertising materials. The language of Law No. 200-FZ allows officials to interpret the rules as they choose. For example, if a supplement advertisement does not expressly state, but "creates an impression that it is an effective treatment or has medicinal properties", the publication may be liable for a fine of up to 500,000 rubles, a substantial amount, especially for regional newspapers, magazines, and radio stations. FAS Russia will be responsible for enforcement of this rule.

On November 15, 2013, Federal Law No. 274-FZ on Amendments to the APeC and Federal Law on Advertising in connection with the adoption of the Federal Law on Protection of the Health of Citizens from the Effects of Environmental Tobacco Smoke and the Consequences

of Tobacco Consumption entered force banning the advertisement of tobacco and tobacco products, as well as setting the fine for violation of the ban at up to 600,000 rubles for legal entities.

Almost simultaneously, on November 25, 2013, Federal Law No 317-FZ on Amendments to Certain Legislative Acts of the Russian Federation and the Rescinding of Certain Provisions of Legislative Acts of the Russian Federation Concerning the Protection of Citizens' Health in the Russian Federation entered into force. As of January 1, 2014, this law bans the advertising of abortion services, and introduces new requirements for the advertisement of traditional medicine and preventative, diagnostic, and medical rehabilitation methods.

Through these changes, legislators have attempted to bring a unifying principle into advertising rules and establish a clear conceptual framework to be observed by both advertisers and advertising distributors.

National competition law developments in the Customs Union

The Agreement on Uniform Principles and Rules of Competition adopted in December 2010 and effective in the Single Economic Space of Russia, Belarus and Kazakhstan has formed a supranational regulatory base on which some powers of the national antimonopoly authorities are to pass to the supranational authority – the Eurasian Economic Commission (EEC). Powers to monitor compliance with uniform competition rules relating to the prohibitions on unfair competition and anticompetitive agreements passed to the EEC at the end of 2013. At the beginning of 2014, powers to monitor compliance with the prohibition on abuse of dominance also passed to the commission. Notably, this is applicable to monitoring monopolistic activities and unfair competition on cross-border markets, i.e., on the territory of two or more states (Russia, Belarus and Kazakhstan).

As a supranational authority, the EEC is expected to assume the powers to review major competition violations affecting the interests of several jurisdictions. However, the package of documents governing the activities of the new competition authority has not been finalized as yet, and there is still no clear demarcation of powers between the national authorities of member states and the supranational bodies of the Customs Union. However, the EEC is expected to begin fully exercising its powers under the Agreement on Uniform Principles and Rules of Competition in the near future.

FAS Russia guidance on joint venture agreements

There has been urgent need for official guidance from the antimonopoly authority as to the provisions permissible for inclusion in a joint venture agreement for some time. In summer 2013, FAS Russia published clarifications of the procedure and methodology for analysis of joint venture agreements.[1] The clarifications provide a method for appraisal of the content of agreements for compliance with antimonopoly law. Provisions in a joint venture agreement requiring the parties not to compete may be permissible subject to certain conditions, including if the aggregate market share of the parties is insignificant. At the same time, it is not permissible, as a rule, to include non-compete conditions that are not limited in time or market distribution, are not related to the market for which the joint venture agreement was concluded, or are inconsistent with the objectives and nature of the joint venture.

Although the application of this guidance will require lawyers drafting joint venture agreements to have thorough knowledge of the state of competition on the respective market, the guidance is a useful tool and provides a general understanding of FAS Russia's approach to what is permissible in a joint venture agreement.

FAS commentaries on legislation concerning investment in strategic companies[2]

There were no amendments to the legislation on investment in strategic enterprises in 2013. Nevertheless, comments by FAS Russia on the existing provisions governing relations in this area are worthy of consideration.[3] For instance, FAS Russia expressly stated that the establishment of a Russian entity by a foreign investor, and the subsequent obtaining by such entity of a license to perform an activity of strategic significance for national

1. www.fas.gov.ru/clarifications/clarifications_30419.html (published 07.08.2013).
2. In particular, comments on Federal Law No. 57-FZ on the Procedure for Foreign Investment in Businesses of Strategic Significance for National Defense or State Security of April 29, 2008 ("Law No. 57-FZ"), and Federal Law No. 160-FZ on Foreign Investment in the Russian Federation of July 9, 1999 ("**Law No. 160-FZ**").
3. Law No. 160-FZ on Foreign Investment in the Russian Federation of July 9, 1999 ("**Law No. 160-FZ**").

defense or state security, does not fall within the scope of Law No. 57-FZ. At the same time, the establishment of any company (including a strategic business) under the control of a foreign state or international organization holding over 25% of such company requires the filing of an application for prior consent in accordance with the requirements of Law No. 160-FZ and in accordance with Law No. 57-FZ.

Notably, FAS Russia has clarified that if it is determined that a company does not have strategic significance, the petition filed in accordance with Law No. 160-FZ is returned to the applicant (although it is still necessary to file the application).

It should also be noted that although a number of international financial organizations are exempted from the requirements to obtain prior consent for transactions in accordance with Law No. 57-FZ, FAS Russia has clarified that the subsequent notification of transactions obligation still applies to such organizations.

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