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Introduction

In 2016 the Federal Antimonopoly Service (FAS) actively continued investigations and proceedings against both Russian and multinational companies such as Apple, Google and members of the ‘shipping cartel’. One focus area was the pharmaceutical industry, with the Code of Good Practice in the Pharmaceutical Industry adopted in 2016 that provides guidance particularly on distribution relationships and adoption of commercial policies.

Legislative changes in 2016 comprise the so-called Fourth Antimonopoly Package, inter alia introducing a merger control filing requirement for joint ventures between competitors and the determination of competitors to include purchasing markets. Upcoming legislative changes or proposals for 2017 concern amendments to administrative fines for antitrust violations, with the fines being differentiated for various types of anti-competitive agreements, fines possibly being increased for making obstacles to FAS inspections and potentially corporate antitrust compliance measures being taken into account upon determination of a fine.

Activities in the competition sphere at the level of the Eurasian Economic Union included the investigation of Caterpillar, highlighting potential risks in case of unequal or restricted conditions for distribution arrangements in the member states of the Eurasian Economic Union.
High-profile cases in 2016

In 2016 the FAS paid particular attention to leading companies active in the information technology and pharmaceutical markets. Proceedings were initiated not only against Russian legal entities, but also against foreign group entities of multinational enterprises.

Google. Abuse of market dominance

In 2016-2017 Google sought to challenge a 2015 FAS decision by which the FAS had held Google Inc. and Google Ireland Limited liable for the abuse of dominance. Google had allegedly tied the installation of Google Play to the simultaneous installation of other Google apps for Android OS mobile devices. In 2015 the court of first instance had upheld the FAS findings that the Google companies had abused their dominant position on the market for pre-loaded apps for Android OS mobile devices to the detriment of producers of competing apps. Google then sought to have the first instance decision overturned at two higher instances, but both appeals were dismissed. The FAS also issued a fine of RUB 438 million (approx. USD 6.7 million) for Google. More critical for Google, however, was the FAS’s mandatory order to have all contracts with vendors of mobile devices amended to remove restraints connected with access to the Google Play Store and to allow unimpeded pre-loading of competing apps. With Google being hesitant to fulfil that request, the FAS issued further fines in 2016. Google ultimately settled with the FAS in April 2017, in substance apparently accepting the FAS’s requirements.

Apple. Coordination of prices

In 2016 the FAS launched an investigation against Apple. The FAS suspected Apple of price coordination in relation to iPhones sold by its Russian resellers, which would violate Article 11 (5) of the Russian Competition Law. The FAS’s investigation of Apple showed that most retailers had set and maintained basically identical prices for iPhone 6s and iPhone 6s Plus since the launch of their official sales in Russia in October 2015. On 14 March 2017 the FAS announced its findings: a Russian subsidiary of Apple was found to have monitored both retail and online prices for the iPhones among the resellers and instructed the diverging resellers to adjust the prices.

Container shipping cartel

In 2016 the court of first instance upheld a FAS decision by which the FAS had held transnational container-shipping companies liable for concerted actions. The FAS found that A.P. Moller-Maersk A/S (Denmark), CMA CGM SA (France), Hyundai Merchant Marine Co. Ltd (Korea), Orient Overseas Container Line Limited (Hong Kong) and Evergreen Marine Corp

(Taiwan) had exercised concerted actions that had resulted in fixing mark-ups to freight rates (General Rate Increase, GRI) at the market of marine container shipping through the Far East / Southeast Asia – the Russian Federation routes in 2012-2013.

In February 2017 the shipping companies reached a settlement\(^5\) with the FAS which was approved by the appellate instance court. The settlement agreement included commitments by carriers aimed at ensuring compliance of their mark-up setting practice with the requirements of the law and at providing fair conditions to the customers. Following the closing of this investigation the FAS announced that it was planning to elaborate on the guidelines for the marine container shipping market.

Codes of Good Practice as 'soft' antitrust regulation

The pharmaceutical industry has been remaining a top FAS priority. In 2016 the Code of Good Practice in the Pharmaceutical Industry was introduced. The code provides guidance on how to build a permissible selective distribution system for a pharmaceutical company. In particular, the code provides the opportunity to stipulate the procedure and criteria for selecting distributors in a commercial policy that is recommended to be agreed with the FAS and that the manufacturer must publish on its official website. The code further stipulates that the manufacturer is allowed to limit at its own choice (and lay down in its commercial policy) the number of distributors with whom it plans to work according to its own business model, provided that this number is economically or technologically justified.

In previous years the Code of Good Practice between Retail Chains and Suppliers of Consumer Goods and the Code of Conduct between Vehicle Manufacturers and Auto-Distributors were adopted. The Codes of Good Practice are issued by industry organisations (in particular, the Association of European Business in Russia) after alignment with the FAS, and formally voluntarily accepted by industry players. They serve as guidance for the respective industry, but their substance can also be relevant for similar situations in other industry sectors in the absence of other, more specific guidance.
Legislative developments in 2016

Fourth Antimonopoly Package

In January 2016 the Fourth Antimonopoly Package\(^6\) came into effect, introducing amendments to the Russian Competition Law (Federal Law No. 135-FZ “On Protection of Competition”).

The Fourth Antimonopoly Package introduced a merger control clearance requirement for joint venture agreements between competitors. Arguably this applies also to amendments to existing joint venture agreements. As a logical consequence of this new filing requirement, the law clarifies that the restrictions on horizontal and vertical agreements do not apply to joint venture agreements approved by the FAS.

With respect to horizontal agreements, only companies competing on the sales markets were previously expressly regarded as competitors. Now also companies that are active on the same purchasing market can be regarded as competitors.

The Fourth Antimonopoly Package expanded the use of "warning" (предупреждение). The FAS must issue a warning in certain cases of dominance abuse (unjustified setting of different prices for the same goods, discriminatory conduct, imposition of unfavorable conditions and refusal to contract), unfair competition and other cases. The effect of this measure is that if the respective company complies with the warning, no case on the alleged antitrust violation will be initiated by the FAS.

Companies with less than 35% of the market are no longer recognized as holding a dominant position. The FAS ceased keeping the register of entities with a market share above 35%. Instead, the FAS is now required to conduct a market analysis in every case of a potential abuse of dominant position, and, consequently, individual or collective dominance is established on a case-by-case basis only.

With respect to the exemption from restrictions on vertical agreements for parties with up to 20% market share, the Competition Law now specifies expressly that the 20% market share is to be calculated for the market that is the subject matter of the agreement. A previous exemption for agency agreements, excluding them from the general restrictions on vertical agreements, was repealed.

Improvements in favour of small businesses

In July 2016 statutory amendments\(^7\) were implemented that provided for the exemption of small businesses from certain antitrust restrictions.

In particular, the criterion for merger clearances concerning target balance sheet value was increased from RUB 250 million to RUB 400 million. Businesses with up to RUB 400 million group turnover were also exempt from general restrictions on agreements restricting competition, while specific restrictions on horizontal agreements (cartels) and vertical agreements remain applicable. Such businesses cannot be regarded as holding dominant positions on the market (with some exceptions).

\(^7\) [https://rg.ru/2016/07/06/konkurencia-dok.html](https://rg.ru/2016/07/06/konkurencia-dok.html)
/ Upcoming legislative developments in 2017

Differentiated liability

A new law\(^8\) coming into effect on 28 April 2017 is amending Article 14.32 of the Russian Code of Administrative Offences. Administrative fines will be differentiated for various types of antitrust offences, whereby the less dangerous offences will entail lower liability.

The amended penalties scale sets forth administrative fines as follows:

- for cartels in the amount from 3% to 15% of the annual turnover of the liable company on the relevant market (previously 1% to 15% of the annual turnover),
- for concluding an anticompetitive vertical and other agreement in the amount from 1% to 5% of the annual turnover of the liable company on the relevant market (previously 1% to 15% of the annual turnover),
- for illegal coordination of economic activities in an amount ranging between RUB 1 million and RUB 5 million irrespective of the company's turnover (previously 1% to 15% of the annual turnover),
- for concerted actions between competitors in the amount from 1% to 3% of the annual turnover of the liable company on the relevant market (previously 1% to 15% of the annual turnover).

Antitrust compliance program

In connection with an initiative on the introduction of a new concept for Russia – a "corporate antitrust compliance program" – into both the Russian Competition Law and the Russian Code of Administrative Offences in 2015, the FAS developed a draft law aimed at encouraging companies to implement special antitrust compliance measures. According to the draft law, companies with an effective antitrust compliance system in place, if held liable for antitrust violations, will be granted a benefit of possible mitigation of liability. Furthermore, the draft law foresees an obligatory implementation of an antitrust compliance program by a wide range of business entities including state corporations, natural monopoly subjects, business entities with the majority stake held by the state as well as companies active in regulated industries. As of April 2017 the draft law\(^9\) is still open for public consultation and has not been submitted to the State Duma yet. However, it may well be that the draft amendments move further through various stages of the legislative process in 2017.

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Lenovo. Increase of fines for impeding FAS investigations

Another FAS initiative is to introduce turnover-related fines for companies creating obstacles to inspections of FAS, including "dawn raids" carried out in order to obtain evidence of suspected violations.

The FAS illustrates the need for this amendment by stating a recent Lenovo case as an example. FAS had sent to Lenovo a number of official requests for provision of information in connection with suspected conspiracy in a tender. However, Lenovo neither complied with these requests in a timely manner nor presented complete information. In addition, the company subsequently impeded conduction of a "dawn raid" by the FAS at the company’s premises. Currently, impeding access to the company’s premises or otherwise impeding inspections carried out by the FAS is punishable by a fine of only RUB 10,000 (less than USD/EUR 200), or of up to RUB 50,000 (less than USD/EUR 1,000) if conduction of an inspection was precluded completely.

The FAS now suggests the fine to be increased to an amount from 0.5% to 1% of the total annual turnover of the company from sales of all goods.

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10 http://regulation.gov.ru/projects#npa=63034
Eurasian Economic Union

2016 was marked by an evolving cooperation of the FAS with the Eurasian Economic Commission (the EEC) and the competition authorities of the member states of the Eurasian Economic Union (the EEU), with the EEC acting as a supranational antitrust authority of the EEU. The EEU member states are Russia, Belarus, Kazakhstan, Armenia and Kyrgyzstan.

Caterpillar. Distribution in the EEU

In 2016 the EEC investigated prices of equipment for the mining industry throughout the territory of the EEU. The EEC established\(^\text{11}\) that Caterpillar had a wide dealership network in Russia, Kazakhstan and Belarus. Within that network, the dealers were appointed as exclusive dealers within their assigned territories. The investigation showed that end customers in some areas of the EEU did not have equal access to the equipment and spare parts because of restrictions in Caterpillar’s distribution system, such as prohibition of passive sales of equipment and spare parts outside each dealer’s exclusive territory, penalties for each delivery in violation of the territorial principle, etc. As a result of consultations with the national competition authorities and the EEC, Caterpillar amended its distribution agreements with the dealers active in the EEU.

With respect to Caterpillar, companies that are active in more than one member state of the EEU are advised to keep in mind that restrictions in distribution agreements may potentially result in antitrust violations on the cross-border markets within the EEU.

/ Our Team

**Stefan Weber**, Local Partner and Head of Noerr’s Moscow office, heads the Antitrust & Competition practice of Noerr in Moscow. Stefan Weber assists international businesses on Russian merger control issues, strategic law filings, distribution structures, joint ventures and M&A transactions, tender–related issues, proceedings with the FAS, ongoing compliance advice, compliance manuals and commercial policies, trainings and investigations, as well as the coordination of antitrust issues in CIS countries.

**Tatiana Dovgan**, Associate, has significant experience in various areas of antitrust law, including due diligence of distribution contracts and other commercial agreements regarding compliance with Russian competition law as well as assessment of business practices for potential liability risks in respect of abuse of dominance, cartel activity and other antitrust violations. She assists clients with the implementation of antitrust compliance programs, trainings, antitrust audits and mock dawn raids. She also deals with merger control clearances in Russia and CIS.

**Artem Kara**, Associate, advises clients from different industries on numerous aspects of antitrust law, such as merger control procedures, vertical and distribution agreements, information exchange, market dominance, tenders. He also advises foreign clients on strategic investments laws and on compliance issues from a Russian antitrust perspective, including investigations, trainings and compliance manuals. He also represents businesses in proceedings with the FAS and advises on unfair competition.
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