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Third Anti-Monopoly Package (Amendments to Russian Competition Law)

I. OVERVIEW

In April 2010, the Federal Anti-Monopoly Service (the "FAS"), announced the Third Anti-Monopoly Package, a set of amendments to Federal Law No. 135-FZ, dated July 26, 2006 "On Protection of Competition", as amended (the "Competition Law"), the Code on Administrative Offenses of the Russian Federation and certain other legislative acts (collectively, the "Amendments"). President Medvedev signed the Amendments into law on December 5, 2011 and they will enter into force on January 6, 2012. This memorandum summarizes the most significant changes to the Competition Law contemplated by the Amendments.

In essence, the Amendments, *inter alia*: (a) modify the scope of application of the Competition Law; (b) introduce new and modify certain existing definitions; (c) increase monetary thresholds for pre-closing approval for statutory mergers and accessions and amend the list of documents and information required for pre-closing approval and post-closing notification; (d) amend the regulation of agreements and concerted actions restricting competition; (e) extend the FAS' powers; and (f) modify the regime of liability for violation of anti-monopoly legislation.

II. KEY DEVELOPMENTS

A. SCOPE OF APPLICATION OF THE COMPETITION LAW

According to the FAS, the Amendments were developed to narrow the scope of application of the Competition Law.

To accomplish this, the Amendments modify Article 3 of the Competition Law that sets the general extraterritorial principle of application of the law, by stating that the Competition Law shall apply to agreements and actions taking place outside the territory

of the Russian Federation between Russian and/or foreign persons if such agreements or actions impact competition in the territory of the Russian Federation. The currently effective wording of this article provides that such agreements and actions fall within the scope of the Competition Law if they relate to assets located in Russia or shares in any entities doing business in Russia or otherwise impact competition in the territory of the Russian Federation. Though the purpose of the amendment, as stated by the FAS, is to limit the scope of extraterritorial application of the Competition Law, it is unclear whether this will be achieved since the criterion is still not objective. The FAS could, in theory, exercise broad discretion when using the amended criterion to reach various agreements and actions outside the territory of the Russian Federation.

The Amendments also introduce the new Article 26¹, which affects the FAS' scope of authority for approval of mergers and acquisitions of foreign entities. The FAS' approval shall be required in a transaction if the transaction involves shares (participation interests) in, or rights with respect to, a foreign person, only if such person in the year preceding the transaction had supplied goods exceeding RUR 1 billion (approximately USD 32 million or EUR 24 million[1]) to the territory of the Russian Federation.

Additionally, the Amendments provide that mandatory pre-closing approval of transactions with respect to foreign legal entities is required only if a person or a group of persons acquires: (i) more than 50% of shares (participation interest) in such foreign legal entity; (ii) other rights to determine the conditions of the entity's business; or (iii) rights to exercise the functions of its sole executive body, provided, in each case, such transaction falls within the monetary thresholds of the Competition Law. For Russian entities, however, the current rule remains unchanged: acquisition of over 25% of shares or over one-third of participation interests triggers pre-closing approval provided the acquisition falls within the statutory monetary thresholds. The Amendments further clarify that foreign legal entities are entities registered outside the territory of the Russian Federation, and Russian legal entities are entities registered in the territory of the Russian Federation.

B. NEW AND AMENDED DEFINITIONS

The Amendments introduce a number of new definitions into the Competition Law. For instance, the Amendments introduce the definition of control. The Amendments provide that control, for the purposes of Articles 11, 11¹ and 32 of the Competition Law[2],

[1] Currency conversions in this memorandum are based on December 9, 2011 exchange rate (RUR 31.2 to USD 1 and RUR 41.9 to EUR 1).

[2] Article 11 ("Prohibition of agreements restricting competition"), Article11¹ ("Prohibition of concerted actions restricting competition") and Article 32 ("Persons filing applications and notifications (as well as documents and information) to the anti-monopoly regulatory body regarding transactions and other actions, which are subject to anti-monopoly control").

means the ability of a legal or natural person to determine either directly or indirectly (i.e., through a legal entity) the decisions of a legal entity by virtue of: (i) having more than 50% of voting shares (participation interest) in the charter capital of the legal entity; or (ii) exercising of the functions of its sole executive body.

The definition of control has been introduced and is used to further limit and clarify the scope of various provisions. First, it is clarified that agreements and concerted actions restricting competition are generally not prohibited if they are entered into or performed by entities constituting a group under common control (see also Section E below). Also, it is clarified that when filing for anti-monopoly approval for, or notification of, mergers and acquisitions, the applicant does not have to disclose the whole groups of the acquirer, target and other entities involved into the transaction, but has to disclose only those entities in the group that are controlled, controlling or under common control, provided also that they do business in the same commodity market (see also Section D.2 below).

The definition of a "vertical agreement" is amended to exclude the condition that parties to such agreement do not compete with each other. The Amendments provide that a vertical agreement is any agreement between legal entities, one of which is selling a commodity and the other is buying the commodity (see also Section E below).

Several amendments have been made to the definition of "coordination of business". According to the Amendments, a person may be deemed to coordinate the business of other persons if the person (i) does not belong to the same group of persons with the coordinated entities, and (ii) does not operate on the market(s) where the coordination of business takes place. Vertical agreements are expressly exempt from the scope of the definition.

C. GROUP OF PERSONS

The Amendments slightly narrow the meaning of "a group of persons". They provide for 9 criteria establishing a group of persons (modifying, and in some cases removing, the currently effective 15 criteria). According to the Amendments, the following persons comprise a group of persons: (i) a legal entity and a person holding more than 50% of voting shares (participatory interest) in such entity (including by written agreements with other persons); (ii) a legal entity and its sole executive body; (iii) a legal entity and a person having under its charter documents or any agreement the right to give mandatory instructions to such legal entity; (iv) a legal entity, with more than 50% of its management board or board of directors consisting of the same persons; (v) a legal entity and a person upon whose nomination the sole executive body of the legal entity was appointed or elected; (vi) a legal entity and a person upon whose nomination more than 50% of the management board or board of directors of the legal entity has been elected; (vii) an individual and his

spouse, parents, children, brothers and sisters; (viii) legal entities and individuals included in a group of persons (under any criterion of the Competition Law) with one and the same person, and other persons included in a group of persons with such persons under any criterion of the Competition Law; and (ix) legal entities and individuals included in a group of persons (under any criterion of the Competition Law) who together have over 50% of the total number of voting shares (participation interests) in a legal entity and such legal entity.

The Amendments discard two further criteria set in the current Competition Law under which the entities where a sole executive body or more than 50% of collective executive body/board of directors were elected upon nomination of the same individual or legal entity comprise a group of persons, as well as members of "an industrial and financial group". However, the definition of a group of persons still remains quite broad due to items (viii) and (ix) above and due to the fact that there is some overlap in the currently existing 15 criteria which is clarified by the new definition.

D. MERGER CONTROL

1. Changes in Thresholds for Clearance of Statutory Mergers and Accessions

The Amendments increase the monetary thresholds for pre-closing approval of statutory mergers and accessions. The increased thresholds for pre-approval of statutory mergers and accessions are equal to those that currently apply to acquisitions. These thresholds are met when:

a. the combined asset value of the merging legal entities (and their groups of persons) exceeds RUR 7 billion (approximately USD 224 million or EUR 167 million);

b. the combined annual revenues of the merging legal entities (and their groups of persons) for the preceding calendar year exceed RUR 10 billion (approximately USD 320 million or EUR 239 million); or

c. any of the merging legal entities (or any of the entities within their respective groups) is included in the FAS's Register of entities having a 35% or more market share in a commodity.[3]

[3] The threshold for a post-closing notification to the FAS is not amended. A post-closing notification to FAS is required when the aggregate asset value or total annual revenues of such entities for the preceding calendar year exceed *RUR 400 million (approximately USD 13 million* or *EUR 9 million).*

In addition, the Amendments contain an important clarification that assets of the seller and its group shall not be taken into account when determining the combined asset value of the acquirer (and its group) and the target (and its group) for the purposes of pre-merger approval, if as a result of the transaction such seller and its group will no longer have rights to determine conditions of business activity of the target. Accordingly, in this case only the value of assets of the acquirer and its group and the value of assets of the target and its group (down from the target) are to be added together.

2. Application and Notification

The Amendments clarify and slightly expand the scope of information that should be provided to the FAS in the course of filing of an application or a notification. Such new information includes, *inter alia*:

a. a list of the persons who have more than 5% of shares (participation interests) in the target or a written statement that the applicant does not have such information;[4]

b. a list of all persons who have more than 5% of shares (participation interests) in the applicant;[5]

c. a list of commercial entities, in which the target has more than 5% of shares (participation interests) or a written statement that the target does not hold any such shares or that the applicant does not have such information;[6]

d. list of persons belonging to the same group as the applicant as of the time of application for pre-approval or, in case of notification, as of the time of the transaction, but limited only to (i) persons under direct or indirect control of the applicant, (ii) persons directly or indirectly controlling the applicant, and (iii) persons doing business in the same commodity market, as well as any persons controlled by

[4] Under the current law, this information is required only with respect to the applicant, not the target

[5] Currently, the law requires disclosure of only commercial entities holding more than 5% of shares in the applicant and the beneficial owners behind them; non-commercial legal entities and individual shareholders holding minority stakes may remain undisclosed.

[6] Under the current law, this information is required only with respect to the applicant, not the target.

them[7]; and

e. information on the licenses (or the absence of such information) of the target in relation to the activities provided for in Federal Law on Foreign Investments into Strategic Companies № 57-FZ dated April 29, 2008, as amended.

While slightly expanding the scope of required information (in particular, in respect of the target) the Amendments aim to reduce the volume of information to be disclosed in the application/notification. In particular, with respect to information on groups of persons of each party to the transaction (*i.e.*, the applicant, the target, the merging companies, *etc.*), only the following is required to be disclosed:

a. information on persons under direct and indirect control of each party;

b. information on persons that directly or indirectly control each party; and

c. information on persons belonging to the same group with each party and acting in the same commodity markets with such a party, as well as persons under control of the above-mentioned persons.[8]

The Amendments clarify that if the applicant fails to provide all necessary documents it shall be notified thereof within 10 days[9] and the application shall be deemed to not have been filed. In such case, the applicant has to withdraw the submitted documents within 14 days.

E. AGREEMENTS RESTRICTING COMPETITION AND CONCERTED ACTIONS

The Amendments alter the provisions concerning the agreements and concerted actions restricting competition. The most important change is that, according to the Amendments, agreements and concerted actions between legal entities belonging to the same group are not deemed "cartel" and are not prohibited, provided that one of the entities

[7] Such information is *de facto* subject to disclosure under the current law through the disclosure of information on legal entities in which the applicant controls more than 5% of shares and information on legal entities that control more than 5% of shares in the applicant and beneficiaries behind them.

[8] The requirement to disclose the group is further limited by the new rule that individuals need to be disclosed only if they are entrepreneurs or comprise a group of persons only based on limited grounds.

[9] Earlier this was provided by FAS regulations but not by the law.

entering into the agreement or performing the actions controls the other or they are under common control, except for agreements between legal entities carrying out types of activities that under the laws of the Russian Federation may not be simultaneously performed by one and the same legal entity (*e.g.*, electricity generation and distribution). Another important amendment is clarification that cartel may be found only if the respective entities compete in one and the same commodity market. The Amendments establish that vertical agreements fixing retail price are permitted if a whole-sale seller fixes the maximum retail price. They also expressly provide that agency agreements shall not be deemed vertical ones. Previously, such a view was supported only by clarifications from the FAS and was not clear from the law.

According to the Amendments, 4 of the 9 prohibitions provided by the current Competition Law with respect to horizontal agreements will apply to any agreements. The Amendments prohibit any agreements that restrict competition and clarify that such agreements include, *inter alia*, any agreements (including horizontal and vertical ones) (i) dictating terms unfavorable to a counter-party or irrelevant to the subject-matter of the agreement; (ii) fixing unjustified disparate prices (tariffs) for the same goods; (iii) creating barriers to enter or exit a particular commodity market; or (iv) establishing criteria for participation in any professional or other union. Only 5 prohibitions *per se* that apply just to "horizontal agreements" (cartels) remain.

With respect to concerted actions, the Amendments provide a new carve out, stating that the prohibitions relating to concerted actions do not apply to persons having a combined market share of less than 20%, provided that the share of each such person does not exceed 8%.

F. FAS POWERS

The Amendments further expand the FAS powers in the sphere of anti-monopoly control. For instance, the FAS will be entitled to issue (i) written alerts to company officials in the situations where the publicly announced plans of the company may result in a violation of anti-monopoly legislation, and (ii) written warnings to companies holding a dominant position requesting to stop actions (omission) that purportedly violate anti-monopoly legislation. The FAS will also maintain a register of persons who committed administrative offences in the sphere of anti-monopoly law. However, this register will not be publicly available.

G. LIABILITY FOR ANTI-MONOPOLY VIOLATIONS

1. Amendments to the Regulation of Administrative Liability

The Amendments provide that turnover fines for abuse of a dominant position may apply only if such abuse results or may result in prevention, restriction or elimination of competition. The Amendments also set forth that for an administrative violation in a commodity market with fixed prices (tariffs), a turnover fine may be imposed in the amount ranging from 0.003% to 0.03% of the offender's respective turnover. All other actions constituting abuse of a dominant position trigger only fixed fines ranging from RUR 15,000 (approximately USD 481 or EUR 358) up to RUR 20,000 (approximately USD 641 or EUR 477) for company officials and from RUR 300,000 (approximately USD 10,000 or EUR 7,000) up to RUR 1,000,000 (approximately USD 32,000 or EUR 24,000) for legal entities.

The Amendments establish administrative liability for a failure to timely provide information required under anti-monopoly legislation (currently, liability is set forth only for a failure to provide such information) in the amount ranging from RUR 10,000 (approximately USD 320 or EUR 239) up to RUR 15,000 (approximately USD 481 or EUR 358) for company officials and from RUR 300,000 (approximately USD 10,000 or EUR 7,000) up to RUR 500,000 (approximately USD 16,000 or EUR 12,000) for legal entities.

The Amendments modify the general list of aggravating and mitigating factors that apply to all administrative offences, and set forth a new list of aggravating and mitigating factors for consideration in the course of imposition of punishment for anti-monopoly violations. Mitigating factors include the following: (i) the company that has violated anti-monopoly legislation did not initiate the agreement restricting competition or concerted actions or was mandatorily instructed to participate therein; or (ii) it did not perform its obligations under such agreement. Aggravating factors include the following: (i) the company that has violated anti-monopoly legislation initiated the agreement restricting competition or concerted actions; or (ii) it forced other persons to commit violation of anti-monopoly legislation or to continue participation in the agreement restricting competition or concerted actions. In addition, the Amendments provide for rules for determining the amount of the fines to be imposed in instances when: (i) aggravating and mitigating factors are absent; (ii) mitigating factors are present; or (iii) aggravating factors are present.

2. Amendments to the Regulation of Criminal Liability

The Amendments abolish criminal liability for concerted actions and vertical agreements. They set forth that criminal liability may be imposed only provided that a cartel agreement is entered into by entities competing in a particular commodity market.

3. Private Course of Action

The Amendments provide for private course of action and right to claim damages in connection with violation of anti-monopoly legislation.

H. OTHER CHANGES

The Amendments introduce other changes, including changes to the procedure of entering into contracts with financial organizations by state and municipal authorities and procedure for reviewing statements, materials and commencement of investigation of anti-monopoly violations.

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Any questions regarding the application of the Competition Law may be discussed with Scott Senecal, Murat Akuyev or Yulia Solomakhina in the Moscow Office (tel. +7 495 660 8500).

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