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PHARMACEUTICAL INDUSTRY:
Entering the distribution network.
The position of the FAS Russia.

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SEPTEMBER 2011

THE FEDERAL ANTIMONOPOLY SERVICE OF RUSSIA REQUIRES THE PRODUCERS OF MEDICINE AND MEDICAL EQUIPMENT TO REVEAL THE REQUIREMENTS FOR BECOMING A MEMBER OF DEALER NETWORK.

Summer 2011 witnessed the end of 2 major proceedings of the Federal Antimonopoly Service of Russia against OOO Novo Nordisc and Johnson & Johnson LLC. The appeal of the said judgments confirmed the legality of antimonopoly agency decisions, which constitutes a precedent for the companies developing their distribution network in Russia. In fact, in order to eliminate further risk of liability for violation of antitrust law in Russia it is necessary to work out, accept as standard and publicize the requirements for the companies wishing to become a distributor in Russia.

OOO Novo Nordisk

On January 20, 2011 the Federal Antimonopoly Service (the «FAS of Russia") levied a fine on Novo Nordisc in the amount of 85,934,025.00 Roubles for the abuse of the dominant position in the commodities market.

From economical and technological point of view the company had no reasons to decline the execution of contracts for supply of medical products manufactured by the Novo Nordisk Group, and thus created discriminatory conditions for potential contractors in comparison with other distributors.

On July 28, 2011 the Federal Antimonopoly Service (FAS of Russia) and OOO Novo Nordisk, representing the group of companies Novo Nordisk A/S in Russia, concluded a settlement agreement, prescribing the definition of more specific and transparent criteria for the access to the products of OOO Novo Nordisk for the Russian Distributors.

In 2010 based on the results of proceedings the FAS of Russia decided that OOO Novo Nordisk violated the law on protection of competition (paragraph 5, 8 part 1 article10), held the company administratively liable, levied a fine on it and ordered to discontinue the detected violations.

During court proceedings FAS of Russia and OOO Novo Nordisk concluded settlement agreement under which OOO Novo Nordisk agreed that it violated antitrust law and complied with the order issued by the FAS of Russia, and namely:

- introduced new policy on commercial partners and approved sample supply contract, specifying standard requirements, precise criteria and procedures for the work with distributors.

These documents are aimed at compliance with the Russian law on protection of competition and do not contradict the requirements of the US or English law on anti-corruption; OOO Novo Nordisk published these documents on the official site of the company for information of any person interested therein;

- is entitled to examine the compliance of the potential and existing contractors with Russian, foreign and international anti-corruption law subject to compliance with the Russian antitrust law.

In view of voluntary correction of violation of antitrust law the court reduced the administrative fine to 53.5 million Roubles.

Johnson&Johnson

Johnson&Johnson (the "Company") established a certain procedure for becoming a member of dealer network, under which business units which claim the status of authorized distributor had to undergo legal audit in order to prove their legal capacity, tax risks and business reputation on the market. In order to become a member of dealer network a potential partner had to receive business proposal of authorized distributors of Johnson&Johnson[1].

State Unitary Enterprise Medtechnika filed a request with the Company, however Johnson&Johnson stated that in order to become a member of dealer network one should contact either the district field force of the company acting primarily in the territory of Chelyabinsk or Chelyabinsk region, or their business partners acting in other regions. As a result the State Unitary Enterprise Medtechnika had once again to undergo all procedures for receipt of commercial proposal from official distributors[2].

The Chelyabinks office of the Federal Antimonopoly Service opined that the actions of the Company contradict the Law on protection of competition and ordered the company to discontinue violations[3].

Later the results of the above examination of FAS were successfully appealed[4]. The appeals instance upheld the judgment of the court in accordance with decision of February 7, 2011.

The cassation court reversed the decision of the lower court and dismissed the claim for revocation of the antimonopoly service judgement as illegal.

[1] See official press-release of the Federal Antimonopoly Service dated April 29, 2010: http://www.fas.gov.ru/fas-news/fas-news_30116.html
[2] See the same document
[3] See the same document.
[4] See official press-release of the Federal Antimonopoly Service dated April 29, 2010: http://www.fas.gov.ru/fas-news/fas-news_30116.html

The cassation court disagreed with the conclusions of the lower instances that the concerted actions of the company are unproved as the company Marketing policy neither specifies any unconditioned obligations of the distributors to obtain consent of the Company to effect transaction, nor prescribes any procedure for the deals approval.

In the cassation instance court's opinion the co-ordination of actions may be proved even if there is no documentary proof of agreement to perform such actions. As evidence of concerted actions the cassation court considered the complex of the following facts of the case:

- The Company's Marketing policy specifies no criteria of the potential partner inconsistency.
- The replies of distributors and the replies of the Company to potential partners specified no precise reasons for denial to enter into agreements for the sutural material supply.
- The company has no clear regulation of the procedure for distribution contracts conclusion.
- The Company sent a letter to distributors requesting them to inform the managers of the Company divisions of any requests from other companies for commercial proposals exceeding 150,000 Roubles 5 working days in advance. Further the letter said such reports would constitute grounds for 2% discounting. In the cassation court's opinion the Company co-ordinated the actions of business entities by mailing this letter.

By its decision of July 13, 2011 the Supreme Arbitrazh court of the RF upheld the judgement of the cassation court.

WHAT'S NEXT?

Many companies trading in the Russian market and developing their distribution network in Russia are presently solving the question whether to stay in the risk zone, sticking to the old scheme of work with distributors, or to take measures aimed at elimination of risks of being held liable and levied huge penalties.

Obviously, these are primarily business issues. However, those who resolved to follow the instructions of FAS and comply with the legislation have to prepare and/or amend the by-laws of the Company and model contract.

In the regulator's opinion, the commercial policy regarding commercial partners should specify:

- strict criteria and terms for assessment of potential and existing contractors, including the right of the Company to assess the legal capacity, financial soundness and business reputation of contractors,
- precise procedure for resolving the issue on cooperation with potential contractor in distribution of products, and
- basic terms of products supply (place of delivery, prices, terms of payment, bonus scheme, other essential conditions).

The model supply contract should specify the undifferentiated prices and economically feasible bonus scheme, economically feasible conditions of payment for the goods, as well as conditions on compliance by commercial partners with the Company's standards of business conduct.

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RECOMMENDATIONS & RECOGNITION:

- European Legal Experts 2011
- Best Lawyers 2011
- International Financial Law Review 2011
  - Restructuring and insolvency
  - Mergers and acquisitions
- Chambers Europe 2011
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COOPERATION:

Ministry of Economic Development, Ministry of Transportation of the Russian Federation; Ministry of Regional Development, Federal Antimonopoly Service, Federal Financial Markets Service, Committees of the State Duma and the Federation Council, Vnesheconombank, Various federal agencies, PPP and Investment Commission of the Russian Union of Industrialists and Entrepreneurs, Protection Committee of the National Securities Market Association

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