



Antitrust and competition in Russia – 2021

Trends for the attention of foreign business

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Over the last 5 or 6 years, the number of cases against foreign companies or their representative offices in Russia has increased sharply, a trend most likely to be related to the state's response to the sanction pressure placed upon the Russian business abroad.

It is worth reminding the reader that the Law on Protection of Competition¹ has an extraterritorial effect and applies to foreign companies if their agreements or actions affect a state of competition within Russia even when such actions are made (or agreements are reached) abroad. That is why the FAS may target any foreign company.

The exception is violations on the territories of two or more EAEU countries—in such a case, these actions or agreements fall within the competence of the Eurasian Economic Commission.

In November 2020, Mr Maksim Shaskolsky, the newly appointed Head of the Federal Antimonopoly Service of Russia (FAS), publically announced a cardinal change in the FAS's politics. Mr Shaskolsky suggested that control measures be substituted by preventive ones, such as the promotion of compliance introduction, a wider use of warnings, etc. However, no significant changes followed.

In this overview, we cover the most important trends of antitrust regulation that foreign businesses in Russia should know. We recommend foreign companies consider these trends when planning a business presence in Russia.

Nº 1. Unscheduled FAS inspections

If there are signs of cartels or other anticompetitive agreements, the FAS may conduct unannounced inspections, so-

called "mock down raids." Such inspections are always conducted by surprise, which means the FAS does not notify the company well in advance.

The FAS conducts hundreds of such inspections throughout the country. In recent years, the FAS officials inspected dozens of foreign companies, including the Russian offices of LG, Philips, Lenovo, Bristol-Myers Squibb, General Electric, Maersk, CMA, Hyundai Merchant Marine, Evergreen and others.

The efficiency of these activities is generally very high—in more than 80% of the inspections, the FAS found antitrust law violations and opened a case.

Nº 2. Compulsory licensing

One of the non-obvious risks, especially for dominants on the market, is the possibility of the application of compulsory licensing tools to their intellectual property.

According to the Civil Code of the Russian Federation,² in a case of extreme necessity, related to ensuring the defence and security of the state or the protection of citizens' life and health, the Russian government shall have the right to take a decision regarding the use of an invention, utility model or industrial design without the consent of the patent holder but with giving the patent holder notice as soon as possible and paying adequate compensation.

In December 2020, the Russian Government, upon the FAS's petition, used this tool for the first time and granted a compulsory license to a Russian company for manufacturing the foreign innovative antiviral product "Remdesivir"³, which is registered by Gilead Sciences (the USA).

¹ See Art. 3(1)(2) of the Federal Law dated 26.07.2006 No.135-FZ "On Protection of Competition" (the "Law on Protection of Competition").

² See Article 1360 of the Civil Code of the Russian Federation as amended by the Federal Law No.107-FZ dated 30.04.2021.

³ See the press release on the website of FAS Russia at <https://fas.gov.ru/publications/22569>.

Prior to that, compulsory licenses were granted under court procedures only, and in such cases the companies at least had the chance to be heard. The first precedent case No. A40-71471/2017⁴ was considered in June 2018. The court granted a compulsory license for the company Celgene's medicine to an individual, a former shareholder of the Russian pharmaceutical company.

It should be noted that in both cases the criteria for granting a compulsory license are rather vague. Thus, the risk of compulsory licensing becomes significant, and this instrument may become one of the FAS's tools (at least regarding COVID-19 vaccines and medicinal drugs),⁵ along with the proposed withdrawal of antimonopoly immunities in relation to intellectual property⁶.

№ 3. Criminal prosecution for anticompetitive agreements

Cartels, being one of the most serious violations of antitrust law, are investigated not only by the FAS but also by law enforcement agencies. Besides a strict administrative liability, Article 178 of the Russian Criminal Code ("Restriction of competition") also ensures criminal liability for cartels.

However, it happens quite often that in the course of an antimonopoly investigation the FAS and law enforcement agencies uncover other related crimes, which are also focused on the restriction or prevention of competition (for example, fraud, bribery or white-collar crimes).

For the last 5 years, the practice of criminal prosecution for cartels and other anticompetitive agreements has developed significantly, and statistics are growing

from year to year. From 2015 to 2020, the number of cases initiated under Article 178 of the Russian Criminal Code has increased twenty-one times over!

№ 4. Control over pricing of large manufacturers and chain stores

Due to the pandemic, sanctions and various other reasons, many markets are experiencing a rapid increase in prices. This has caused the extensive use of pricing control mechanisms by the Russian Government and the FAS, which sometimes remind an excessive "government price regulation" of competitive markets. In particular, the Russian Government has approved changes in the rules for government price regulation for certain socially essential goods.⁷

The FAS has selected a way of drawing up the lists of the largest companies in order to exercise pricing control in an expedient manner. As a start, the FAS plans to draw up a list of manufacturers in construction material markets, including the markets of metal products, wood-based materials, paintwork materials and many others. The FAS also invites tax authorities to participate. The FAS intends to assess the financial results of businesses; therefore, it is expected that the companies showing a significant increase in revenue will be targeted first.

Such actions set up a new trend towards the "manual" pricing management. This process is most noticeable in construction material markets and social retail markets, which is resulting in the whole range of antimonopoly inspections and cases.

In April 2021, the FAS initiated cases against metal manufacturers for fixing

⁴ See <http://kad.arbitr.ru/Card/322413fa-38a7-4085-9cc7-3c8ff9fd7d92>.

⁵ See the article "WHO has called for a temporary waiver of the patent protection of COVID-19 vaccines" in Rossiyskaya Gazeta at <https://rg.ru/2021/05/07/voz-prizvala-vremenno-otkazatsia-ot-patentnoj-zashchity-vakcin-ot-covid-19.html>.

⁶ See the press release on the website of FAS Russia at <https://fas.gov.ru/news/24928>.

⁷ See Interfax's article "The Cabinet of Ministers has approved the new rules for regulating the prices for socially essential foods" at <https://www.interfax.ru/business/743758>.

monopolistically high prices for hot-rolled products. A few days later, a case regarding a cartel of metal traders was also opened. At the end of August, the FAS conducted inspections against the manufacturers of reinforcement bars and large chain stores. At the beginning of September, we saw cases with regard to monopolistically high prices against a foreign manufacturer of wood panels, a few manufacturers of sheet glass and major federal retailers.

Taking into account the FAS's recent activities, the fines for the violation of antitrust law may run into hundreds of millions of rubles. For example, in April 2021, Apple was fined 906 million rubles⁸, and in August 2021 Booking was fined 1.3 billion rubles⁹. Should the companies fail to pay such fines, these figures may be doubled.

№ 5. Challenging the M&A transactions

In some cases, the failure to make a request for the FAS's preliminary approval of mergers and acquisitions may result in the cancellation of such transactions in the court. Until recent times, the FAS identified such violations rather rarely, whereas this practice is becoming extensive nowadays.

According to the Report on the State of Competition in Russia for 2020¹⁰, the FAS initiated six court proceedings focused on the elimination of foreign investors' illegal control over Russian companies of strategic importance for national defence. Even if the transactions were concluded many years ago, they are still subject to review.

In October 2014, several foreign companies acquired the shares of two plants engaged in the mining of loparite ores and the supply of magnesium products for defence industry purposes¹¹. Five years later, the FAS filed a claim seeking invalidation of the transaction. The FAS's claim in relation to one of the plants has been upheld while the foreign investors' appeals have been dismissed.

In April 2018, the FAS also challenged the acquisition by a Chinese company of 100% of the shares in a major copper asset in the Amur Region¹². In May 2020, the Commercial Court of the Amur Region satisfied the claim and invalidated the contract with respect to the acquisition of the shares in the copper company.¹³

⁸ See the RBC's article "FAS has fined Apple 906 million rubles" at <https://www.rbc.ru/business/27/04/2021/608805829a7947fa85a07d73>.

⁹ See the Kommersant daily's article "FAS has fined Booking.com 1.3 billion rubles for the abuse of dominant position" at <https://www.kommersant.ru/doc/4958391>.

¹⁰ See the FAS Russia's Report on the competitive situation in Russia in 2020 at <https://fas.gov.ru/documents/687779>

¹¹ See cases Nos. A50-32879/2019 and A42-10735/2019.

¹² See the press release "A citizen of the People's Republic of China has acquired a strategic subsoil user without the approval of the Law Commission" on FAS's website at <https://fas.gov.ru/news/24748>.

¹³ See the Resolution of the Commercial Court of the Amur Region dated 25.05.2020 in case No. A04-899/2020 at https://kad.arbitr.ru/Document/Pdf/b0dc09cb-e6a9-4002-bbc1-7368b2f9fcb7/cd7aedb7-dd9d-496b-94da-225ce68e3f0a/A04-899-2020_20200525_Reshenie.pdf?isAddStamp=True.

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