



Russian Antitrust Laws — Sanctions Impact

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VEGAS LEX

Foreign policy developments and recent international sanctions have had a significant impact on all sectors of the economy. Such drastic changes have entailed active rulemaking aimed at adjusting the regulatory framework to new economic realities. The law-making initiatives concern, *inter alia*, issues related to the competence of the Federal Antimonopoly Service (hereinafter — the “**FAS Russia**”).

This current article presents an up-to-date overview of already implemented, as well as planned initiatives in the field of anti-monopoly and related regulation in 2022 under sanctions. Companies will be able to pre-assess the impact of changes on their activities and, if necessary, adjust their business processes in a timely manner.

IMPLEMENTED INITIATIVES

1. Legalization of Parallel Imports

Russian Government Decree No. 506 dated 29 March 2022 has actually legalized parallel imports. It has been established that the Ministry of Industry and Trade of Russia approves a list of goods for which certain provisions of Part 4 of the Russian Civil Code do not apply, subject to the introduction of such goods into circulation outside the Russian territory by intellectual property owner, as well as with their consent. This means the possibility of importing certain types of products into the Russian Federation without a separate permission of the intellectual property owner.

By Order of the Ministry of Industry and Trade of the Russian Federation No. 1532 dated 19 April 2022, the specified list has been approved. It includes certain types of fuels, pharmaceutical products, chemical goods, textile materials, metals, vehicles, ships, etc.

It should be noted that earlier the FAS Russia had for a long time supported the

idea of legalizing parallel imports — the corresponding bill was developed back in 2014¹. For all 8 years, discussions have been held at the EAEU level about the expediency of such actions and the impact on the market.

On the eve of the adoption of the above-mentioned Russian Government Decree, the Head of the FAS Russia, Mr. Maxim Shaskolsky, expressed the position that “... the legalization of parallel imports would allow entrepreneurs to import original goods without the consent of the copyright holder. This would help to expand the range of products sold and reduce prices for it”².

2. Amendments to the Principles of Economic Analysis of Pricing Practices

On 24 September 2014, the Presidium of the FAS Russia approved the Principles of Economic Analysis of Pricing Practices with regard to their compliance with the Law on Protection of Competition (hereinafter — the “**Principles**”). The Principles were originally intended for use by antimonopoly authority officials as methodological recommendations when analyzing the pricing policy of dominants for compliance with requirements of paras 1 and 6 of Article 10(1) of the Law on Protection of Competition³.

On 10 March 2022 the FAS Russia announced that the Principles was adjusted:

“Against the background of the rising prices in a number of commodity markets, the number of investigations conducted by the FAS Russia has increased. In this regard, the FAS Russia has changed its approach to the economic analysis of pricing practices for Russian goods. Now it gives priority to the balance of supply and demand in the domestic market, and export quotations cannot be accepted as the main argument”⁴.

It should be mentioned that on 10 March 2022 the similar question of whether the

1 See at: <https://fas.gov.ru/publications/5037>.

2 See at: <https://tass.ru/ekonomika/14200495>.

3 Federal Law No. 135-FZ “On Protection of Competition” dated 26 July 2006.

4 See at: <https://fas.gov.ru/news/31843>.

focus should be on the domestic, rather than export, market was also partially touched upon by the Head of the FAS Russia, Mr. Maxim Shaskolsky, in his report at a meeting of the State Duma:

"I also propose to make specific provision in the legislation with regard to another form of abuse of a dominant position, i.e. failure to ensure the priority of the domestic market. The introduction of such measures in the event of a failure of self-regulation in competitive and socially significant commodity markets will allow for the prompt suppression of unfair, speculative behavior, as well as promote fair pricing in commodity markets"⁵.

Moreover, at the end of March 2022, the media reported that the FAS Russia prepared a bill banning the setting of the contract price based on foreign currency and exchange indicators⁶. In April 2022, a bill of the same meaning was submitted to the Russian State Duma⁷.

The practical significance of the changes made to the Principles is that earlier companies quite often justified their approach to pricing by references to prices prevailing abroad. Starting now, such arguments actually have no chance of success, and most likely a so-called "cost-orientated method" (production costs plus a reasonable profit margin) will be the main tool for checking the reasonability of prices.

3. Introduction of Restrictions on Participation in Public Procurement for Companies that Refused to Fulfill the Contract due to Sanctions

Russian Government Decree No. 937 dated 23 May 2022 established that state customers, according to the Law on the Contract System⁸, are obliged to establish a requirement in the tender documentation that potential tender participants shall not

be included in the Register of Disreputable Suppliers in connection with their refusal to execute the contract due to sanctions and restrictive measures introduced against the state customer.

This change reflects the general approach of the State to the non-recognition of international sanctions as such, and is a measure to ensure the stability of contractual relations.

At the same time, taking into account the inflexibility of state contracts, the State seeks to provide their parties with tools to "adjust" conditions in the new realities.

For example, under construction contracts, the Russian Government Decree No. 680 dated 16 April 2022 granted the parties the right to make almost any changes, including those concerning essential conditions – types and volumes of works or services, terms, prices and payment procedures. Such changes are allowed if circumstances beyond the control of the parties have arisen during the execution of the contract, entailing the impossibility of its execution, which, among other things, include international sanctions and the consequences caused by them.

Moreover, if the obligations were still breached by the contractor, and the contract was not executed due to sanctions and other restrictive measures, the contractor may escape from liability and penalties (Russian Government Decree No. 783 dated 04 July 2018).

At the same time, a contractor who has not fulfilled a state contract due to sanctions, may avoid being included in the Register of Disreputable Suppliers. A similar position was developed by the FAS Russia in relation to COVID-19 consequences, and, most likely, will be extended to international sanctions.

⁵ Transcript of the meeting of the State Duma of the Federal Assembly of the Russian Federation on 10 March 2022, see at: <http://transcript.duma.gov.ru/node/5804/>.

⁶ <https://www.rbc.ru/business/31/03/2022/6242e5799a7947640dd1ed25>.

⁷ Draft Federal Law No. 112181-8 "On Amendments to Articles 317 and 424 of Part 1 of the Civil Code of the Russian Federation", see at: <https://sozd.duma.gov.ru/bill/112181-8>.

⁸ Federal Law No. 44-FZ "On the Contract System in the Field of Procurement of Goods, Works and Services for State and Municipal Needs" dated 05 April 2013.

INITIATIVES UNDER CONSIDERATION

4. Extension of a Prohibition to Abuse a Dominant Position to Any Company, Irrespective to the Market Share

On 10 March 2022, the Head of FAS of Russia, Mr. Maxim Shaskolsky, speaking at a meeting of the Russian State Duma, noted:

"The existing prohibitions on price abuse apply only to sellers and manufacturers dominating the market and do not cover intermediaries selling goods at inflated prices during a period of increased demand. ...In this regard, we propose to extend antitrust bans not only to dominant companies, but in some cases to other sellers and manufacturers of goods, including intermediaries in the chain of sale"⁹.

To put the initiative into effect, Mr. Shaskolsky proposed to enshrine in the Law on Protection of Competition the right of the Russian Government to determine the list of goods for the sale of which the requirements of antimonopoly legislation will apply to any company, irrespective to the market share.

To date, the corresponding bill has not been yet submitted to the Russian State Duma. At the same time, if the initiative is put into practice (even as temporary measures), antitrust restrictions will be applicable to a large number of companies, including representatives of medium-sized and small businesses. These entities are less likely to encounter the FAS Russia and, as a rule, do not have a practice of building business processes in a way to comply with antimonopoly legislation.

5. Temporary Lifting of Restrictions on Acquiring Additional Area of Shopping Facilities for Retail Chains

According to media reports¹⁰, the Ministry of Industry and Trade of Russia has prepared a bill according to which, until 1 January 2023, it is proposed to abolish the prohibition established by Article 14 of the Law on Trade¹¹ on the purchase and lease of additional area of shopping facilities within the boundaries of an administrative-territorial entity by a retail network, the share of which exceeds 25% of the volume of all food products sold for the previous financial year within the corresponding territory.

The practical value of the initiative lies in the possibility of a temporary "expansion" of Russian retail chains existing within the administrative-territorial entities, and the preservation of jobs. Thus, the media link information about the initiative with the possibility of the acquisition by the grocery retailer X5 Group of the Prisma supermarket chain in St. Petersburg, owned by the Finnish holding company S-Group, which announced the termination of operating activities in Russia¹².

6. Introduction of a Post-Notification Procedure for M&A transactions up to RUB 2 Bln

Currently, foreign companies are actively selling their Russian business to Russian companies in order to exit the market. Recently, for example, OBI, VALIO, McDonald's, Nordic, FAZER, Shell, and many others have followed this path.

Since certain transactions in Russia that may affect the state of competition require

⁹ Transcript State Duma of the Federal Assembly of the Russian Federation on 10 March 2022, see at: <http://transcript.duma.gov.ru/node/5804/>.

¹⁰ <https://www.vedomosti.ru/business/articles/2022/05/03/920776-riteileram-limit>.

¹¹ Federal Law No. 381-FZ "On the Fundamentals of the State Regulation of Trade Activities in the Russian Federation" dd 28.12.2009.

¹² <https://www.vedomosti.ru/business/articles/2022/05/03/920776-riteileram-limit>.

the FAS Russia approval, such a mass sale of foreign business to Russian market players has provoked a huge number of such applications.

According to media reports¹³, the FAS Russia has submitted to the Russian Government a proposal to simplify the procedure for obtaining the consent of the antimonopoly authority for transactions on the acquisition of assets of companies that have decided to leave the Russian market in current conditions.

If this proposal is implemented, transactions up to RUB 2 bln that meet the requirements of the Law on Protection of Competition will not require the prior consent of antimonopoly authority, but will only require a subsequent notification of the FAS Russia on its completion.

Despite the simplification of the procedure for the acquisition by Russian companies of foreign brands leaving the Russian market, the initiative is rather controversial.

The experience of using the already existing institution of post-notification (when transactions are made by persons belonging to the same group) shows that it is highly likely that the same large set of documents will still need to be submitted to the antimonopoly authority.

At the same time, the parties to an already completed transaction will be at risk of invalidation of the transaction for a long time, if the antimonopoly authority considers that such a transaction restricts a state of competition. Thus, the goal of simplifying the procedure for approving transactions with the antimonopoly authority may not be fully achieved.

¹³ <https://www.vedomosti.ru/economics/articles/2022/04/20/919069-krupnij-biznes-fas>.

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