



## **ANTITRUST COMPLIANCE AND AMENDMENTS TO ANTITRUST REGULATION IN RUSSIA**

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Globally more and more attention is being paid to antitrust compliance which is generally understood to mean that a company complies with the norms of antitrust legislation in the countries where it conducts business.

Antitrust compliance regulations have currently been adopted in the European Union, the EAEU, the United States, and many other developed countries. In Russia, regulations that directly regulate antitrust compliance came into force in 2020.

It is essential that due attention be paid to this area not only for the current law and the available clarifications and recommendations of the antitrust service, but, first and foremost, in connection with the possible employment of antitrust compliance systems to identify violations of antitrust legislation, and the possible mitigation of and even complete release from liability for certain antitrust violations.

## 1. Antitrust compliance law

In March 2020, amendments to the Law on the Protection of Competition were adopted, which introduced the concept of antitrust compliance into the Russian law<sup>1</sup> (hereinafter "Law No. 33-FZ")<sup>2</sup>.

According to the amendments, a legal entity may independently arrange an antitrust compliance system by adopting an internal act, or by using the internal act of any other entity belonging to the same group of persons (a holding company).

The above-mentioned internal acts must contain:

- requirements on the procedure for assessing the risks of a violation of antitrust legislation;
- measures aimed at reducing the risks of violating antitrust legislation;
- the procedure for making employees aware of this act;
- information on the official responsible for the operation of the antitrust compliance system within the entity;
- additional requirements on arranging the antitrust compliance system, which may be included in the act at the company's discretion.

<sup>1</sup> Federal Law No. 33-FZ dated 1 March 2020 "On Amendments to the Federal Law ,On the Protection of Competition".

<sup>2</sup> Federal Law No. 33-FZ introduces the term "system for internal compliance with the requirements of antitrust legislation", which is similar to the term "antitrust compliance" used in the legal literature.

Before adopting an internal act on antitrust compliance, a company may send a draft internal act to the Federal Antimonopoly Service (hereinafter the “**FAS of Russia**”) to determine whether it complies with antitrust legislation. The FAS of Russia is obliged to consider the request and issue an opinion within 30 calendar days. An act that has already been adopted may also be sent to the FAS of Russia for review<sup>3</sup>.

Information on the adoption of the internal act must be posted on the website of the company.

## **2. Clarifications and recommendations by the state authorities on the introduction and effective functioning of antitrust compliance systems**

Recently, Russia’s state authorities – namely the FAS of Russia – have adopted the following clarifications and recommendations regarding antitrust compliance:

- Clarification No. 5 of the Presidium of the FAS of Russia “Assessment of the Admissibility of the Business Methods of Subjects Holding a Dominant Position in the Market”<sup>4</sup>;
- Methodical Recommendations on Introduction of Internal Controls of Compliance with Antitrust Legislation, Legislation on the State Defence Order and Legislation Regulating Procurement Activities<sup>5</sup>;
- Decree No. 618 of the President of the Russian Federation dated 21 December 2017 “On the Primary Areas of State Policy for the Development of Competition”;
- Methodical Recommendations on the Establishment and Organisation by the Federal State Executive Authorities of a System for Ensuring Internal Compliance with the Requirements of Antitrust Legislation<sup>6</sup>;

<sup>3</sup> The court practice gives examples of cases when the antimonopoly authority assessed the compliance of an act with the legislation after it had entered into force (Ruling of the Supreme Court of the Russian Federation dated 19 April 2021 in case No. A40-3569/2020).

<sup>4</sup> Approved by the minutes of the Presidium of the Federal Antimonopoly Service of Russia, No. 4 dated 24 February 2016.

<sup>5</sup> Approved by Directive No. 795-5 of the Government of the Russian Federation dated 26 April 2017.

<sup>6</sup> Approved by Directive No. 2258-r of the Government of the Russian Federation dated 18 October 2018.

- Order No. 133/19 of the FAS of Russia dated 5 February 2019 "On Approval of the Methodology for Calculating Key Performance Indicators in the Functioning of the Federal Executive Body of Antitrust Compliance".

Though being addressed to companies in certain sectors or the state authorities, these documents may also be used by private companies. For example, the aforementioned clarifications and recommendations provide for different measures for the establishment and effective functioning of antitrust compliance, which include *inter alia*:

- Adoption of special antitrust compliance regulations;
- Creation of a competent division/appointment of an executive officer who will be responsible for the functioning of antitrust compliance;
- Separation of areas of responsibility between divisions, officers and employees in the field of antitrust compliance;
- Creation of a mechanism to identify and assess the risks of antitrust violations;
- Drafting of actions to mitigate these risks.

The clarifications and recommendations provide guidance for state policy on antitrust compliance. They also offer examples of specific recommended measures, such as an analyses of identified antitrust violations during the past three years, and development of actions aimed at mitigating the risks of antitrust violations at least once a year<sup>7</sup>.

### **3. Mitigation of and release from liability for antitrust violations**

Legislation of the Russian Federation stipulates that it is possible in certain instances to mitigate or avoid liability for the following antitrust violations:

- Conclusion of a cartel agreement and participation therein;
- Conclusion of other anti-competition agreements (*inter alia*, prohibited "vertical" agreements) and participation therein;
- Engagement in inadmissible concerted practices.

<sup>7</sup> In addition, companies can also refer to acts dealing with antitrust compliance adopted by major players in the market.

Here, administrative liability for the commission of the aforementioned antitrust violations may be reduced or avoided, whereas criminal liability can only be avoided solely in respect of the conclusion of a cartel agreement recognised as a crime.

For this purpose, the company must satisfy all of the following conditions<sup>8</sup>:

- at the time when the company filed its appeal, the relevant information and documents on the antitrust violation had not yet been submitted to the FAS of Russia;
- the company withdrew (subsequently withdrew) from the cartel or other anti-competitive agreement, or refused to engage in (continue engaging in) the concerted practices;
- the information and documents submitted by the company are sufficient to prove the antitrust violation.

A company is released from liability if it is the first to satisfy all the aforementioned conditions.

Officers of a company may avoid criminal liability for the conclusion of a cartel agreement recognised as a crime if they satisfy all of the following conditions<sup>9</sup>:

- the officer is the first co-perpetrator to voluntarily report the crime;
- the officer proactively facilitates disclosure of the crime and/or investigation;
- the officer provides reimbursement for the damages caused by the crime or otherwise atones for the damages that were caused;
- the officer's actions constitute no other corpus delicti.

Administrative liability of a company for an antitrust violation is mitigated by imposing a minimal fine on the company. To mitigate liability, a company must satisfy the following conditions<sup>10</sup>:

- the company admits to the commission of the antitrust violation;

<sup>8</sup> Note 1 to Article 14.32 of the Code of the Russian Federation on Administrative Offences (hereinafter the "RF Code on Administrative Offences").

<sup>9</sup> Note 3 to Article 178 of the RF Criminal Code.

<sup>10</sup> Note 5 to Article 14.32 of the RF Code on Administrative Offences.

- the company withdraws (subsequently withdraws) from the cartel or other anti-competitive agreement, or refuses to engage in (continue engaging in) the concerted practices;
- the information and documents submitted by the company are sufficient to establish commission of the antitrust violation.

## **4. Adopted amendments to the Antitrust Regulation of the Russian Federation**

The following amendments to antitrust legislation were adopted and entered into force in 2019–2022:

- a ban on the establishment of new unitary enterprises and their activities in competitive markets, except:
  - to establish a unitary enterprise as provided for by federal laws or acts of the executive authorities of the Russian Federation;
  - to support the activities of the federal executive authorities in extremely important areas of the state (e.g. defence, fire safety);
  - activities in the sectors of natural monopolies;
  - to support the living conditions of the population in the Far North and areas equivalent to the Far North;
  - activities in the sphere of radioactive waste management;
  - where there is the need to eliminate the consequences of an emergency, as requested by the senior official of a constituent entity of the Russian Federation.<sup>11</sup>
  - an increase, from RUB 400 million to RUB 800 million, in the annual revenue threshold starting from which the approval of the transactions of legal entities and individual entrepreneurs is subject to antimonopoly control<sup>12</sup>;

<sup>11</sup> Federal Law No. 485-FZ dated 27 December 2019 “On Amendments to the Federal Law “On State and Municipal Unitary Enterprises” and the Federal Law ,On Protection of Competition”.

<sup>12</sup> Federal Law No. 11-FZ dated 16 February 2022 “On Amendments to the Federal Law “On Protection of Competition” and Article 1 of the Federal Law “On the Fundamentals of State Regulation of Trade Activities in the Russian Federation”.

- a change in the procedure for the FAS of Russia to approve transactions for 2022: transactions involving the assets of an entity with a book value of between RUB 800 million and RUB 2 billion require only that the FAS of Russia be notified after the completed transaction<sup>13</sup>;
- basic criteria and conditions have been adopted for classifying services in the sector of natural monopolies<sup>14</sup>;
- the possibility for SME to pay an administrative fine for a violation of the antitrust legislation in the amount of half of its size<sup>15</sup>;
- state or municipal preferences are extended to natural persons who are not individual entrepreneurs and who apply the tax regime “tax on earned income”;
- a moratorium has been imposed on the application of antitrust legislation to decisions of the Government of the Russian Federation and the senior officials of state authorities.<sup>16</sup>

## 5. Proposed amendments to the Antitrust Regulation of the Russian Federation

The FAS of Russia is actively working on developing antitrust regulation further, and plans to ensure the adoption of the following important laws over the next few years.

### **“FIFTH ANTITRUST PACKAGE”**

The draft law, aimed at updating antitrust legislation considering the development of the digital economy, introducing more rigid requirements on the approval of transactions, subject to the preliminary consent of the antitrust authority (transactions with a price above RUB 7 billion for companies that have annual revenues of more than RUB 10 billion), and also introducing certain amendments to antitrust legislation (the so-called “fifth antitrust package”) is a key example of the most recent draft legislation work of the FAS of Russia that has been widely discussed<sup>17</sup>.

<sup>13</sup> Federal Law No. 286-FZ dated 14 July 2022 “On Amendments to the Federal Law ‘On Advertising’ and the Federal Law ‘On Amendments to Certain Legislative Acts of the Russian Federation’”.

<sup>14</sup> Recommendation No. 15 of the Board of the Eurasian Economic Commission dated 19 April 2022 “On the Basic Criteria and Conditions for Classifying Services in the Sector of Natural Monopolies”.

<sup>15</sup> Federal Law No. 41-FZ dated 6 March 2022 “On Amendments to the Code of Administrative Offences of the Russian Federation”.

<sup>16</sup> Federal Law No. 286-FZ dated 14 July 2022 “On Amendments to the Federal Law ‘On Advertising’ and the Federal Law ‘On Amendments to Certain Legislative Acts of the Russian Federation’”.

<sup>17</sup> Draft Federal Law “On Amendments to the Federal Law ‘On the Protection of Competition’” (<https://sozd.duma.gov.ru/bill/160280-8>).

In particular, it is planned to tighten the regulation of digital markets: to introduce the concept of “network effects”, prohibit the monopolistic activities of persons who use computer software on the Internet to conduct transactions between sellers and buyers.

As for the regulation of transactions and other actions subject to preliminary consent by the antitrust authority, the draft law stipulates an extension of time for the antitrust authority to consider petitions for the conclusion of such transactions and other actions (in particular in the case of cross-border transactions), implementation of the system of an expert examination of the procedures for considering applications for the approval of transactions subject to control. The rules on expert examinations are largely taken from procedural legislation, with some differences (e.g. free of charge expertise is allowed, and the expert cannot be a competitor of the applicant).

Among other amendments, it is also proposed that the requirement to provide notarised copies of documents to the FAS of Russia in order to obtain prior approval for a transaction be lifted.

### **INTENSIFICATION OF STATE CONTROL OVER FOREIGN INVESTMENTS IN THE RUSSIAN FEDERATION**

Draft laws developed by the FAS of Russia<sup>18</sup> propose extending the special regime used to regulate foreign investments in business companies of strategic importance for national defence and state security to other categories of legal entities, in particular, business entities that are recognised as the economic core of a locality, that have a dominant position on the commodity market, or that are the sole producers or suppliers of products in Russia that are not controlled by a foreign investor, etc.

In addition, the Government Commission will approve transactions in respect of companies participating in a national project or a federal project, if the transaction is planned before the end of the term of implementation of such a project.

All transactions in which a foreign state or an international organisation that it controls acquires the right to dispose of at least 25% of shares (participation interests) in a Russian company will require the approval of the Government Commission.

Another draft law proposed by the FAS of Russia involves the expansion of activities that are deemed to be strategic for national defence and state security, and the strengthening of control over foreign investments in the fishing industry.<sup>19</sup>

<sup>18</sup> Draft Federal Law “On the Introduction of Amendments to Certain Legislative Acts of the Russian Federation regarding Improvements to Controls over Compliance with Legislation on the Exercise of Foreign Investments in the Russian Federation” (<http://regulation.gov.ru/projects>List/AdvancedSearch#npa=83472>), and also the draft Federal Law “On the Introduction of Amendments to the Code of the Russian Federation on Administrative Offenses” (<http://regulation.gov.ru/projects>List/AdvancedSearch#npa=83477>).

<sup>19</sup> Draft Law No. 95537-8 “On Amendments to the Federal Law ‘On the Procedure for Foreign Investments in Business Entities of Strategic Importance for National Defence and State Security’”.

## **DRAFT LAW ON THE PREVENTION OF UNREASONABLE PRICE INCREASES**

At the proposal of the FAS of Russia, antitrust bans should be extended to the concerted actions of business entities resulting in unreasonable price increases for socially important goods.<sup>20</sup>

The draft law affects price increases of more than 30% within 60 calendar days, which must be recorded by the Ministry of Economic Development of the Russian Federation, which also determines which goods are classified as socially important. In accordance with the instruction of the Government of the Russian Federation, the Federal Antimonopoly Service will assess the actions of companies to determine whether or not they have unreasonably raised prices.

If this draft law is adopted, these amendments will remain in force until the end of 2024.

## **REFORM OF REGULATION ON THE ACTIVITIES OF NATURAL MONOPOLIES**

An important proposal of the FAS of Russia is a plan to change how the activities of natural monopolies are regulated.<sup>21</sup> According to the FAS of Russia, the current legislation on natural monopolies restrains the transition of natural monopolies to competitive markets by formally defining a broad list of areas of activities of natural monopolies.

The FAS of Russia proposes supplementing the Law on Natural Monopolies with a new article introducing the concept of an agreement on the terms and conditions of the regulated activities of a natural monopoly. Such an agreement may be entered into if state regulation of tariffs has been imposed for at least five years. The agreement may provide for the compensation of the difference between the company's expenses and those taken into account when setting tariffs at the expense of the budgets of the Russian Federation or its constituent entities.

It is also proposed that decisions on the imposition, amendment, or termination of the regulation of companies operating in the railway transportation, services in transport terminals, ports and airports, telecommunication and postal services, and services for the use of inland waterway infrastructure shall be taken by the natural monopoly regulatory authority based on an analysis of competition on the relevant market.

<sup>20</sup> The FAS of Russia has developed a draft law to prevent unreasonable price increases (<https://fas.gov.ru/publications/23741>).

<sup>21</sup> Draft Federal Law "On Amendments to the Federal Law 'On Natural Monopolies'" (<http://regulation.gov.ru/p/125663>).

# Contacts



**Falk Tischendorf**

Rechtsanwalt | Partner  
Managing Partner in Russia

**ADVANT Beiten**

[Falk.Tischendorf@advant-beiten.com](mailto:Falk.Tischendorf@advant-beiten.com)



**Alexander Bezborodov**

Attorney-at-law | LL.M. | Partner

**ADVANT Beiten**

[Alexander.Bezborodov@advant-beiten.com](mailto:Alexander.Bezborodov@advant-beiten.com)

**ADVANT Beiten** in Russia

Turchaninov Per. 6/2

119034 Moscow

T: +7 495 2329635

[www.advant-beiten.com](http://www.advant-beiten.com)

# Our offices

## BEIJING

Suite 3130 | 31st floor  
South Office Tower  
Beijing Kerry Centre  
1 Guang Hua Road  
Chao Yang District  
1000020 Beijing, China  
[beijing@advant-beiten.com](mailto:beijing@advant-beiten.com)  
T: +86 10 85298110

## DUSSELDORF

Cecilienallee 7  
40474 Dusseldorf  
PO Box 30 02 64  
40402 Dusseldorf  
Germany  
[dusseldorf@advant-beiten.com](mailto:dusseldorf@advant-beiten.com)  
T: +49 211 518989-0

## HAMBURG

Neuer Wall 72  
20354 Hamburg  
Germany  
[hamburg@advant-beiten.com](mailto:hamburg@advant-beiten.com)  
T: +49 40 688745-0

## BERLIN

Luetzowplatz 10  
10785 Berlin  
Germany  
[berlin@advant-beiten.com](mailto:berlin@advant-beiten.com)  
T: +49 30 26471-0

## FRANKFURT

Mainzer Landstrasse 36  
60325 Frankfurt / Main  
Germany  
[frankfurt@advant-beiten.com](mailto:frankfurt@advant-beiten.com)  
T: +49 69 756095-0

## MOSCOW

Turchaninov Per. 6/2  
119034 Moscow  
Russia  
[moscow@advant-beiten.com](mailto:moscow@advant-beiten.com)  
T: +7 495 2329635

## BRUSSELS

Avenue Louise 489  
1050 Brussels  
Belgium  
[brussels@advant-beiten.com](mailto:brussels@advant-beiten.com)  
T: +32 2 6390000

## FREIBURG

Heinrich-von-Stephan-Strasse 25  
79100 Freiburg im Breisgau  
Germany  
[freiburg@advant-beiten.com](mailto:freiburg@advant-beiten.com)  
T: +49 761 150984-0

## MUNICH

Ganghoferstrasse 33  
80339 Munich  
PO Box 20 03 35  
80003 Munich  
Germany  
[munich@advant-beiten.com](mailto:munich@advant-beiten.com)  
T: +49 89 35065-0

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Falk Tischendorf

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