

Monopoliya Nyet:

New Developments in Russian Anti-Monopoly Law

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While everybody has been watching the development of China's Anti-Monopoly Law they have perhaps missed one of the world's more significant changes in anti-monopoly law in the Russian Federation. For a variety of reasons the Russian Federal Anti-Monopoly Service¹ (FAS) has become very active over the last year and a half. In 2008 it handled 6,540 cases of which 2,978² or 45% were against the so-called "administrative monopolies" such as state-owned enterprises, municipal governments and even ministries of the federal government.

The Federal Anti-Monopoly Service has a broad mandate and this is one of the reasons for their high degree of activity. In addition to traditional antitrust issues such as abuses of dominant position, cartels and mergers under the law *On the Protection of Competition*,³ they also have responsibility for government procurement procedures,⁴ the electrical power industry,⁵ foreign investment in strategic industries,⁶ natural monopolies,⁷ and advertising.⁸

The law *On the Protection of Competition* is quite broad in its own right, containing provisions on the prohibition of unfair competition, particularly with respect to intellectual property, in Article 14; administrative monopolies, in Articles 15 and 16, tenders in Article 17, and state or municipal aid; in Articles 19 to 21.

¹ In Russian the Федеральная антимонопольная служба, web site: <http://www.fas.gov.ru/>.

² FAS Press Release, Игорь Артемьев представил доклад «О состоянии конкуренции в Российской Федерации» (Igor Armetiev presented the report "On the Status of Competition in the Russian Federation") July 14, 2009, available online at: http://www.fas.gov.ru/news/n_25348.shtml.

³ О защите конкуренции – On the Protection of Competition, as amended by amendments adopted 26.07.2006 as Federal Law No. 135 FZ.

⁴ Under the law "О размещении заказов на поставки товаров, выполнение работ, оказание услуг для государственных и муниципальных нужд – On the Procurement of Goods, Works, and Services for State and Municipal Needs," adopted 21.07.2005 as Federal Law No. 94 FZ.

⁵ Under the law "Об электроэнергетике – On the Electrical Power Industry," adopted by the State Duma on February 21, 2003, and the Federal Council on March 12, 2003, as amended.

⁶ Under the law "О порядке осуществления иностранных инвестиций в хозяйственные общества, имеющие стратегическое значение для обеспечения обороны страны и безопасности государства – On the Procedures for Foreign Investment in Business Entities of Strategic Importance to National Defence and Security," Federal Law No. 57 – FZ adopted by the State Duma on April 2, 2009 and by the Federal Council on April 16, 2009.

⁷ Under the law "О естественных монополиях – On Natural Monopolies," adopted 17.08.1995 as Federal Law No. 147 FZ.

⁸ Under the law "О рекламе – On Advertising," adopted 13.03.2006 as Federal Law No. 38 – FZ.

But without political backing such broad powers have little meaning, and previously the Russian Federal Anti-Monopoly Service was not considered a major government authority.

What has changed is that it since Dmitri Medvedev became President and Vladimir Putin assumed the ostensibly lesser role of Premier in March 2008 the priorities for reform have changed. Medvedev in particular wants an increase in the role of the private sector in the economy. It appears that he is not alone, and Putin has been responsible for implementing some of the changes by giving strong support to FAS.

Since the submission of the “*Report on the State of Competition in the Russian Federation*”⁹ June of 2008 and the demand by Prime Minister Putin to the FAS to “wake-up,” FAS has been very active recently in many ways.

In March of 2009 the Russian Ministry of Industry and Trade proposed measures to deal with the financial crisis that included subsidized interest rates on consumer loans for items such as cars. But when it was proposed that only cars certain Russian companies would be eligible, the FAS threatened to take the Ministry to court for limiting competition under Article 15 of the law *On Protecting Competition*.¹⁰

Ultimately the list of eligible cars was expanded through negotiations,¹¹ and the FAS then proceeded to argue for the expansion of the banks eligible to provide the soft loans.¹²

Of broader significance is the adoption by the Duma of what is known as the “Second Anti-Monopoly Package” consisting of amendments to the law *On the Protection of Competition*, the *Code of Administrative Violations of the Russian Federation*, and the *Criminal Code*.¹³

⁹ Доклад о состоянии конкуренции в Российской Федерации, submitted to the Government in June, 2008; released publically October 31, 2008; and available in Russian at <http://www.fas.gov.ru/competition/goods/20916.shtml> .

¹⁰ Maria Antonova, “Anti-Monopoly Service Threatens Car List Suit,” Moscow Times, March 13, 2009.

¹¹ “ФАС одобрила расширение списка “льготных” автомобилей – FAS approves the Expansion of the List of “soft” vehicles,” ИА “Клерк.Ру”. [Отдел новостей](http://www.klerk.ru/law/news/?155775); available on line at: <http://www.klerk.ru/law/news/?155775> .

¹² Нина Егоршева, “В списках не значатся: ФАС предлагает расширить перечень банков, участвующих в льготном автокредитовании – The Lists do not Appear : FAS proposes to Expand the List of Banks participating in the Preferential Car Loans,” Российская Газета Федеральный Выпуск Но. 5005 (181) ,September 25, 2009; available online at: <http://www.rg.ru/2009/09/25/fas.html>.

¹³ Второй антимонопольный пакет, available online in Russian at: <http://www.fas.gov.ru/competition/20349.shtml> .

The FAS had sought many of the amendments to clarify its authority to bring actions, particularly with respect to cartels. Highlights of the amendments include:

- The law *On the Protection of Competition* was expanded to clarify that it covered not only agreements but also actions.
- The definition of “a group of persons” was expanded.
- The concepts of “monopolistically high” and “monopolistically low” prices were clarified by having defined by both the cost method and the comparable markets method.
- The legislative threshold of 35% of a market necessary to hold a dominant position was weakened in favor of assessments of actual control.
- The prohibitions on vertical agreements previously in Article 11(1) were revoked. These included prohibitions on territorial, scope or sales restrictions. Exclusive conditions are now not expressly prohibited. However this has been replaced by a *Resolution on the Instances of Admissibility of Agreements between Economic Entities*.¹⁴
- The thresholds for notifiable transactions were increased.
- The right of FAS to conduct investigations was broadened.
- A limitation period for violations was introduced.
- Fines were increased and the leniency program was tightened.
- Criminal penalties were added, particularly for cartels.

Hopefully these developments will lead to greater competition in the Russian marketplace, and a more level playing field for foreign investors and distributors in the Russian Federation. But there is still work to do. Article 14(2) of the law *On the Protection of Competition* prohibits the abuse of intellectual property rights. Unfortunately there are no guidelines as yet as to what constitutes abuse.

Problem areas are being worked on though. On October 1st the head of FAS announced that the rules for foreign investors are to be simplified through amendments to the law on foreign investments in strategic industries.¹⁵ Russia is changing.

¹⁴ О Случаях допустимости Соглашений Между Хозяйствующими Субъектами, Постановление от 16 июля 2009 г. No. 583, Government of the Russian Federation; available online in Russian at: <http://www.kadis.ru/texts/index.phtml?id=38362> .

¹⁵ ФАС откроет шлюзы Для притока иностранных инвестиций в Россию - FAS will open the Floodgates to an Influx of Foreign Investment in Russia,” РБК Daily, October 1, 2009; available online at: <http://www.rbcdaily.ru/2009/10/01/focus/433990>