

Legal Newsletter – “Changes in Legislation on Competition”

August, 2009

We would like to draw your attention to the amendments¹ to the Federal Law “On Competition Protection” (hereinafter – “**Competition Law**”) that have recently been introduced. The new requirements concern, *inter alia*, the following issues:

- **Area of regulation of the Competition Law**
The amendments specify the applicability of the Competition Law to arrangements made out of the territory of Russia which influence on competition in Russia. The new amendments broaden the sphere of the Competition Law and nullify the provision according to which the Competition Law applied to the agreements which lead or could lead to a restraint on competition. Previous version of the Competition Law applies solely to agreements. New version of the Competition Law applies to arrangements (agreements and actions) which may otherwise influence on competition.
Thus, the Competition Law now applies to arrangements made out of the territory of Russia between Russian and(or) foreign companies or organizations if the arrangements are reached in respect of the production funds and(or) intangible assets or shares, rights in relation to companies having business in Russia or to arrangements otherwise influencing on competition in Russia;
- **Group of persons**
The new amendments extend the definition of “group of persons” by adding a new ground for recognition of legal entities and (or) individuals as a group of

persons. It is stipulated that a commercial company, individuals and (or) legal entities included in the group under any ground specified in the Competition Law shall form one group in case such persons due to their joint participation or granted powers have more than 50 percent of the total number of votes carried by the voting shares in such commercial company;

- **Dominant position in the market**
The new amendments add the list of situations where a company is deemed a company having a dominant position in the market. A company can be now deemed to occupy a dominant position in the market if it has a share in the relevant market not exceeding 35% and if it can influence on the general conditions of the commodities circulation in the relevant market under certain conditions specified in the Competition Law;
- **Non-discriminatory rules for natural monopolies**
The new amendments specify subject of the rules issued by the Russian Government with regard to non-discriminatory access to the commodities market and services provided by the natural monopolies. The rules aim to increase the level of information availability for the customers, assessment of the conditions of access to the commodities market and services provided by the natural monopolies, use of standard agreements, etc.;
- **Prohibition of “vertical” agreements**
The new amendments prohibit “vertical” agreements (with certain exceptions) if:
 - such agreements lead or can lead to a resale price fixing;
 - by virtue of such agreements the seller of the commodities prevents the admission of the competitor’s commodity to the sale (except for the agreements on sale of goods under the trade mark or trade name of the seller or producer).
- **Monopoly high and monopoly low prices**

¹ Federal Law No.164-FZ as of 17.07.2009;
Federal Law No.173-FZ as of 17.07.2009

The new amendments clarify the provisions in consideration of the monopoly high and monopoly low prices of the commodities.

A monopoly high price means a price determined by a company having a dominant position in the market if the following conditions are met simultaneously:

- (1) according to the previous version of the Competition Law, the price exceeds expenses and income for manufacture and the final realization of the commodities;
- (2) according to the new version of the Competition Law, it is a price that exceeds the price which has been formed in competitive conditions in the commodities market in Russia or out of the Russian territory comparable with the composition of the buyers and sellers, access conditions, the state regulation (hereinafter - “**comparable market**”) (e.g., the price formed by increasing or maintaining the price for the commodities under certain conditions specified in the new version of the Competition Law).

A monopoly low price means a price determined by a company that has a dominant position in the market if the following conditions are met simultaneously:

- (1) according to the previous version of the Competition Law, the price is lower than expenses and income for the manufacture and the final realization of the commodities;
- (2) according to the new version of the Competition Law, it is also when the price is lower than the price which developed in the conditions of competition in the comparable commodities market in Russia or out of the boundaries of Russia (e.g., a price formed by decreasing or maintaining the price for the commodities under certain conditions specified in the new version of the Competition Law).

The new amendments also determine exemptions from situations of the recognition of the monopoly high and monopoly low prices for the commodities;

- **State and municipal preferences**

The new amendments provide for the requirements (more strictly in comparison with the previous version of the Competition Law) on granting state and municipal preferences under the preliminary consent of the antimonopoly authorities.

The amendments broaden the definition of the preferences. According to new version of the Competition Law preferences mean arrangements of favorable conditions for the activity of the entities created through the transfer of state/municipal property or the granting of civil rights according to the previous version of the Competition Law *as well as mean the arrangements of favorable conditions for the activity of these entities by granting other property privileges according to the new amendments.*

The new changes maintain that the preferences are granted, in general, for social purposes (e.g., social protection, labour protection, culture development) by the federal executive bodies, authorities of the Russian subjects and local governments, as well as other bodies or organizations which are executing the powers of the above-said authorities under the preliminary consent of the antimonopoly authorities (with some exemptions).

The new changes to the Competition Law clarify certain terms and conditions with respect to granting preferences.

Under the new amendments, the antimonopoly authorities are entitled to appeal to the court against the regulations of the authorities the Russian Federation which provided preferences in conflict with the procedure for granting preferences. The antimonopoly authorities also have the right to issue instructions in respect to the return of property (property rights) which has been granted.

- **Extension of powers of the antimonopoly authorities**

New amendments extend the powers of the antimonopoly authorities in respect to carrying out in-office inspections for the purposes of the antimonopoly legislation compliance test. In general, the antimonopoly authorities are entitled to inspect Russian authorities as well as companies and individuals every three year (however, under certain conditions inspections

can be unscheduled). The new amendments stipulate the procedure for carrying out inspections.

- **Increase of thresholds triggering control filing obligations**

The new amendments increase the thresholds triggering control filing obligations. Accordingly, transactions with shares, property or rights in respect of commercial entities listed in the Competition Law should be executed upon a preliminary consent of the antimonopoly authorities in one of the below named cases:

- the aggregate value of the assets according to the last balance sheet of the acquiring company acquiring and its group and the target company and its group exceeds RUR 7 000 000 000 (according to the previous version of the Competition Law - RUR 3 000 000 000) and (i) the aggregate value of the assets of the target company and its group exceeds RUR 250 000 000 (according to the previous version of the Competition Law - RUR 150 000 000) or (ii) if one of the said persons is included into the register of economic units with a share in the market of a certain commodity exceeding thirty five per cent or occupy a dominant position in the market of a certain commodity (hereinafter “**Register**”), or
- the aggregate sales turnover of the acquiring company and its group and target company and its group received within the last calendar year exceeds RUR 10 000 000 000 (according to the previous version of the Competition Law - RUR 6 000 000 000) and (i) the aggregate value of the assets of the target company and its group exceeds RUR 250 000 000 (according to the previous version of the Competition Law - RUR 150 000 000) or (ii) if one

of the said persons is included into the Register.

The preliminary consent of the antimonopoly authorities should be obtained in case of establishment of a new commercial company the charter capital of which is paid by shares (participation shares) and (or) property of another commercial company or in case the new company acquires controlling rights with respect to another commercial company in one of the below named cases:

- the aggregate value of the assets according to the last balance sheet of the founders (their groups) and the company (its group) whose shares/property are transferred to the charter capital of the new company exceeds RUR 7 000 000 000 (according to the previous version of the Competition Law - RUR 3 000 000 000), or
- the aggregate sales turnover of the founders and the company whose shares/property are transferred to the charter capital of the new company, received within the last calendar year exceeds RUR 10 000 000 000 (according to the previous version of the Competition Law - RUR 6 000 000 000), or
- if the company, whose shares/property are transferred to the charter capital of the new company is included into the register.

The new amendments also increase two-fold the thresholds for the notification of the antimonopoly authorities;

- **Exception from requirements regarding obtaining preliminary consent of antimonopoly authority**

Pursuant to the new amendments the preliminary consent of the antimonopoly authority is not required in case the transactions are performed by persons - members of one group, if such persons belong to one group due to the fact that one of them has more than 50 votes carried by the voting shares in the charter capital of the other.

- **Persons who are entitled to submit an application/notification to the antimonopoly authorities**

The new amendments specify a list of persons who are entitled to submit an application for obtaining the preliminary consent / notification to the antimonopoly authorities. The previous version of the Competition Law stipulated that an application/notification could be submitted by any person interested in the transaction/action or a person who was obliged to notify pursuant to the Competition Law provisions. The new version of the Competition Law provides that an application/notification can be submitted only by the following persons:

- (1) persons performing mergers and accessions;
- (2) person(s) making a decision on setting-up a company;
- (3) persons acquiring shares, property, assets or rights in relation to the entities; or
- (4) persons obliged to notify pursuant to the Competition Law provisions.

Thus, according to the new amendments, a seller or a target entity can not submit an application to the antimonopoly authorities to obtain a preliminary consent of the antimonopoly authority in respect of the transaction on acquisition of shares, assets or rights in relation to the companies;

- **List of documents to be submitted to the antimonopoly authorities**

The new amendments add/specify the list of documents to be submitted to the antimonopoly authorities along with the application/notification. The following documents/information have been added: information on the total balance value of the applicant and its group, information on the total balance value of the target and its group (or an inquiry that the applicant possesses this information), a list of companies who possess more than a 5% share in the applicant² and informa-

² According to the Order of FAS No. 129 as of April 17, 2008, information on the total balance value of the applicant and its group, information on the total balance value of the

tion on persons to whose benefit more than 5% of shares of the applicant are owned by nominal holders (including persons situated in states with favorable tax regime or states in which it is not provided a disclosure of information on companies (offshore))³.

In case of failure to provide all the documents specified in the Competition Law, an application for obtaining a preliminary consent of the antimonopoly authority is considered as not submitted.

- **Consideration of cases on administrative offences**

The new amendments clarify the procedure for the consideration of cases of administrative offences. New version of the Competition Law provides for a limitation period which constitutes 3 years. It means that, in general, administrative proceedings can not be initiated after expiration of 3 years from the moment of the commission of the administrative offence.

- **Procedure for the conclusion of agreements in relation to state and municipal property**

The new amendments specify the procedure for the conclusion of agreements in relation to state and municipal property solely pertaining to these kinds of auction with certain exemptions specified in the Competition Law.

The amendments described herein as well as certain others not covered in this Newsletter shall come into force as of the expiration of 30 days from the date of their official publication.

target and its, a list of companies who possess more than a 5% share in the applicant should be submitted to the antimonopoly authorities along with the application/notification. Thus, the list of above mentioned documents is not new and has been just included in the Competition Law.

³ The antimonopoly authorities has required a disclosure of the beneficiary in course of providing documents and information. However, it was not a legislative requirement. The new amendments made this requirement obligatory under the Competition Law.

These amendments were published in “Rossiskaya Gazeta” on July 23, 2009. The amendments regarding the procedure for concluding agreements in relation to state and municipal property come into force from the date of their official publication, save for several provisions. The amendments were published in “Rossiskaya Gazeta” as of July 23, 2009.

Therefore, should you have any questions with regard to the changes in the Russian legislation as described herein and need any additional assistance, please do not hesitate to contact us.

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This BBH Newsletter is to serve as a general piece of information in respect of certain important news and events taking place in the area of the regulation of competition in Russia. The contents hereof do not, and shall not, serve as legal advice of any kind.

In the case of your interest, please feel free to contact us and request personal information, advice and/or consultation.

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