

RUSSIA ALERT

AMENDMENTS TO THE RUSSIAN LAWS ON PROTECTION OF COMPETITION

On August 23, 2009, the Federal Law of the Russian Federation No. 164-FZ On Amendments to the Federal Law *On Protection of Competition and Certain Statutes of the Russian Federation* dated July 17, 2009, (the “Law”) came into force.

The Law has introduced the following key changes—

EXPANDED APPLICATION OF THE FEDERAL LAW ON PROTECTION OF COMPETITION

The Law expands the scope of application of the Federal Law *On Protection of Competition*. Thus, the Federal Law *On Protection of Competition* will apply—

- not only to agreements, but also to the actions of foreign and/or Russian individuals or entities with respect to fixed assets or intangible assets located in the Russian Federation or shares/interests in business entities, rights with respect to business companies operating in Russia or otherwise influencing the competition in Russia
- to agreements not only with respect to shares/interests in Russian business entities, but also shares/interests in foreign business companies operating in Russia or otherwise influencing the competition in Russia.

THE LAW TREATS A BUSINESS ENTITY AS HAVING A DOMINANT POSITION IRRESPECTIVE OF ITS MARKET SHARE

The Law allows the antimonopoly authority to treat a business entity as having a dominant position even if its share of the relevant commodity market is less than 35 percent (but exceeds the shares of the other market participants), provided that all of the following conditions are met (absent any other grounds for the position of the entity to be considered dominant)—

- the business entity is in a position to unilaterally determine the prices of a commodity and exercise dominant influence over the general terms of sale of the commodity in the relevant commodity market
- the access of new competitors to the relevant commodity market is impeded, including due to economic, technological, administrative and other restrictions

- the commodity sold or purchased by the business entity may not be replaced with another commodity for consumption purposes (including for industrial consumption purposes)
- the change in the price of the commodity does not cause corresponding diminution in demand for the commodity.

It should be noted that previously the Federal Law *On Protection of Competition* permitted a business entity whose share of the relevant market is less than 35 percent to be treated as having a dominant position only in case of so-called “collective domination” or in other cases provided by the federal laws (in particular, the Federal Law *On the Electric Power Industry* and the Federal Law *On Communications* contain such provisions). Such clauses of the Federal Law *On Protection of Competition* remain effective.

AMENDMENT OF DEFINITIONS OF MONOPOLISTIC HIGH AND LOW PRICES

The Law expands the definition of monopolistic high and low prices (according to the Federal Law *On Protection of Competition*, fixing and maintaining such prices constitute an abuse of the dominant position). For the purposes of definition of the monopolistic high and low prices, the Law—

- keeps the cost-based criterion (i.e., correlation with the necessary costs of production and sale of the relevant commodity and the profit)
- modifies the definition of the criterion of correlation with prices in comparable markets: first, it specifies that the comparability of such markets shall be evaluated, inter alia, by considering state regulatory measures (including tax and customs tariff regulation); second, it makes the application of such criterion conditional upon the existence of a comparable market in or outside Russia
- introduces the criterion of economic feasibility of the price dynamics. A price fixed or maintained by a dominant business entity may be treated as monopolistic high or low if the increase, decrease or maintenance thereof does not reflect the relevant commodity production cost dynamics, changes in the vendors and purchasers in the market or the regulatory environment of a particular commodity, including the state regulation thereof.

The Law introduces an exception to the monopolistic high or low price rules for products deriving from innovation activities.

AMENDED RESTRICTIONS WITH RESPECT TO VERTICAL AGREEMENTS

- The Law provides that the general prohibitions set forth in Article 11(1) of the Federal Law *On Protection of Competition* do not apply to “vertical agreements” (i.e., agreements between a noncompeting seller and buyer of a commodity). However, the provision of Article 11(2) of the Federal Law *On Protection of Competition* prohibiting any agreements between business entities or their concerted actions that have or may have any anticompetitive effect, including “vertical agreements” (with the exception of commercial concession agreements or agreements entered into between business entities with the market share of no more than 20 percent) remains in effect
- The Law expressly prohibits “vertical agreements” (with the exception of commercial concession agreements or agreements entered into between business entities with market share of no more than 20 percent), if—

- (i) such agreements result or may result in fixing of the commodity resale price
- (ii) under such agreement the seller of the commodity requires the purchaser to bar a competitor's commodity from sale.

EXPANDED POWERS OF THE ANTIMONOPOLY AUTHORITY

- The Law expands the list of binding directives that may be issued by an antimonopoly authority to include the following—
 - (i) directives requiring a certain volume of products to be sold through a commodity exchange
 - (ii) directives requiring securing consent of the antimonopoly authority for the particular procedures to determine the starting price for sales at the commodity exchange, in accordance with the procedure established by the government of the Russian Federation.
- The Law substantially amends and elaborates the provisions governing the powers of the antimonopoly authority in conducting antimonopoly compliance audits, including—
 - (i) regulations regarding regular audits, which may be conducted once every three years with respect to each legal entity
 - (ii) definition of the grounds and procedures for extraordinary audits
 - (iii) inclusion of the results of regular and extraordinary audits in the list of grounds for the initiation of investigation procedures in connection with the breach of antimonopoly laws.

STATUTE OF LIMITATIONS FOR ANTIMONOPOLY CASES

The Law provides that no antimonopoly proceedings may be initiated, and, if initiated, must be dismissed, upon expiration of a three-year period from the date of the alleged offence and, in case of a continuing breach, the date on which the alleged offence was remedied or detected.

NEW GROUP OF PERSONS TEST

The persons that, pursuant to one of the existing criteria, belong to one and the same group of persons are now treated as belonging to the same group of persons with a business entity (partnership) where such persons by virtue of their participation in such company or partnership or powers granted by other persons jointly hold over 50 percent of the total votes represented by the voting shares/interests of such business entity (partnership).

INCREASE OF THRESHOLDS FOR THE APPLICATION OF ANTIMONOPOLY CONSENT OR NOTIFICATION REQUIREMENTS

- The total asset value threshold triggering a prior antimonopoly consent requirement has been increased:
 - (i) *in case of formation of a business entity*, if the total value of assets of the founders and entities whose shares/interests are contributed to the company so formed (representing at least 1/3 of all interests or 25 percent of shares) exceeds RUR 7 billion or if the aggregate earnings of such persons for the previous calendar year exceed RUR 10 billion

(ii) *in case of transactions involving acquisition of interests/shares, or fixed assets of, or rights with respect to, business entities*), the above thresholds (RUR 7 billion and RUR 10 billion, respectively) apply to the total value of assets of the purchaser and the target entity the shares/interests or property of, or rights in respect to which, are acquired, and of all participants of the groups of persons of both the purchaser and the target, provided that the total value of assets of the target entity and its group of persons exceeds RUR 250 million.

- The total value of assets owned by parties to the transactions requiring subsequent antimonopoly notification has been increased from RUR 200 million to RUR 400 million.

THE LAW LIFTS THE PRIOR ANTIMONOPOLY CONSENT REQUIREMENT WITH RESPECT TO CERTAIN INTRAGROUP TRANSACTIONS

No prior antimonopoly consent is required where a transaction is made between entities that qualify as members of the same group by virtue of participation of one entity in another business entity (partnership) in which the first entity owns more than 50 percent of the total number of votes attached to the voting shares/interests of the latter business entity (partnership).

LIABILITY FOR BREACH OF ANTIMONOPOLY LAWS

In addition to the Law, certain statutes were adopted as part of the so-called “second antimonopoly package” that establish more stringent liability for breach of antimonopoly laws:

- Federal Law No. 160-FZ *On Amendments to the Code of Administrative Offences of the Russian Federation and Certain Statutes of the Russian Federation*, dated July 17, 2009, that came into force on August 23, 2009, and provide, in particular, for introduction of administrative liability for the abuse of dominant position by a business entity whose share of the relevant commodity market is less than 35 percent, and for illegal coordination of economic activities, more stringent liability for entering into anticompetitive agreements and concerted anticompetitive actions, and introduction of additional releases for an entity voluntarily disclosing the fact that it has entered into an agreement or has engaged in concerted actions prohibited by antimonopoly laws.
- Federal Law No. 216-FZ *On Amendments to Article 178 of the Criminal Code of the Russian Federation* effective from November 1, 2009, which details the elements of acts that qualify as criminal violation of antimonopoly legislation and provides for more stringent punishment for such offences.

CONTACT INFORMATION

If you have questions about this alert, please contact:

Alexey Kondratchik.....akondratchik@akingump.com 7.495.783.7837 Moscow
Andrei V. Danilovavdanilov@akingump.com 7.495.783.7839 Moscow