



The “Third Antimonopoly Package” – A Further Update

13 December 2011

The Third Antimonopoly Package (TAP) introducing amendments to the Russian competition legislation was adopted by the State Duma¹ on 22 November 2011 and signed by President Medvedev on 6 December 2011².

The TAP enters into force on 6 January 2012³.

A number of important changes were made to the draft TAP at the time of its 2nd reading in the State Duma (although it should be noted that a large portion of such further changes proposed by FAS were not accepted).

Below we set out a revised and expanded version of our earlier summary of the key amendments offered by the TAP - which summary is now based on the final adopted version of the TAP.

The “Third Antimonopoly Package” of Reforms – A Set of Measured Amendments to Russian Competition Law

The Third Antimonopoly Package offers a clearer set of competition law rules for business. At the same time, in certain areas the scope of changes has so far been more modest than could have been expected.

¹ The lower Chamber of the Russian Parliament.

² Federal Law No. 401-FZ dated 6 December 2011.

³ Except for Article 19.2 which enters into force on 1 January 2012.



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The process of drafting the TAP commenced shortly after the adoption of the Second Antimonopoly Package in 2009, and has been driven by the Federal Antimonopoly Service (FAS), the Russian competition authority.

In part, the proposed amendments were made in response to experience stemming from the enforcement practice, and in part – in response to the comments by the Organisation for Economic Developments (“OECD”) in the process of Russian accession, as well as recommendations from major competition jurisdictions such as the EU.

The amendments of the TAP tackle several wide groups of matters, such as (i) clarifying core anti-trust restrictions applicable to business, (ii) strengthening responsibility of the authorities, and (iii) improving administrative enforcement procedures.

Below we focus only on some of the key amendments.

Behavioral Matters

The central part of the Third Antimonopoly Package appears to be in a clearer demarcation between different types of anticompetitive agreements and actions, and differentiation of sanctions for those depending on the nature of a breach and degree of negative effects on competition.

Cartels

In line with the FAS policy statements regarding competition law enforcement focus on cartels, the revised Article 11(1) now clearly states that it applies to agreements between competitors, or cartels.

The TAP provides for the list of outright prohibitions for cartels, and does not allow for the possibility to apply for an individual exemption for such practices.

The only exception from the ban on applying for admissibility of a prohibited horizontal agreement is made for certain types of joint

operation agreements. In particular, the TAP sets out the list of conditions that must be met by a joint operation agreement for it to be found admissible (such as the resulting direct foreign investments into Russia and benefits to consumers).

In addition, cartels are the only type of anticompetitive agreements in respect of which it is proposed to retain criminal liability (apart from the cases of repeated abuse of dominant position).

This legislative approach towards a stricter prohibition of cartels is consistent with the approach of the major antitrust jurisdictions.

Vertical Agreements

While FAS has stated on a number of occasions that vertical agreements represent much less concern than cartels and abuse of dominance, the TAP does not provide for material relaxation of related restrictions (such as formulation of a set of legitimate practices). However, some liberalization of the rules on vertical agreements is achieved by allowing to apply to FAS for individual exemptions for such agreements under Article 13.

Importantly, the definition of vertical agreements was changed to remove the condition for the parties to be non-competing entities, and to just leave reference to their capacity as seller and buyer. It is hoped that the revised definition will mean that, in the situation where, apart from sales to distributors, the producer also has its own distribution channel(s), it would still benefit from the more flexible regime applicable to most vertical agreements.

The TAP also expressly recognizes that agency agreements are not regarded as vertical agreements (and therefore exempted from the scope of competition law restrictions). That said, this does not represent any new exemption, but rather reiteration of the fact that a genuine agency relationship is not, by its nature, within the scope of antitrust control, as it does not involve any passing of title to the goods.

The hardcore restrictions on vertical agreements (namely, establishing resale price and exclusivity terms) have been revised to

allow the seller to set a maximum resale price (prior to the TAP, setting of any resale price was prohibited).

Unfortunately, the TAP does not clarify such issue as the interrelation between exempted vertical agreements and collective dominance.

Other Agreements Restricting Competition

The new Article 11(4) is an expanded version of the existing Article 11(2): it prohibits any agreement that lead, or may lead to restriction of competition (except for vertical agreements to which general exemptions apply). The revised version provides for the list of examples where an agreement may restrict competition (borrowed from the existing Article 11(1) on prohibited horizontal agreements).

Hence, the proposed provisions on other agreements restricting competition, apart from a certain drafting reshuffle, appear not to provide for any meaningful changes in terms of reducing the risks of overly broad interpretation of this general restriction.

Concerted Actions

As has been admitted by FAS on a number of occasions, the existing provisions on concerted actions and related enforcement practice lack the necessary evidential criteria and, consequently, are prone to allow the characterisation as concerted actions of so-called “parallel behaviour” of competitors which has been caused by common objective factors.

Pursuant to the TAP, it is proposed to clarify that concerted actions occur only where the participants of concerted actions have prior notice of the relevant behaviour due to a public announcement by one of them regarding taking respective actions.

Concerted actions are now dealt with in separate new Article 11.1, which allows for: (i) a clearer demarcation between prohibited agreements and concerted actions (in particular, it is stressed that actions on performance of the terms of an agreement should not be treated as concerted actions), and (ii) a stricter test (in comparison

with agreements) for triggering the prohibitions on concerted actions. Thus, in case of concerted actions, the relevant actions must lead to the specified consequences, whereas the rules for restricted agreements apply even where such agreements may lead to the specified consequences.

Moreover, pursuant to the TAP, restrictions on concerted actions do not apply if an aggregate share of the respective entities on a relevant market does not exceed 20%, and their individual shares do not exceed 8%. In contrast to the previous regime, the TAP also permits to apply for individual exemptions for concerted actions.

Intra-Group Arrangements

One of the most material improvements of the antitrust regime offered by the TAP is the exemption from the majority of restrictions (such as cartels, vertical agreements, anti-competitive agreements, co-ordination of economic activity and concerted actions) for certain qualifying intra-group arrangements.

In particular, intra-group arrangements are deemed to be exempted if (i) one of the participating entities controls the other participant, or (ii) both participating entities are controlled by the same person. For this exemption, the TAP introduces a concept of control, which is defined as the ability of a person to determine (directly or indirectly) decisions taken by a (controlled) legal entity by way of: (i) control of more than 50% of its voting equity and/or (ii) the performance of the functions of its management body.

However, the TAP also makes the following exception: the intra-group exemption does not apply to agreements between entities within the same group if such entities perform activities that are not allowed to be performed by a single entity in accordance with Russian law. This exception seems to be aimed at such cases as partnership between banks and insurance companies in consumer finance programmes with an exclusionary effect with regard to other market participants (according to Russian law, banking and insurance activities cannot be performed by the same entity). Therefore, it appears that the TAP confirms the FAS approach in a

number of recent cases on consumer finance that, even if a lending institution and an insurance company belong to the same group, this would not be treated as a safe-harbour from the restrictions on anti-competitive practices.

Agreements on IP Rights

Another important exemption offered by the TAP relates to agreements on granting/alienation of intellectual property rights, including trade names/trademarks. It is provided that such IP rights agreements are exempted from the restrictions of Article 11 (cartels, vertical agreements, anti-competitive agreements and co-ordination of economic activity).

Previously, the Competition Law provided for a similar exemption only with respect to abuse of dominant position.

It remains to be seen where the enforcement practice would draw the borderline between the legitimate conditions on the use of IP rights, and the terms which would go beyond the scope of rights of an IP owner (and would therefore not be covered by the exemption).

Co-Ordination of Economic Activity

Co-ordination of economic activity of commercial entities by a third party is a special concept of restricted behaviour under Russian competition law. Such co-ordination is prohibited if it results or may result in the types of behaviour by co-ordinated entities that are currently prohibited by Article 11(1) with respect to horizontal agreements. This concept is not sufficiently elaborated, and often results in disputes. More specifically, it is not certain to what extent this type of breach may apply to a supplier and its distribution network.

The TAP attempts to provide for certain exemptions from this catch-all prohibition. In particular, it is provided that (i) in order to constitute prohibited co-ordination, the co-coordinating entity must operate in a market different from that of the co-ordinated entities, (ii) co-ordination is prohibited only if it leads (rather than may lead) to prohibited consequences and (iii) co-ordination may be exempted

either by general exemptions on vertical agreements or by way of an individual application to FAS (under Articles 12 and 13, respectively).

The TAP adds the following important reservation to the definition of co-ordination of economic activity: "Actions of entities performed within the framework of vertical agreements shall not be regarded as co-ordination of economic activity". While the drafting of this provision is unclear, it will hopefully be interpreted as exempting arrangements under vertical agreements from the scope of application of prohibitions on co-ordination of economic activities.

On the other hand, TAP specifies that the prohibited co-ordination applies not only where it results in a prohibited horizontal agreement, but also in a prohibited vertical agreement (between the entities activities of which have been co-ordinated).

Abuse of Dominant Position

With regard to abuse of dominant position, the principal change is introduced through the differentiation of applicable administrative fines depending on the consequences of the respective breach (at the moment, all types of abuse of dominance are punishable with turnover fines).

In particular, where abuse of dominance leads (or may lead) to the infringement of rights of other persons (usually, counterparties), but there are no risks of negative effect on competition, fixed administrative fines would apply (in case of legal entities, up to 1mln. Roubles⁴). If, however, a breach leads (or may lead) to the restriction of competition, the currently existing turnover fines would apply.

This represents a very positive development in terms of "protection of competition rather than counterparties". Moreover, differentiation of administrative sanctions depending on the consequences of abuse should force the FAS to prove, in each case, the risks of negative effect on competition and potentially positive changes to

⁴ Approx. EURO 24,000.

the court practice (which at the moment usually does not require a proof of negative effects on competition).

Other changes concern some detalisation of the rules on monopolistically high prices, which mainly relate to the prices set on exchanges, and the introduction of a set of conditions for sales at exchanges that would allow for the price to be outside the risk of abuse of dominance.

It should however be noted that the controversial concept of collective dominance remains unchanged.

Liability

The TAP introduces noticeable changes to the regime of liability for anti-trust violations.

In particular, in response to various proposals from the business community, the TAP introduces the following two new forms of FAS exercising control over anti-trust compliance: (i) a preventive notice (*предостережение*) and (ii) a warning (*предупреждение*).

A preventive notice is issued where no prohibited behaviour has occurred yet, there is only a statement by an official representative of the relevant entity that it is planning to undertake a certain behaviour and, in the view of FAS, such behaviour may lead to an anti-trust violation. Whereas a warning is issued in case of an existing behaviour and, in the view of FAS, there are signs of an anti-trust violation. A warning may be issued not in all cases of anti-trust violations, but only with respect of abuse of dominant position in the form of imposing unfavourable contract terms or unjustified refusal to enter into an agreement.

Both, a preventive notice and a warning, are not treated as official administrative liability. An administrative proceeding may be initiated by FAS only if the entity did not react to the relevant preventive notice/warning, and there remain signs of an anti-trust violation.

In this way, the introduction of a preventive notice and a warning would allow the business entities to avoid imposition of

administrative liability in case they take prompt and effective measures to rectify the alleged violation. This would also help to mitigate the risk of imposition of criminal liability on the managers of the respective business entities – especially in respect of abuse of dominant position where criminal liability may be imposed in case of a repeated violation in the form of abuse of dominant position (and, if the respective violation is rectified at the time of issuance of a preventive notice/warning, this would not count as an official breach for the purposes of triggering the risk of criminal liability).

However, the introduction of such forms of preventive mechanisms may lead to the risk of their abusive/unjustified use by FAS, as a preventive notice/warning would be issued without a full scale investigation and without any chance for the business entity to defend its position (like in an administrative proceeding).

The TAP further differentiates administrative sanctions by introducing the lists of mitigating and aggravating factors that must be taken into account when calculating the amount of fine to be imposed. It also introduces a mathematical formula for calculating the amount of an administrative fine depending on the presence/absence of the referred mitigating/aggravating factors.

Separate categories of fines have also been introduced for breaches of legislation on foreign investments in connection with regulatory filings required to be made pursuant to such legislation.

In addition, FAS will be maintaining a register of persons held liable for anti-trust violations. Such register, however, will not be subject to public disclosure.

With respect to criminal liability, as discussed above, the TAP removes criminal liability for all kinds of breaches except for cartels and repeated abuse of dominant position. In addition, a clarification was made to the rules on release from criminal liability at the initiative of the Ministry of Internal Affairs. In particular, previously release from criminal liability was conditional upon the relevant person compensating the damages or transferring to the federal budget income received as a result of the violation. This proved to

be an inoperative norm, since the breach is usually performed by a business entity, while criminal liability is imposed on its manager, who personally can only cause the respective business entity to make the payment, but cannot make such payment himself. To address this, the wording of the relevant norm has been changed to state that the person may “otherwise recover the harm caused”.

Merger Control

The key innovation for merger control rules is the clarification of their application towards the acquisitions taking place outside Russia. Prior the TAP, Russian merger control rules applied to any agreements/actions in respect of entities that carry out activities in Russia or otherwise affect competition in Russia, without any clarifications on what constitutes “carrying out activities in Russia”, or “affecting competition in Russia”.

Pursuant to the TAP, acquisition of equity in a foreign company is subject to Russian merger control rules if: (a) the relevant foreign target company made supplies of goods to Russia in excess of 1bln Roubles⁵ during the year preceding the transaction; and (b) the purchaser acquires more than 50% of voting equity in such target company, or of other rights to determine the terms of business activity of the target, or the right to perform the functions of its management body.

That being said, the TAP does not appear to deal with a long-standing uncertainty regarding the application of Russian merger control rules towards indirect acquisitions of equity in Russian companies in a scenario where such indirect acquisition does not result in gaining control over the Russian subsidiary.

The TAP simplifies the rules for the types of links between entities that constitute a “group of persons” for competition law purposes by way of, *inter alia*, removing from the scope of a “group of persons” most of the horizontal links (such as the companies with the same controlling shareholder, or with the same general director).

⁵ Approx. EURO 24 mln.

However, in reality, the same types of horizontal links would still be caught by the remaining “group of persons” criteria. That said, the TAP also appears to seek to reduce the scope of a group of persons to be disclosed to FAS within a merger control filing by introducing references to the persons carrying out activity on the same markets as the purchaser and the target.

Regarding the (monetary) thresholds for merger control filings, the TAP increases them only in connection with the creation and reorganisation of commercial organisations, but not with regard to the acquisitions. With regard to the acquisitions, some positive effect on monetary thresholds is achieved by the following reservation introduced by the TAP: when calculating asset value of the target and its group, the asset value of the selling entity and its group are not to be taken into account if, as a result of the proposed transaction, such selling entity and its group would lose the rights “to determine the terms of business activity” of the target. It should be noted that there is a number of uncertainties relating to the conditions of application of this reservation which are not clarified by the TAP.

Unfortunately, the post-transaction notification requirement has also remained intact, even though FAS has, on some occasions, expressed the view that it would be keen to completely abandon the post-transaction notification requirements.

In addition, FAS will be entitled to make audits in the process of considering merger control applications.

Summary

The TAP offers a clearer set of competition law rules for business, especially with regard to the demarcation of prohibited practices and corresponding liability for anticompetitive agreements/actions. One would agree with the statements by FAS officials that the TAP represents a certain liberal balancing act after the tightening of the antitrust regime by the Second Antimonopoly Package of 2009. At the same time, in certain areas the scope of changes has been more careful than could have been expected. On the positive side, such

careful approach preserves continuity and stability in the antitrust legislation. The key challenge, however, remains the development of enforcement practice.

Due to the fact that a number of further amendments proposed by FAS at the time of the TAP 2nd reading in the State Duma were not accepted, it is reasonable to expect that these would be improved and proposed as separate amendments to the Competition Law in the near future.

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