

RUSSIAN DESK

Overview of amendments to antitrust regulation for Q4 2018

In this letter we provide information on amendments to and clarifications of antitrust regulation in Russia and the Eurasian Economic Union (“EAEU”) which appeared in Q4 2018. This information letter will be of interest to management of companies, lawyers and specialists of compliance departments responsible for legal and compliance issues of companies in Russia and the EAEU.

In this information letter you can find out about the following aspects:

- I. Amendments to antitrust legislation: the establishment of a uniform procedure for the extension of lease agreements for state and municipal property for a new period;
- II. Regulations: the entry of information on inspections by anti-trust authorities in the unified inspections register, etc.;
- III. Clarifications, letters and recommendations of the state authorities: abuse of the dominant position by economic entities deemed collectively dominant, recommendations on antitrust compliance, etc.;
- IV. Antitrust regulation in the EAEU: the annual report of the Eurasian Economic Commission on the state of competition on the cross-border markets of the EAEU during 2017, etc.

Amendments to antitrust legislation

UNIFORM PROCEDURE FOR EXTENDING THE LEASE AGREEMENTS FOR STATE AND MUNICIPAL PROPERTY FOR A NEW PERIOD

On 8 January 2019 amendments¹ to the Competition Protection Law² entered into force which formalised a uniform procedure for renegotiating state and municipal property lease agreements for a new period. Now, after the expiry of the effective term of a lease agreement for state or municipal property, which had been concluded based on the results of competitive bidding – or even without such competitive bidding (with the exception of certain

types of property), this agreement is concluded for a new period with a lessee that has duly performed its obligations without a repeat tender or auction provided that the following terms and conditions are observed at the same time:

- The initially concluded agreement did not establish another procedure for concluding the agreement for a new period;
- The effective term for the initially concluded agreement is not limited by legislation;
- The amount of rent is determined based on the results of a valuation of the market value of the property to be conducted in accordance with legislation;
- The minimum period for which the lease agreement is renegotiated must equal at least three years (this period may only be reduced further to the application of the lessee).

The innovations apply not only to lease agreements for state and municipal property, which were concluded after these amendments came into force, but also to agreements concluded previously.

Regulations

ENTRY OF INFORMATION ON INSPECTIONS BY THE ANTITRUST AUTHORITIES IN THE UNIFIED INSPECTIONS REGISTER

The Government adopted a resolution³ on the introduction of amendments to the rules for maintaining the unified inspections register which is maintained by the Office of the Prosecutor General. In accordance with these amendments, information will be entered in the register on scheduled and unscheduled inspections by the Federal Antimonopoly Service of Russia (“FAS of

¹ Federal Law No. 572-FZ dated 27 December 2018 “On the Introduction of Amendments to Article 171 of the Federal Law “On the Protection of Competition”.

² Federal Law No. 135-FZ dated 26 July 2006 “On the Protection of Competition”.

³ Resolution No. 1399 of the Government of the Russian Federation dated 21 November 2018 “On the Introduction of Amendments to the Rules for Establishing and Maintaining the Unified Inspections Register”.

Russia”) and its regional bodies, *inter alia* on the results of the inspections and on the measures adopted to prevent and/or eliminate the consequences of the violations. The amendments stipulate, *inter alia*, a list of the data to be entered in the register and the timeframe for their entry.

Both business entities in respect of which the antitrust authorities are conducting inspections and also any third parties may study the indicated information on the official website of the Office of the Prosecutor General that can be accessed at the following link: <https://proverki.gov.ru>.

THE DISCLOSURE OF INFORMATION BY FOREIGN INVESTORS ON BENEFICIARIES, BENEFICIAL OWNERS AND CONTROLLING PERSONS

The Government adopted Rules⁴, and also amendments to legal acts regarding the submission of information on beneficiaries, beneficial owners and controlling persons. This obligation affects foreign legal entities and organisations that are not legal entities and also the organisations controlled by them in accordance with the Law on Foreign Investments in Strategic Companies.⁵

This information is submitted using one of the following methods:

- as part of a petition for the preliminary approval of a transaction (other action) or a petition for the approval of control not later than 30 days before the planned date for the conclusion of the transaction (other action);
- as part of the notice on the conclusion of the transaction (other action) within 45 days of the conclusion of the transaction (other action);
- in the form of a request on the need to approve the planned transactions (other actions).

The indicated Rules also establish the composition of and specifics for drafting the information to be disclosed.

Clarifications, letters and recommendations of the state authorities

RECOMMENDATIONS ON THE ESTABLISHMENT AND ORGANISATION BY THE FEDERAL STATE AUTHORITIES OF A SYSTEM FOR ENSURING INTERNAL COMPLIANCE WITH THE REQUIREMENTS OF ANTITRUST LEGISLATION

The Government approved methodological recommendations on the establishment and organisation by the federal executive authorities of a system for ensuring internal compliance with the requirements of antitrust legislation (antitrust compliance)⁶.

This document proposes, *inter alia*, decisions regarding such measures relating to the establishment of antitrust compliance as the adoption of a special act, the establishment of a competent division (appointment of a responsible officer), the establishment of a mechanism for identifying and assessing risks of violations of antitrust legislation, and also the development of actions to mitigate such risks.

Companies could also take the indicated recommendations into account when they establish or improve their own antitrust compliance systems.

CLARIFICATION ON THE ABUSE OF A DOMINANT POSITION BY BUSINESS ENTITIES DEEMED COLLECTIVELY DOMINANT

Based on the results of a summary of law enforcement practice, the Presidium of the Federal Antimonopoly Service of Russia issued the following clarification: “On the Imposition of Liability for the Abuse of a Dominant Position by Business Entities Deemed Collectively Dominant”.⁷

This clarification contains the following key conclusions:

- A collectively dominant position per se does not constitute a violation of antitrust legislation;
- When establishing the abuse of a dominant position by any business entities deemed collectively dominant, the FAS of Russia must determine a link between the dominant position, actions (inaction) and the adverse consequences of such conduct. In so doing, the FAS of Russia must factor in, *inter alia*, the terms and conditions governing the sale of a product not only by one, but also by all the business entities that are when taken together collectively dominant with it;
- The business entity is entitled to try and prove that it does not hold a dominant position on the product market (for example, by submitting evidence that another business entity is able to unilaterally affect the general terms and conditions governing the sale of the product on a corresponding product market);
- Only a specific business entity and its officer may be held administratively liable for the abuse of a collective dominant position, and not all the business entities that are jointly deemed collectively dominant.

OVERVIEW OF THE PRACTICAL APPLICATION OF ANTITRUST LEGISLATION BY THE COLLEGIAL BODIES OF THE FAS OF RUSSIA

The Presidium of the FAS of Russia approved an overview of the practical application of antitrust legislation by the collegial bodies of the FAS of Russia for the period from 5 January 2016 to 1 July 2018.⁸

⁴ Resolution No. 1457 of the Government of the Russian Federation dated 1 December 2018 “On the Introduction of Amendments to the Rules for the Submission by a Foreign Investor or Group of Persons That Includes a Foreign Investor of Information on the Conclusion of Transactions with Shares (Interests) constituting the Charter Capitals of Business Companies of Strategic Importance for the Defence of the Country and State Security, of Transactions, Other Actions Subject to Preliminary Approval”.

⁵ Federal Law No. 57-FZ dated 29 April 2008 “On the Procedure for Foreign Investments in Business Companies of Strategic Importance for the Defence of the Country and State Security”.

⁶ Directive No. 2258 of the Government of the Russian Federation dated 18 October 2018 “On the Methodological 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”.

⁷ Approved by Minutes No. 11 of the Presidium of the Federal Antimonopoly Service of Russia dated 24 October 2018.

⁸ Approved by Minutes No. 10 of the Presidium of FAS of Russia dated 3 October 2018.

This document contains the main legal positions of the collegial bodies regarding the uniformity of the application of the provisions of antitrust legislation, which were developed during consideration of the decisions and/or orders of regional antitrust authorities pursuant to the procedure for an inter-departmental appeal.

The overview includes the following conclusions:

- Prohibited coordination of economic activity may be expressed not so much in the establishment of the rules of conduct as in the communication of the rules of conduct to the entities involved in the coordination and in the monitoring of compliance with the indicated rules;
- The antitrust authority is not required to prove that participants actually fulfilled cartel terms and conditions;
- If the conclusions of the antitrust authority contained in a decision and/or order in a case contravene the clarifications of the FAS of Russia and/or the Presidium of the FAS of Russia, it may be held that such a decision and/or order violates the uniformity of the application of antitrust legislation;
- Violation of the uniformity of antitrust legislation may be expressed in a violation of either substantive or procedural norms;
- A decision and/or order of the antitrust authority may be appealed simultaneously with a commercial court and the collegial body of the FAS of Russia;
- Based on the results of the review of an appeal, the collegial body of the FAS of Russia is entitled to forward the case to the regional antitrust authority for a new hearing.

OVERVIEW OF LAW ENFORCEMENT PRACTICE ON CASES ON THE ABUSE OF A DOMINANT POSITION

The FAS of Russia approved an overview of court practice in cases where a person holding a dominant position on a product market imposed on the counterparty unfavourable contractual provisions or provisions unrelated to the subject of the contract at the time of its conclusion⁹.

The following positions are expressed, *inter alia*, in the overview:

- Imposition implies the actions (inaction) of the dominant party on coercing the counterparty to agree to contractual provisions that place the counterparty at a disadvantage or are not related to the contract;
- The preparation of a draft contract that contains provisions placing the counterparty at a disadvantage, and proposals on the conclusion of such a contract sent to the counterparty

may not be considered imposition – for this purpose, the FAS of Russia must prove additional circumstances (for example, a threat not to conclude or terminate a contract, the onset of adverse consequences, *inter alia* through termination of the performance of obligations under the contract);

- In instances when the conclusion of the contract in accordance with legislation is mandatory for the dominant party (for example, a public contract), the habitual actions of the dominant party regarding the approval of the terms and conditions of the contract in violation of the procedure established by legislation (for example, the exchange of statements of disagreement, refusal to accept the disagreements, the holding of mediation procedures, etc.) are deemed to be the imposition of disadvantageous contractual provisions by the dominant party.

LETTERS AND OTHER DOCUMENTS OF THE FAS OF RUSSIA

In Q4 2018 the FAS of Russia adopted a number of documents setting out its position regarding certain provisions of effective legislation, in particular:

- Clarification of the FAS of Russia that the Law On Foreign Investments in Strategic Companies does not apply to organisations under the aggregate control of two or more Russian citizens who don't have another citizenship¹⁰;
- Letter No. RP/86694/18 of the FAS of Russia dated 26 October 2018 "On the Practical Application of Concession Legislation during the Conclusion of the Concession Agreement";
- Recommendations of the FAS of Russia regarding the demarcation of acts of unfair competition in the form of confusion or misrepresentation¹¹;
- Clarification No. AK/106495/18 of the FAS of Russia dated 25 December 2018 "On the Consideration of Cases Commenced based on Indicia of the Violation of Legislation of the Russian Federation on Advertising";
- Clarification No. SP/106730/18 dated 25 December 2018 "On Certain Issues Arising during the Consideration of Cases on Violations of Antitrust Legislation, the Issue and Enforcement of Warnings";
- Clarification No. SP/106703/18 dated 25 December 2018 "On the Issue of Warnings under Part 1 of Article 15 of the Competition Protection Law in the Event of the Lease Before 1 March 2015 of Land Plots, the State Title to Which has Not Been Demarcated, Without the Holding of Competitive Bidding Procedures".

⁹ Letter No. SP/106050/18 of FAS of Russia dated 24 December 2018 „On Sending Clarifications regarding the Overview of Law Enforcement Practice During the Consideration of Applications, Cases by the Antitrust Authorities, and also Court Decisions under Article 10 of Federal Law No. 135-FZ dated 26 July 2006 "On the Protection of Competition" if a Dominant Party Imposes Disadvantageous Terms and Conditions during the Conclusion of Contracts".

¹⁰ Clarification No. TsA/86620/18 of FAS of Russia dated 26 October 2018 "On the Application of Part 9 of Article 2 of Federal Law No. 57-FZ dated 29 April 2008 "On the Procedure for Foreign Investments in Business Companies of Strategic Importance for the Defence of the Country and State Security".

¹¹ Letter No. AD/66643/18 of FAS of Russia dated 22 August 2018 "On the Issue of the Demarcation of the Application of Articles 14.2 and 14.6 of the Competition Protection Law" (published on 5 December 2018 on the official website of the FAS of Russia).

Antitrust regulation in the EAEU

COMPETITION ON THE CROSS-BORDER MARKETS OF THE EAEU DURING 2017

On 6 December 2018 the Supreme Eurasian Economic Council approved the annual report of the Eurasian Economic Commission (“EEC”) on the state of competition on the cross-border markets of member states of the EAEU for 2017.

The report explains, *inter alia*, that in 2017 the EEC completed the consideration of one case on abuse of dominant position on the cross-border market of transformer steel, and also conducted nine investigations regarding indicia of violations of the general competition rules on cross-border markets, six of which were conducted on the initiative of the EEC, and three on the basis of submitted applications.

ADVISORY OPINION OF THE COURT OF THE EAEU ON THE ISSUE OF THE DEMARCATION OF PROHIBITED “VERTICAL” AGREEMENTS AND THE PROHIBITED COORDINATION OF ECONOMIC ACTIVITY ON THE CROSS-BORDER MARKET OF THE EAEU

The Court of the Eurasian Economic Community submitted an advisory opinion¹² in which it distinguished between the conclusion of a prohibited “vertical” agreement and the prohibited coordination of economic activity on the cross-border markets of the EAEU as separate violations of the general competition rules on the cross-border markets of the EAEU.

The following are classified as the criteria for such demarcation:

- Range of entities: if the prohibition in EAEU Law on the coordination of economic activity is addressed to one entity (coordinator), then at least two business entities are the actual addressees of the prohibition in EAEU Law on the conclusion of “vertical” agreements;
- The position of entities in the structure of the market: the coordinator is not a participant in the market on which the coordinated business entities are doing business, but the participants in the prohibited “vertical” agreements do business on different levels in the structure of one market;

- The nature of the interaction of entities: the coordinator approves the actions of other business entities, while the participants of prohibited “vertical” agreements reach mutual understandings regarding the terms and conditions of their economic activity.



Falk Tischendorf

Attorney-at-law | Partner
Head of the Representative Office
BEITEN BURKHARDT Moscow
E-mail: Falk.Tischendorf@bblaw.com



Vasily Ermolin

Attorney-at-law | Partner
BEITEN BURKHARDT Moscow
E-mail: Vasily.Ermolin@bblaw.com



Alexey Kuzmishin

Lawyer | LL.M. | Partner
BEITEN BURKHARDT Moscow
E-mail: Alexey.Kuzmishin@bblaw.com



Anna Klimova

Lawyer | LL.M.
Attorney-at-law (New York)
Associate
BEITEN BURKHARDT Moscow
E-mail: Anna.Klimova@bblaw.com

¹² Advisory Opinion of the Court of the EAEU dated 17 December 2018 „On the Application of the Eurasian Economic Commission on the Clarification of the Provisions of Clauses 4 and 6 of Article 76 of the Treaty on the Eurasian Economic Union dated 29 May 2014 and the Criteria for Classifying the Market as Cross-Border, approved by Decision No. 29 of the Supreme Eurasian Economic Council dated 19 December 2012”.

Imprint

This publication is issued by

BEITEN BURKHARDT

Rechtsanwaltsgesellschaft mbH

Ganghoferstrasse 33 | D-80339 Munich

Registered under HR B 155350 at the Regional Court Munich/
VAT Reg. No.: DE811218811

For more information see:

<https://www.beiten-burkhardt.com/en/imprint>

EDITOR IN CHARGE

Anna Klimova

© BEITEN BURKHARDT Rechtsanwaltsgesellschaft mbH.

All rights reserved 2019.

PLEASE NOTE

This publication cannot replace consultation with a trained legal professional. If you no longer wish to receive this newsletter, you can unsubscribe at any time by e-mail (please send an e-mail with the heading "Unsubscribe" to newsletter@bblaw.com) or any other declaration made to BEITEN BURKHARDT.

YOUR CONTACTS

MOSCOW

Turchaninov Per. 6/2 | 119034 Moscow

Falk Tischendorf

Tel.: +7 495 2329635 | Fax: +7 495 2329633

Falk.Tischendorf@bblaw.com

ST. PETERSBURG

Marata Str. 47-49 | Lit. A | Office 402 | 191002 St. Petersburg

Natalia Wilke

Tel.: +7 812 4496000 | Fax: +7 812 4496001

Natalia.Wilke@bblaw.com