

“Three Waves” of antitrust cases against oil companies

From 2007 to 2012, FAS Russia initiated “three waves” of antitrust cases against vertically integrated oil companies (VICs) that were accused of abuse of collective dominance in four markets: gasoline, diesel fuel, aviation kerosene, and furnace fuel oil, by which results there were fundamental institutional changes on the market.

First Wave

In 2008, FAS Russia found that in the fourth quarter of 2007 and the first half of 2008 the largest vertically integrated oil companies (OJCS “Gazprom Neft”¹, OJSC “TNK-BP Holding”, OJSC “NK” Rosneft”, OJSC “LUKOIL”) violated Part 1 Article 10 of the Federal Law of 26.07.2006 № 135-FZ “On Protection of Competition” (hereafter - the Law on Protection of Competition).

The violation of the law expressed in fixation of monopolistically high prices for oil products, creation of discriminatory conditions for buyers and establishment of economically, technologically and otherwise overestimated different prices for petroleum products.

All decisions and orders of the FAS Russia in these cases were appealed by the oil companies in arbitration courts.

Second Wave

In 2009, FAS Russia has found that in the early beginning of year 2009 OJCS “Gazprom Neft”², OJSC “TNK-BP Holding”³, OJSC “NK” Rosneft”, OJSC “LUKOIL”⁴ were withdrawing their product from circulation and that resulted in the price increase. FAS Russia has qualified these actions as another violation of the Law on Protection of Competition.

As a result of judicial proceedings, OJSC “TNK-BP Holding”, OJSC “NK” Rosneft” and OJSC “LUKOIL” have made settlement agreements with the Federal Antimonopoly Service.

On 15 February 2011, the Presidium of the Supreme Arbitration Court has confirmed the validity of FAS Russia decision and orders against OJCS “Gazprom Neft” (withdrawal of goods and creation of discriminatory conditions).

¹ See «“Gazprom Neft” OJSC paid over one billion Rubles following the “first wave” of cases against oil companies», FAS Russia press release of 3 March 2011 <http://en.fas.gov.ru/press-center/news/detail.html?id=40716>

² See «“Gazprom Neft” paid 4.67 billion rubles in course of the "second wave" of cases against oil companies», FAS Russia press release of 15 March 2011 <http://en.fas.gov.ru/press-center/news/detail.html?id=40738>

³ FAS Russia decision and determination of 25.06.2009 № 1 10/25-09

⁴ See «“Lukoil-Volgogradneftepererabotka” Ltd. shall pay 500 million Rubles as a fine for abusing market dominance», FAS Russia press release of 30 March 2011 <http://en.fas.gov.ru/press-center/news/detail.html?id=40738>

The total amount of paid fines to the federal budget for law violations of the 1st and the 2nd wave by four VICs was over 15 billion rubles.

According to the FAS orders, oil companies should prevent product withdrawal and/or avoid supply decrease (car oil and diesel deficit) leading to higher prices on both car oil and diesel markets; should secure the disclosure of the information including placement of the criteria on the official websites to those, who intend to sign direct contracts with oil refineries; should ensure the realization of oil products on the domestic market by trading on commodity exchange and /or on the electronic trading platform, to meet the antimonopoly legislation requirements.

Third Wave⁵

In 2011, FAS Russia initiated the third wave of proceedings against companies OJCS “Gazprom Neft”, OJSC “TNK-BP Holding”, OJSC “NK” Rosneft”, OJSC “LUKOIL” and OJSC “ANK” Bashneft” on the grounds of abuse of their dominant position.⁶

FAS Russia fined OJSC “NK” Rosneft⁷ and OJSC “ANK” Bashneft⁸ up to 2.5 billion rubles. It has been decided not to give regulations on the termination of violation of antimonopoly legislation due to the fact, that companies have voluntarily eliminated the violations.

On 27 December 2011, FAS Russia fined OJCS “Gazprom Neft” up to 979 million rubles for violating the antimonopoly legislation (Part 1 Article 10 of the Law on Protection of Competition)⁹. It has been decided not to give regulations on the termination of violation of antimonopoly legislation due to the fact, that company have voluntarily eliminated the violations.

On 28 December 2011, FAS Russia has imposed a fine to OSJC “LUKOIL” and its legal entity groups OSJC “Lukoil-UNP”, OSJC “Lukoil-PNOS”, OSJC “Lukoil-

⁵ See «Finalizing the “third” wave of cases against vertically-integrated oil companies. FAS Russia sums up the results», FAS Russia press release of 23 March 2012 <http://en.fas.gov.ru/press-center/news/detail.html?id=36955>

⁶ See «FAS Russia initiated cases against “TNK-BP” Holding” OJSC and “Bashneft” ANK” OJSC», FAS Russia press release of 7 October 2011 <http://en.fas.gov.ru/press-center/news/detail.html?id=41217>

⁷ Violation of OJSC “NK” Rosneft “expressed in the abuse of a dominant position through establishing and maintaining monopolistically high prices for diesel fuel and jet fuel in the fourth quarter of 2010 - January 2011. At the same time OJSC “NK” Rosneft “was suspected of seizure of goods (diesel and kerosene) from circulation, as well as creating discriminatory conditions for individual counterparties, but these facts were not confirmed.

⁸ OJSC “ANK” Bashneft” has established and maintained monopolistically high prices on the wholesale market of motor gasoline in the period from April to September 2011. In order to eliminate the effects of violations, the company “Bashneft” has provided FAS Russia with information on reducing gasoline prices by more than 15%, which happened in two phases - in October and November 2011. In addition, the company voluntarily reduced the prices for motor gasoline on the retail market.

⁹ Violation of OJCS “Gazprom Neft” expressed in the abuse of a dominant position through establishing and maintaining monopolistically high prices for diesel fuel and jet fuel from the fourth quarter of 2010 to the beginning of 2011, as well as in creation of discriminatory conditions of activity. In order to eliminate the effects of violations, the company in the appeal letter acknowledged the violation of antimonopoly legislation, and provided oral and written explanations on removal of violations and their consequences.

NNOS"¹⁰ in the size of more than 600 million rubles for abuse of dominant position on the diesel market¹¹.

FAS Russia did not give the order due the fact that OJSC "Lukoil" voluntarily eliminated the violation.

The decision of the Supreme Arbitration Court of the Russian Federation in the OJSC "TNK-BP Holding" case¹²

From May to July 2008, FAS Russia received a large number of requests from citizens, legal entities, legislatures and governors (heads of the constituent entities of the Russian Federation), which indicated a significant increase in motor gasoline and aviation kerosene prices. For example, in a letter addressed to the President of the Russian Federation, the Russian Aircrew Union mentions that the rise in prices for jet fuel in the first half of 2008 led to unprofitable operation of domestic aircraft, significantly reduced the freight capacity of airlines and put many businesses at brink of bankruptcy.

Through the analysis of competitive environment on product markets FAS Russia, which found that OJSC "TNK-BP Holding" together with OJSC "NK" Rosneft ", OJSC "LUKOIL", OJSC "Gazprom Neft" are gaining a dominant position on the wholesale markets of motor gasoline and jet fuel.

Because of price increase on the wholesale markets of oil products, FAS initiated proceedings for the violation of antimonopoly legislation against OJSC "TNK-BP Holding" and determined that OJSC "TNK-BP Holding" abused its dominant position by:

- Fixing monopolistically high prices for aviation kerosene and motor gasoline in the fourth quarter of 2007 and first half of 2008;
- establishing economically overestimated wholesale prices on jet fuel and creating discriminatory conditions in the wholesale markets of motor gasoline and aviation kerosene in Russian Federation.

Based on the decision of FAS of Russia, company received a determination¹³ to stop the violations of the antimonopoly legislation and to make actions aimed at ensuring competition in the relevant product markets.

In addition, the company was administratively sanctioned in "turnover" fine form up to 1.1 billion rubles.

¹⁰ See FAS Russia decision and determination on the case № 1004-10-A of 5 March 2011 (Russian version only) <http://solutions.fas.gov.ru/to/permskoe-ufas-rossii/8488>

¹¹ See «FAS Russia: "LUKOIL" paid a fine in course of the third wave of antimonopoly cases», FAS Russia press release of 20 February 2012 <http://en.fas.gov.ru/press-center/news/detail.html?id=41500>

¹² See «The ruling of the Supreme Arbitration Court of the Russian Federation on the case against TNK-BP», FAS Russia press release of 1 July 2010 <http://en.fas.gov.ru/press-center/news/detail.html?id=35573>

¹³ See FAS Russia determination on the case № 1 10/171-11 of 23 December 2011 (Russian version only) <http://solutions.fas.gov.ru/documents/ag-523>

OJSC "TNK - BP Holding" contested the FAS Russia decision, determination and decree in the courts. By the decision of the Arbitration Court of the Tyumen region of 11.12.2009, upheld by the provisions of the Eighth Circuit Arbitration Appeal Court dated 01.11.2010¹⁴, "TNK-BP Holding" claims were fully satisfied. The courts relied on the fact that antimonopoly authority incorrectly identified product and geographical borders of markets, and as a result, the existence of a dominant position of the company was not proven, as well as the facts of abuse of such a position.

FAS Russia appealed to the Supreme Arbitration Court of the Russian Federation with for supervisory review of judicial acts of arbitration courts.

On 25 May 2010, the Presidium of the Supreme Arbitration Court has canceled the decision of the Arbitration Court of the Tyumen region, the decision of Eighth Circuit Arbitration Appeal Court and the Federal Arbitration Court of the Western-Siberian Region, and without submitting a new trial issued a new judicial act, where refused to satisfy "TNK-BP Holding" claim and has confirmed FAS Russia statement as legal and reasonable.¹⁵

Institutional changes on oil and oil products market

One of the biggest changes is that oil companies have received the requirement to sell a certain volume of oil products within the framework of the FAS Russia prescriptions.

Over the past few years, the practice of antitrust legislation was formed due to the regulatory framework, aimed at development of market pricing for oil and petroleum products.

Particularly, following laws were adopted:

- Federal Law of 21.11.2011 № 325-FZ "On Organized Trading"¹⁶, according to which, inter alia, the Bank of Russia regulates, controls and licenses the activity of electronic trading platforms (ETP).
- Amendments to the Federal Law of 26.07.2006 № 135-FZ "On Protection of Competition" ("The Third Antimonopoly Package"), which entered into force on 6 January 2012 and that set out the requirements on formation of the market price on the stock exchange.

¹⁴ Find the decisions of the Arbitration Court of the Tyumen region of 11.12.2009 and the Eighth Circuit Arbitration Appeal Court of 01.11.2010 on the case № A70-10775/2009 in the arbitration courts' decision database - <http://ras.arbitr.ru/> (Russian version only)

¹⁵ The decision of the Supreme Arbitration Court of the Russian Federation of 25 May 2010 № 16678/09 (Russian version only) http://www.arbitr.ru/bras.net/f.aspx?id_casedoc=1_1_cf7d0cbd-736a-43e5-9428-0605d59c0356

¹⁶ See Federal Law of 21.11.2011 № 325-FZ "On Organized Trading" (Russian version only) http://www.consultant.ru/document/cons_doc_LAW_121888/

It should be mentioned that the "third antimonopoly package" includes a number of regulations that establishes the features petroleum exchange realization.

- FAS Russia Order of 26.06.2012 № 409 approved the procedures of provision to the stock exchange of a list of affiliated persons by business entity occupying a dominant position on the relevant market, accredited and (or) participating in the auction (including through the submission of applications for participation in the auction to a broker, brokers).
- Resolution of the Russian Government of 11.10.2012 № 1035 approved criteria of regularity and uniformity of product sale on the stock exchange for particular product markets (oil and (or) oil products).
- Joint Order of the Federal Antimonopoly Service of the Russian Federation and the Ministry of Energy of the Russian Federation of 12.01.2015 № 3/15/3 "On approval of the minimum value for petroleum products sold on the stock exchange, as well as certain categories of goods produced from oil and gas, and the requirements for exchange trading, in which transactions with petroleum products are made, as well as with certain categories of goods produced of oil and gas by economic entity occupying a dominant position on the relevant product markets, and recognition of invalidity of the FAS Russia and the Russian Ministry of Energy joint order of 30.04.2013 № 313/13/225» (hereinafter - the Joint order).

In accordance with paragraph 1 of the Joint order, a minimum value traded on the exchange of petroleum products, as well as certain categories of goods produced from oil and gas produced and (or) sold by an economic entity occupying a dominant position on the relevant wholesale product markets is being set, including entities belonging to the same group of persons with such business entity and (or) participants of exchange trading, acting in the interests and at the expense of these persons, and this value has the following volumes:

- a) petrol - ten percent;
- b) diesel fuel - five percent;
- c) jet fuel - ten percent;
- g) oil - two percent;
- e) liquefied petroleum gases for household use and road transport (LPG - a mixture of propane and butane, PT - Propane Technology, BT - butane, LPG - propane-butane automobile, PA - propane car) - five percent.

The entry into force of the Joint order completed the preparation of a regulatory framework aimed at the formation of market prices on the stock exchange for oil products.

From 2008 to the present time, the largest commodity exchange CJSC "SPIMEX" continues to successfully operate.

As a result of the completion in 2015 of about 97% implemented on organized trading of petroleum products were sold to CJSC "SPIMEX".

According to CJSC "SPIMEX", volume of sales on the stock exchange in 2015 amounted to about 15.5 million tons with turnover of 486 billion rubles. The number of transactions at the exchange trades totaled 99 263 units in 2015 with an average transaction volume of 156 tons. The number of participants in 2015 amounted to 1911 companies.

Pursuant to the request of the Deputy Chairman of the Government of the Russian Federation A. Dvorkovich of 10 December 2013 № AD-P9-8998, and in order to improve transparency of export transactions with oil and oil products, the representativeness of OTC transactions' indicators of both export and domestic market contracts FAS Russia developed, prepared and presented to the Russian Government draft of amendments to the Decree of the Russian Government of 23 July 2013 № 623 "On approval of the provision of information about contracts, concluded by parties not at organized exchange, which obligations involve transfer of ownership of goods admitted to organized exchange, as well as on keeping a register of such contracts and the provision of information from the register" (hereinafter - the Decree of the Russian Government № 623).

In accordance with the requirements of the Decree of the Russian Government № 623, CJSC "SPIMEX" carries technical registration and processing of bulk of data on OTC transactions with oil and oil products.

During the first quarter of 2016, there were 58.300 of actual OTC contracts with oil products in the volume of more than 55.1 million tons (163.5 million tons in 2015) registered on the stock exchange, as well as 2552 of OTC contracts with oil in the volume of more than 89.4 million tons (130.7 million tons in 2015). The statistics above suggests that the measures have allowed to obtain reliable information about the fundamental nature of the oil market.

In order to create reliable price indicators and increase transparency in the Russian market of petroleum products, on behalf of the FAS Russia, the project «Regional indexes of export parity for the main oil products («Regional netback indexes») was created and is now in the process of implementation by CJSC "SPIMEX", it will allow to conduct comprehensive assessment of the situation in the oil market.

Thus, FAS Russia received the opportunity to track the three indexes that characterize the situation in the wholesale oil products market: OTC prices, stock prices and netback prices. The price arbitrage between the three indexes give an adequate assessment of the oil products market value in the Russian market.

FAS Russia conducts weekly monitoring of small-scale wholesale and retail prices for petroleum products in all regions, the monthly change of the wholesale allowance, as well as monitoring of the petroleum products movement, including the assessment of stocks and delivery of petroleum products in the regions. This makes it possible to predict the change in situation in the future, and in case of oil product

shortages to be able to influence the situation on the market, including through trade interventions.

The new framework for monitoring of the situation on the market creates the prerequisites for the stability not only in the current situation, but also in the future. The conclusion of a quadripartite agreement between FAS Russia, Rosstandart,¹⁷ Rostekhnadzor¹⁸ and the oil companies had a central role to play in this respect. Companies undertook a unilateral commitment to modernize of refine capacities, and the competent authorities monitor the situation within their competence.

On 10 December 2015, pursuant to the order of the President of the Russian Federation V. Putin, conducted within the framework of the meeting in St. Petersburg on "On the performance of Russia's fuel and energy complex in 2010 and priorities for 2011", on the initiative of Federal Antimonopoly Service jointly with the Federal Tax Service and the Bank of Russia an agreement on cooperation in the development of commodity markets and creation of the Exchange Committee was signed¹⁹.

The purpose of the Exchange Committee is to prepare proposals for the improvement of the mechanisms of formation of representative price indicators in the oil products market, as well as the basic principles of organization of exchange trading of oil products. Interaction of participants of the Exchange Committee in the framework of cooperation, aimed at creating a favorable competitive environment in the oil market, will improve practice on the implementation of legislation in the oil industry, and thus, ensure pricing transparency, harmonization of requirements for business entities in connection with the organization and implementation of trading activity, as well as create a basis for formation of the petroleum products market and non-discriminatory mechanisms for oil products realization.

The current situation on the market of oil and oil products is being analyzed at the meetings of the Exchange Committee. The Committee is taking all measures to develop and improve exchange trading of oil and oil products, provides market participants with recommendations, aimed at preventing possible violations of antitrust law. As of March 31, 2016, the Exchange Committee held 47 meetings.

On the initiative and instruction of the FAS Russia, at a regular meeting of the Exchange Committee additional trading session in the Section "Petroleum" started to work and successfully operate on the basis of "SPIMEX". Additional trading session allowed VICs to fulfill the obligations under the Federal Law of 18 July 2011 № 223-FZ «On Procurement of Goods, Works and Services by Certain Legal Entities», and conclude exchange transactions between oil companies and their sales companies that, in turn, allowed to exclude the possible negative impact of the above transactions on the stock price index. This measure led to the fact that oil companies

¹⁷ Federal Agency on Technical Regulation and Metrology

¹⁸ Federal Service for Ecological, Technological and Nuclear Supervision

¹⁹ See «FAS, the Federal Tax Service and the Central Bank signed an Agreement on the Exchange Committee», FAS Russia press release of 9 December 2015 <http://en.fas.gov.ru/press-center/news/detail.html?id=44309>

have begun to make part of the purchases of motor gasoline in the course of the said additional trading session.

Besides that, on behalf of the Federal Antimonopoly Service jointly with the Bank of Russia at the regular meeting of the Exchange Committee, held on August 14, 2015, the duration of the trading session of JSC "SPIMEX" in the Section "Petroleum" was reduced, now it runs from 11.00 to 13.00. Previously, the trading session was held from 11.00 to 15.00. This measure is intended to increase the liquidity of the proposals on the exchange bases, to ensure the uniformity and regularity of proposals, to eliminate the elements of unfair trading, that was contributing, in particular, to the unfounded increase in prices.

At the initiative of the FAS Russia, the following subcommittees of the Exchange Committee and project working groups were established:

- Sub-Committee of the Exchange Committee on the launch of delivery contracts for oil in the Russian Federation;
- Sub-Committee of the Exchange Committee on the organization of the movement of regular freight trains with oil products purchased on the stock exchange; and on rates registration of freight wagons for the transportation of goods, the cost of transportation of goods by rail services;
- Project Working Group to address issues of existing difficulties when paying for the service of public and non-public traffic routes use, and other legally unresolved cases involving the disturbance of economic activity of the petroleum products market participants;
- Project Working Group on regulatory consideration of storage and use of oil companies' stocks and release of oil refineries for maintenance;
- Project Working Group on elaboration of proposals regarding the improvement of the provisions of the joint order of the Federal Antimonopoly Service and the Ministry of Energy of 12 January 2015 № 3/15/3.

During 2015, through the activities of the aforementioned subcommittees and project working groups of the Exchange Committee, quickly emerging issues were resolved and all necessary measures were taken to prevent problems, which, in turn, helped to change the trend and to reverse the upward trend in the prices for petroleum products.