

Russian Federation¹
Roundtable on “Competition Compliance Programmes”
Working Party No.3 on Co-operation and Enforcement
OECD Competition Committee
June 8, 2021

Summary

The State is interested in reducing violations of antimonopoly legislation, since the negative consequences of such violations may be so significant that it may be impossible to restore competitive conditions in certain commodity markets.

One of the most effective ways to prevent violations of antimonopoly legislation is the application by authorities and business entities of antimonopoly compliance – a system of internal compliance with the requirements of antimonopoly legislation.

The Decree of the President of the Russian Federation of December 21, 2017 No. 618 "On the main directions of state policy for the development of competition"² provides for the need to stimulate business entities that introduce a system of internal compliance with the requirements of antimonopoly legislation.

It should be noted that antimonopoly compliance certainly contributes to increasing the level of lawfulness of the activities of business entities in the commodity markets, creates additional incentives for business entities to take measures to prevent violations of antimonopoly legislation, and is necessary to reduce the risks of negative consequences for the business entities itself.

Competition Compliance Programmes

An important vector of the development of antimonopoly legislation and competition law in the world practice, including in Russia, has recently been the application and improvement of preventive measures.

The State is interested in reducing violations of antimonopoly legislation, since the negative consequences of such violations may be so significant that it may be impossible to restore competitive conditions in certain commodity markets.

¹ The contribution was prepared by the FAS Russia in cooperation with the Association of Antimonopoly Experts

² <http://en.fas.gov.ru/documents/documentdetails.html?id=15342>

One of the most effective ways to prevent violations of antimonopoly legislation is the application by authorities and business entities of antimonopoly compliance – a system of internal compliance with the requirements of antimonopoly legislation.

The Decree of the President of the Russian Federation of December 21, 2017 No. 618 "On the main directions of state policy for the development of competition"³ provides for the need to stimulate business entities that introduce a system of internal compliance with the requirements of antimonopoly legislation.

Thus, on March 12, 2020, the Federal Law of March 1, 2020 No. 33-FZ "On Amendments to the Federal Law "On Protection of Competition"⁴ came into force, which provides for the consolidation in the Law on Protection of Competition of the concept "system of internal compliance with the requirements of antimonopoly legislation", the procedure for organizing the antimonopoly compliance system by business entities, the basic requirements for the content of internal acts of business entities that form the antimonopoly compliance system.

In the current version, taking into account the above changes, the Law on Protection of Competition provides that a business entity has the right to send an internal act (acts) to the federal antimonopoly body, forming a compliance system to establish its compliance with the norms of antimonopoly legislation (hereinafter – the Internal Act).

Part 2 of the Article 9.1 of the Law on Protection of Competition provides for mandatory provisions to be reflected in the text of the internal act, including: requirements for the procedure for assessing the risks of violation of antimonopoly legislation associated with the implementation by business entity of its activities, measures aimed at reducing the risk of violation of antimonopoly legislation related to the implementation of its activities, measures aimed at exercising control over the functioning of the system of internal compliance with the requirements of antimonopoly legislation by a business entity, the procedure for familiarizing employees of a business entity with an internal act (internal acts), information on the official responsible for the functioning of the internal compliance system with the requirements of antimonopoly legislation.

Part 6 of the Article 9.1 of the Law on Protection of Competition establishes that the FAS Russia within thirty days considers the directed internal act (acts) and, based on the results of the consideration, gives an opinion on its (their) compliance or non-compliance with the requirements of the antimonopoly legislation.

In the period from March 2020 to February 2021 inclusively, business entities, within the framework of the Article 9.1 of the Law on Protection of Competition,

³ <http://en.fas.gov.ru/documents/documentdetails.html?id=15342>

⁴ <http://www.kremlin.ru/acts/bank/45225> (Russian version only)

sent 32 applications to the FAS Russia for giving an opinion on the compliance of internal acts with the requirements of antimonopoly legislation.

For example, the FAS Russia considered the application of Gazotransportnaya Company LLC to issue an opinion on the compliance of internal acts with the requirements of antimonopoly legislation. Based on the results of consideration of this application, the FAS Russia gave a negative opinion due to the absence of information in the submitted internal act, the presence of which is mandatory in connection with the direct requirement of the Article 9.1 of the Law on Protection of Competition in whole or in part. At the same time, the competition authority gave recommendations on correcting some provisions of the company's internal act that do not meet the requirements of antimonopoly legislation. After fulfillment the recommendations by the company, the FAS Russia re-examined the company's application and issued a positive conclusion.

Thus, in most of the internal acts, on which a negative opinion was given by the FAS Russia, there was no information about the official responsible for the functioning of the system of internal compliance with the requirements of antimonopoly legislation.

In addition, when submitting the internal act, business entities formally approached the content of the mandatory requirements in it, for example, their proposed measures aimed at reducing the risks of violation of antimonopoly legislation related to the implementation of their activities were rather general and did not specify the introduction of possible procedures aimed at reducing the risks of violation of antimonopoly legislation related to the implementation of activities, which was also the reason for the negative conclusions of the FAS Russia.

It should also be taken into account that the conclusion of the FAS Russia on the compliance of the internal act forming the compliance system with the norms of antimonopoly legislation may have a positive impact on the business entity in terms of assigning its activities to a lower risk category. In addition, it should be noted that the organizational and legal measures taken by a business entity to comply with the antimonopoly legislation and prevent its violations within the framework of the implementation of the antimonopoly compliance system may be recognized by the FAS Russia as other circumstances mitigating administrative responsibility. These measures can also be taken into account by the competition authority in the framework of ongoing antimonopoly investigations, for example, as an assessment of actions aimed at eliminating the committed violation.

Thus, as part of the hub&spoke antimonopoly investigation of Apple's practices related to the coordination of prices for Apple smartphones of direct counterparties and retail outlets, Apple provided data on the measures taken to strengthen and

improve the quality of antimonopoly compliance measures in connection with the investigation.

In particular, the company provided information on the following steps:

- 1) adoption of a more detailed antimonopoly compliance policy as a local regulation;
- 2) conducting on an annual basis special trainings for employees on compliance with antimonopoly legislation, but with a focus on the rules for communicating with resellers;
- 3) development of a reseller communication guidelines for employees to use on a daily basis in order to give value to compliance with enhanced antimonopoly compliance measures;
- 4) development of a new template for a notification on prices in the Apple online store as part of a press release on the launch of a new model of the iPhone smartphone.

The Commission on reviewing the case concluded that the measures listed above to strengthen and improve the quality of antimonopoly compliance measures planned to be adopted by the company may be effective in preventing this person from committing violations of antimonopoly legislation of the Russian Federation in the future⁵.

It should be noted that the draft Guidelines on antimonopoly compliance developed by the FAS Russia, the adoption of which will contribute to the advocacy of this mechanism for entrepreneurs, fix possible approaches to the structure of compliance and the procedural elements of coordinating compliance policies with the FAS Russia.

At the same time, companies are actively implementing commercial or trade and sales policies. These local acts record approaches to the selection of counterparties, including, for example, the formation of a selective distribution network, and, in appropriate cases, basic approaches to price formation. Often, the development of such policies is provided as a requirement in the remedies of the competition authority on the results of the approval of transactions of economic concentration with the threat of establishing/strengthening dominance, as well as on the results of investigations of abuse of dominance.

According to the Paragraph 2 of the Decree of the Government of the Russian Federation dated March 1, 2018 No. 213 "On approval of the criteria for classifying the activities of legal entities and individual entrepreneurs engaged in economic

⁵ Decision of the FAS Russia dated March 27, 2017 No. AC/20961/17: <https://br.fas.gov.ru/ca/upravlenie-po-borbe-s-kartelyami/ats-20961-17/> (Russian version only)

activity as risk categories in the implementation of state control over compliance with the antimonopoly legislation of the Russian Federation⁶" (hereinafter referred to as the Government Decree No. 213) establishes the frequency of scheduled inspections of legal entities and individual entrepreneurs engaged in economic activity, depending on the risk category assigned to their activities, unless otherwise established by federal laws: for the medium-risk category – no more than once every 3 years; for the moderate-risk category – no more than once every 5 years.

In respect of legal entities and individual entrepreneurs engaged in economic activities classified as low-risk, scheduled inspections are not carried out.

In accordance with the Paragraph 2 of the Government Decree No. 213, it is provided that the activities of business entities that are subject to classification in accordance with the annex to this document to the categories of medium and moderate risk are subject to classification in the categories of moderate and low risk, respectively, if the following conditions are met in combination:

a) the absence within 3 years on the date of the decision to assign (change) the risk category of the decision on the imposition of an administrative penalty on a legal entity, its officials, an individual entrepreneur for committing an administrative offense under Articles 14.31-14.33⁷, 14.40⁸, 14.41⁹, Parts 2.1-2.3, 2.5 and 2.6 of the Article 19.5¹⁰ and the Article 19.8¹¹ of the Code of Administrative Offenses of the Russian Federation;

b) the functioning of a business entity for at least one year on the day of the decision to assign (change) the risk category of the system of legal and organizational measures aimed at compliance by such a business entity with the requirements of the antimonopoly legislation of the Russian Federation, provided for by an internal act (acts) of the business entity, or another person from among the persons belonging

⁶ <http://government.ru/docs/all/115553/> (Russian version only)

⁷ Paragraph 14.31 – "Price manipulation in the wholesale and (or) retail electricity (capacity) markets"; Paragraph 14.32 - "Conclusion of an agreement restricting competition, implementation of concerted actions restricting competition, coordination of economic activity"; Paragraph 14.33 - "Unfair competition";

⁸ Paragraph 14.40 – "Violation of antimonopoly rules established by federal law in the implementation of trading activities";

⁹ Paragraph 14.41 - "Violation of the requirements established by federal law for the provision of information on the conditions for concluding an agreement for the supply of food products in the implementation of trading activities"

¹⁰ Paragraph 19.5 - "Failure to comply with the legal order (decree, submission, decision) of the body (official) exercising state supervision (control), the organization authorized in accordance with federal laws to exercise state supervision (official), the authority (official) exercising municipal control"

¹¹ Paragraph 19.8 - "Failure to submit requests, notifications (applications), data (information) to the federal antimonopoly authority, its regional offices, regulatory bodies of natural monopolies or bodies authorized in the field of export control"

to the same group of persons with the business entity, if such internal acts apply to the business entity.

Thus, the organization by a business entity of an internal compliance system in the absence of violations of antimonopoly legislation within three years can serve as a basis for reducing the risk category when exercising state control over compliance with antimonopoly legislation and, consequently, terminating scheduled inspections in relation to such a business entity.

Based on the above, it should be noted that antimonopoly compliance certainly contributes to increasing the level of lawfulness of the activities of business entities in the commodity markets, creates additional incentives for business entities to take measures to prevent violations of antimonopoly legislation, and is necessary to reduce the risks of negative consequences for the business entities itself.