***Russian Federation*[1]**

Safe Harbors and Legal Presumptions in Competition Law

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Summary

Endemic to the jurisdiction of the Russian Federation is the application of both the respective presumptions, as well as the concept of "safe harbors," which, in turn, are absolute. An illustrative example of "presumptions of unlawfulness" is provided by the "per se" prohibition, such as cartels. In this case, the competition authority should only prove the existence of the consequences described in the aforementioned clauses and not the restriction or potential restriction of competition. Such agreements are prohibited as such, irrespective of their impact on the state of competition.

Also considered as "per se" are the prohibitions envisaged by Part 3, Article 15 of the Competition Law, which ban the combination of functions between federal bodies of executive power, bodies of executive power at the RF constituent-entity level, other state agencies and local self-government authorities, on the one hand, and the functions of business entities, as well as vesting of economic entities with the functions and rights of the aforementioned bodies, including the functions and rights of state control and oversight agencies.

As "presumptions of lawfulness" within the scope of antimonopoly legislation may be considered particular conditions upon satisfaction of which certain actions (inaction), agreements, concerted actions and transactions may be deemed lawful from the standpoint of antimonopoly legislation.

Russian competition legislation also establishes "safe harbors" in the form of immunity from the establishment of dominant position for legal entities whose founders or participants consist of one or more natural persons and whose revenue from the sale of goods, works or services over the preceding calendar year does not exceed four hundred million rubles.

"Safe harbors" are also established on the level of the Eurasian Economic Union. Annex No. 19 to the Treaty on the Eurasian Economic Union (EAEU) (hereinafter referred to as the Treaty) provides only two grounds for the acceptability of "vertical" agreements: (1) if these are contracts of commercial concession and (2) the share of each economic entity (market participant) that is a party to such an

[1] Contribution was prepared by the FAS Russia with participation of Association of Antimonopoly Experts

agreement in the commodity market of the goods covered by the vertical agreement does not exceed 20 % .

Safe harbours (legal presumptions) in the Russian competition legislation

Endemic to the jurisdiction of the Russian Federation is the application of both the respective presumptions, as well as the concept of "safe harbors," which, in turn, are absolute.

An illustrative example of "presumptions of unlawfulness" is provided by the "per se" prohibition. For instance, Part 1, Article 11 of the Federal Law № 135-FZ dated 26.07.2006 "On the Protection of Competition" (hereinafter – the Competition Law) contains a provision that are recognized as a cartel, and are prohibited agreements between competing business entities, that is, between business entities engaged in the sale of goods on the same commodity market, or between business entities engaged in the purchase of goods on the same commodity market, if such agreements result, or may result, in the consequences specified in Clauses 1-5, Part 1, Article 11 of the Competition Law.

In this case, the competition authority should only prove the existence of the consequences described in the aforementioned clauses and not the restriction or potential restriction of competition. Such agreements are prohibited as such, irrespective of their impact on the state of competition.

Also considered as "per se" are the prohibitions envisaged by Part 3, Article 15 of the Competition Law, which ban the combination of functions between federal bodies of executive power, bodies of executive power at the RF constituent-entity level, other state agencies and local self-government authorities, on the one hand, and the functions of business entities, as well as vesting of economic entities with the functions and rights of the aforementioned bodies, including the functions and rights of state control and oversight agencies. At the same time, this Article contains a number of exceptions, the list of which is excausted. In particular, the exceptions could be established in federal laws, Presidential decrees and Government resolutions. Currently exceptions are established in the Federal Law № 238-FZ dated 30.10.2007 "On the State Corporation for the Construction of Olympic Venues and Development of the City of Sochi As An Alpine Resort," the Federal Law № 317-FZ dated 01.12.2007 "On the State Atomic-Energy Corporation Rosatom" and the Federal Law "On the State Space Corporation Roscosmos."

As “presumptions of lawfulness” within the scope of antimonopoly legislation may be considered particular conditions upon satisfaction of which certain actions (inaction), agreements, concerted actions and transactions may be deemed lawful from the standpoint of antimonopoly legislation pursuant to Article 13 of the Competition Law, if they result or can result in:

1) perfection of production, sale of goods or stimulation of technical, economic progress or rising competitive capacity of the Russian goods in the world market

2) obtaining by consumers of benefits (advantages) which are proportionate to the benefits (advantages) obtained by the economic entities in the result of actions (lack of action), agreements and concerted practices, transactions, other actions.

As concerns “safe harbors,” it is worth mentioning that they find their expression, inter alia, in Part 2, Article 12 of the Competition Law, which permits “vertical” agreements between business entities (with the exception of “vertical” agreements between financial organizations), provided that the share of each such entity on the commodity market of the product which is the subject matter of the respective “vertical” agreement does not exceed twenty percent.

In addition, following adoption of the “fourth antimonopoly package,” the Competition Law was updated under the Federal Law № 264-FZ dated 03.07.2016 “On Amending the Federal Law on the Protection of Competition and Certain Legislative Acts of the Russian Federation” with a number of changes concerning certain categories of small and medium enterprises.

These changes introduced “safe harbors” in the form of immunity from the establishment of dominant position for legal entities whose founders or participants consist of one or more natural persons and whose revenue from the sale of goods, works or services over the preceding calendar year does not exceed four hundred million rubles. That said, the Competition Law permits the founders or participants of such legal entities to hold the status of individual entrepreneurs. This immunity does not extend to those cases envisioned by Clauses 1-5, Part 21, Article 5 of the Competition Law.

Thus, the immunity established by these changes for the aforementioned entities presumes immunity from the application of Part 1, Article 10 of the Competition Law (Abuse of Dominance).

In addition to "safe harbours", the Russian competition legislation establishes threshold, at the achievement of which transactions are subject to state control. With the prior consent of the antimonopoly authority, transactions are made if the total

value of assets exceeds 7 billion rubles, or the revenue for the year preceding the merger exceeds 10 billion rubles.

Moreover, in accordance with Article 26.1 of the Competition Law, subject to state control are transactions, other actions with assets of Russian financial organisations and located in the Russian Federation fixed production-related assets and (or) intangible assets, or with regard to voting stocks (shares), the rights regarding Russian commercial and non-commercial organisations, as well as foreign persons and (or) organisations supplying goods to the Russian Federation for over one billion rubles within a year preceeding the date of the transaction.

Safe harbours (legal presumptions) in the competition legislation of Eurasian Economic Union

Annex No. 19 to the Treaty on the Eurasian Economic Union (EAEU) (hereinafter referred to as the Treaty) provides only two grounds for the acceptability of "vertical" agreements: (1) if these are contracts of commercial concession and (2) the share of each economic entity (market participant) that is a party to such an agreement in the commodity market of the goods covered by the vertical agreement does not exceed 20 % .

These basics of the Treaty are identical to those provided in Parts 1 and 2 of Article 12 of the Russian Competition Law. At the same time, unlike the Russian antimonopoly legislation, which fixes the right of the Government of the Russian Federation to determine additional conditions for the acceptability of agreements and concerted actions (general exceptions), which are not specified in the Competition Law, competition legislation of the EAEU does not provide such an opportunity.

On April 4, 2017, the Court of the Eurasian Economic Union issued an advisory opinion (N CE-2-1/1-17-BC), which clarified the provisions of Articles 74, 75 and 76 of the Treaty on the possibility of establishing in the legislation of the EAEU Member states of other criteria for the acceptability of "vertical" agreements. The EAEU Court concluded that the EAEU Member states can not change the criteria for the acceptability of "vertical" agreements. This means that when investigating and considering cases of violation of general rules of competition with regard to "vertical" agreements in cross-border markets, the Eurasian Economic Commission will be guided solely by the provisions of the Treaty on the acceptability of such agreements and will not take into account the norms, in particular, of the Russian

antimonopoly legislation establishing additional criteria not specified in the Treaty of the EAEU.

This approach to regulating the acceptability of "vertical" agreements at the level of competition legislation of the EAEU is seen as not logical and unreasonably rigid. It contradicts both Russian and European practice. In the EU it is common to adopt class exemptions for certain types of activities, that allows to flexibly regulate the relationship of different market players depending on the features of the market. In this regard, it is necessary to introduce amendments to the Treaty, which would allow establishing other criteria for the acceptability of "vertical" agreements in the national legislation of the EAEU Member States. The FAS Russia actively participates in elaboration of proposals on development of competition legislation of the EAEU.