

Strengthening the private sector capacity in competition compliance

Prevention of violations of antimonopoly legislation is one of the main functions of the FAS Russia. Besides the state control of antimonopoly law enforcement, economic concentration control, detection and investigation of antitrust violation, the FAS Russia “prevents monopolistic activity, unfair competition, other violations of the antimonopoly legislation by federal executive authorities, public authorities of the subjects of the Russian Federation, bodies of local self-government, other bodies or organizations exercising the functions of the above-mentioned bodies, public extra-budgetary funds, economic entities, physical persons” (paragraph 3 of article 22 of the Federal Law from July 26, 2006 No 135-FZ “On Protection on Competition” (hereinafter – the Law on Protection on Competition)).

According to the Law on Protection on Competition, there are the following ways to prevent antitrust violations:

1. Issue a Warning on the early stage of the investigation;
2. Giving explanations on antimonopoly legislation in order to resolve the legal uncertainty;
3. Fines varying, considering of mitigating and aggravating circumstances, liability release.
4. Competition advocacy.
5. Implementation of compliance procedures.

The implementation of measures on prevention violations involves not only enforcement activities from the FAS Russia’s side: it also requires economic entities to participate in this process, but not only economic entities themselves and applicants which were aggrieved. Companies which may violate the Law on Protection on Competition can also be involved in the process in case of proper assessing their risks and preventive violations mechanism development.

In 2012 in Russian legislation an important institution was introduced – Institution of Warnings and Cautions (on the impermissibility) which are both instruments of preventive preliminary control of antimonopoly violations.

More frequently than all warning on termination of actions (inaction), which contain the signs of violations of antimonopoly legislation, are given out to companies abusing dominance, if the question is about refusal or avoiding the conclusion of contract or about imposing of unprofitable terms.

The Warning is an issued by antimonopoly authority written document aiming at termination of actions (inactions), abolish or amend acts that have elements of violating the antimonopoly law, or eliminate the cause and conditions that facilitated such a violation, and to undertake measures to eliminate the consequences of the violationⁱ. If a warning is not executed the antimonopoly authority must make a decision to initiate a case on violating the antimonopoly law within not more than 10

days from the moment of the termination of the period established for execution of warningⁱⁱ

Besides warning the FAS Russia applies Cautions (*on the impermissibility*). Unlike the Warning, this document does not testify to existent violation but merely indicates that certain activity may create in the future an antitrust violation.

The Caution (on the impermissibility) is a written document issued about prohibition to exercise actions that can lead to violation of the antimonopoly legislation (further on referred to as a Caution)ⁱⁱⁱ

In 2015 within the framework of "fourth antimonopoly package" of Warning and Cautions (on the impermissibility) widespread on government bodies.

The grounds for a Caution to an official of an economic entity is a public statement by this officer about proposed conduct if such conduct can lead to violating the antimonopoly law and there are no grounds to initiate and investigate a case on an antimonopoly violation.

In accordance to Paragraph 3 of Article 25.7 of the Law "On Protection on Competition" a decision to send a Caution shall be taken by the Head of the antimonopoly authority no later than ten days from the day when the antimonopoly authority found out on the existence of the grounds mentioned in the Part 2 and 2.1 of this Article.

The last years the amount of issued Caution have decreased, and the amount of the issued Warnings annually grows approximately on 20-30%. According to statistics, in 2015 the Russian competition authority issued 2363 warnings, more than 80% from them were executed, that helped Russian entrepreneurs to avoid the enormous risks constrained with the use of measures by antimonopoly bodies, and save significant amount of money both on fines and on the procedures of conducting antimonopoly and cases against the competition authority.

One of instruments of preventing and decline of antimonopoly risks for companies are development and introduction of "antitrust compliance" is a complex of legal and organizational measures, establishing by the normative local acts of the business entity or other company from its group of person, having obligatory effect on the business entity, aimed at compliance with the antimonopoly legislation and prevention of the antimonopoly violations.

Antimonopoly compliance should sent to providing of observance of antitrust legislation managing subject and here to be not the method of care from punishment in case of offensive of consequences for a market as a result of violation of Antitrust legislation.

Introduction of effective system of antitrust compliance will assist to the creation of favorable institutional and organizational environment for the meaningful protection and development of Competition in the Russian Federation.

The internal corporate compliance of the other law areas appeared in Russia long enough, and antitrust compliance does not differ from an anticorruption, tax and

others. Compliance is always a system of control and risk management with those measures that the authorities can apply to the company (risk management).

In 2013, the FAS Russia included development of antitrust compliance in to the long term “Strategy of Development of Competition and the Antimonopoly legislation for the period of 2013 –2024”^{iv} as the independent direction of further activity of the authority and designated it as the priority for development of the antimonopoly legislation and law enforcement practice.

Antitrust compliance may consist of the following statements:

- public (public commitments of the company) or in the form of the non-public policy (internal guidance or clarifications for the employees) with the indication of the main risks and consequences of the violation of the Competition Law);
- corporate commercial policy with a provision of non-discriminatory terms and criteria of selection of contractors for entering into agreements (marketing policy);
- training programs for employees with on antimonopoly legislation (including attestation of key employees);
- documents established disciplinary and other liability for the employees in case of violation of internal orders and procedures (for the actions (inactions) increasing the risk of antitrust violations or actual violations);
- internal measures and algorithms aimed at minimizing antimonopoly risks;
- introduction of the position of company’s officer responsible for functioning of antitrust compliance within the company (antitrust manager);
- procedures of antimonopoly and control over the implementation of antimonopoly compliance.

Currently the FAS Russia analyses practice of antimonopoly compliance both in Russian Federation and on the international level.

In spite of the fact that the current Russian legislation does not contain any provisions regarding antitrust compliance some companies have made the decision to implement antitrust compliance on its own initiatives.

Antitrust compliance requires both legislation recognition and the consequences of its conscientious application. Moreover there should be statements in legislation which determinate the risk assessment of a violation by the company, measures to reduce these risks and indicators of effective compliance.

The FAS Russia proposed to make amendments to the Law “On Protection on Competition” and the Code of Administrative Offences of the Russian Federation (within the framework of the "fifth Antimonopoly package") which leads to the legalization of antitrust compliance procedures.

Thus it is necessary to make an amendments in Code of Administrative Offences of the Russian Federation in accordance with which the fines for antimonopoly violations might be reduced in case of existence of effective antitrust compliance

within the company and the existence of the antitrust compliance procedure could be regarded by the FAS Russia as a mitigating circumstance within defining the size of the penalty.

Its important to take into consideration that antitrust compliance has a different value in application to different violations of antitrust legislation. The most challenging enforcement is abusing dominance: there is no options to develop one unitary standard for all entities. Each entity should managing its own system, which will take into account the market specific, suppliers, employees, etc.

As it has been mentioned there are examples of development and implementation of system and (or) separate elements of antitrust compliance. The reasons of its introduction were primarily, the remedies of the FAS Russia issued within the antimonopoly proceedings or receiving preliminary approval of the FAS Russia to the transactions^v.

In addition, the elements of compliance were introduced as the commitments of the companies as a result of negotiated settlement agreements concluded with the FAS Russia.

Moreover now on the stage of development there are methodical recommendations with minimum requirements to maintenance and composition of the corporate systems which will be noted as the overall focus on the development of a culture of compliance, and the fundamental principles and requirements of Antimonopoly regulation, the measures sent to providing of these requirements, procedures and methodologies of determination of risks, decline of these risks, will be fixed in that.

ⁱ Paragraph 1 of Article 39.1 of the Federal Law “On Protection On Competition”

ⁱⁱ Paragraph 8 of the Article 39.1 of the Federal Law “On Protection On Competition”

ⁱⁱⁱ Paragraph 1 of Article 25.7 of the Federal Law “On Protection On Competition”

^{iv} Affirmed by Presidium of the FAS Russia on July 3, 2016

http://fas.gov.ru/netcat_files/File/Str_razv_konk_i_antimonop_reg_13-14.pdf

^v For example, the compliance procedures have been implemented in such companies, as Uralkali, Rosneft, GazpromNeft, RUSAL, Novo-Nordisk, EVRAZ Group, Knauf Gips, etc.