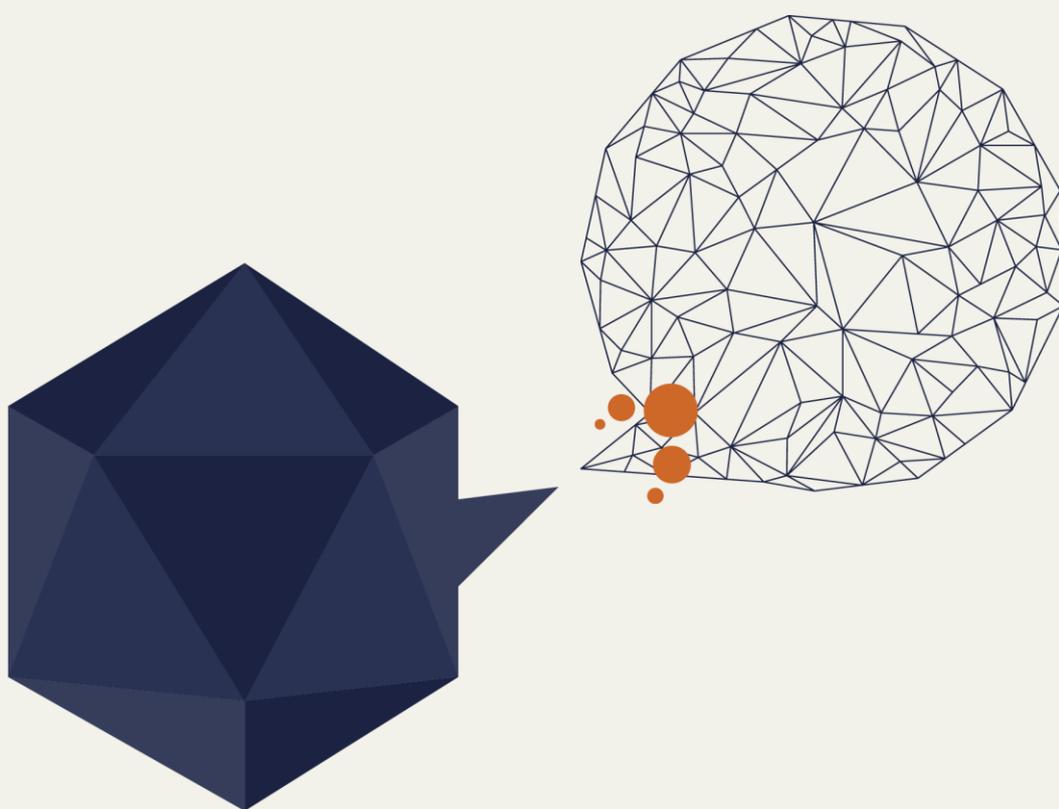


Noerr



**Russia: Antitrust Legislation and
Enforcement Practice 2017-2018**

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/ Introduction

In 2017-2018 the Federal Antimonopoly Service (**FAS**) actively continued investigations and proceedings against both Russian and multinational companies, with a large part of its activity addressed at tender-related violations. In its enforcement efforts FAS is increasingly cooperating with law enforcement authorities, resulting in higher risks that consequences under criminal law may be applied particularly for cartels.

Digital business and technology-driven changes remain a focus of FAS. This is demonstrated in the enforcement area with algorithm-driven cartels and offences (**LG Electronics** and other cases) as well as with changes envisaged to be made to the Russian Competition Law¹ with respect to digital platforms.

Significant legislative changes in 2017-2018 also comprise **differentiation of liability** for antitrust violations, basically resulting in a reduction of maximum fines for violations of less importance, i.e. for vertical agreements in contrast to liability for cartels.

Highlights in the merger control area include **Bayer/Monsanto** which became one of the relatively few examples of FAS imposing conditions on the parties and of an applicant trying to challenge the burdensome conditions.

FAS is also pushing for legislative amendments in order to partially **permit parallel import** without the consent of the trademark owner. However, the implementation of this initiative in Russia requires a prior amendment of rules on the level of the Eurasian Economic Union which remains outstanding to this day.

Activities in the competition sphere at the level of the **Eurasian Economic Union** included a decision against PAO NLMK and OOO VIZ Steel which, together with the previous Caterpillar investigation, highlights potential risks in case of unequal or restricted conditions for distribution arrangements in the member states of the Eurasian Economic Union.

¹ Federal Law No. 135-FZ “On Protection of Competition” dated 26 June 2006.

/ High-profile Cases in 2018

LG Electronics Rus. Algorithms. Recommended Retail Prices.

In 2018 the FAS continued to pay particular attention to leading companies active in the information technology markets. Early in 2018, FAS finished its investigation of LG Electronics RUS, the official importer of LG smartphones into Russia, and established that the company had monitored the prices for its LG smartphones sold in the Internet and coordinated behaviour of independent resellers.

The Russian LG entity regularly published recommended retail prices (RRP) for its LG smartphones on its web-page and monitored whether the resellers observed the RRP. In doing so, LG Electronics RUS collected price data with the use of a special **price algorithm** as well as relied on information from resellers who provided the company with information about their competitors' prices that fell below the RRP. FAS established that some resellers used various price algorithms for monitoring their competitors' prices too and then requested the Russian LG entity to take measures against any diverging reseller, threatening to otherwise reduce retail prices below the RRP too.

FAS held LG Electronics RUS liable² for coordination of economic activities of resellers of smartphones that resulted in fixing and maintaining the prices for LG smartphones of certain models which is prohibited under Art. 11 Part 5 of the Russian Competition Law. Later in 2018 a fine in the amount of RUB 2.5 mn (approx. EUR 34,000) was imposed on LG Electronics RUS.

This case is similar to the 2017 investigation by FAS of a Russian subsidiary of Apple who was found to have monitored both retail and online prices for various iPhones models among resellers and instructed the diverging resellers to adjust the prices³.

Bayer/Monsanto. Merger Control Approval Subject to Conditions.

In evaluating the effects of a proposed acquisition by Bayer of Monsanto in 2017, FAS stepped away from traditional methods of analyzing the consequences of economic concentrations on the basis of the cumulative market shares of the merging parties. Instead, this time FAS analyzed possible changes in the cross-border agro-industrial markets and performed a prospective analysis of the possible position of the combined company with unique potential in digital farming.

² <https://solutions.fas.gov.ru/ca/upravlenie-po-borbe-s-kartelyami/ats-14552-18>

³ For more information please see our Antitrust Legislation and Enforcement Practice 2016/2017 at <https://www.noerr.com/en/newsroom/News/russia-antitrust-legislation-and-enforcement-practice-2016-2017.aspx>

The decision⁴ rendered by FAS required the merging parties to ensure the effective transfer of selection technology to Russian companies and to provide to Russian companies non-discriminatory access to data and platforms that are necessary for digital farming. An independent party, the Technology Transfer Centre formed on the basis of the HSE National Research University, was commissioned to control the execution of the technology transfer and the fulfilment of other requirements by Bayer.

Noteworthy, the FAS required that Bayer should grant Russian companies access to certain IP of Bayer by entering into licensing agreements with selected recipients of the envisaged technology transfer. Previously, FAS had never ordered that access be granted to IP. Under the current legislation IP is largely exempt from antitrust regulation. The case has therefore become an important case as to FAS's authority with respect to IP. In addition, generally the imposition of conditions or restrictions in connection with a merger clearance had happened only on rare occasions in the past.

On 20 April 2018 FAS approved the acquisition of Monsanto by Bayer and issued a mandatory order⁵ substantially stating the previously announced conditions.

⁴ <https://solutions.fas.gov.ru/ca/upravlenie-kontrolya-agropromyshlennogo-kompleksa/-c084b115-a929-42e7-a5a9-a8362a96e6c4>

⁵ <https://solutions.fas.gov.ru/ca/upravlenie-kontrolya-agropromyshlennogo-kompleksa/ia-28184-18>

/ Other “Hot Topics” in 2018

Russian Competition Law and Sanctions

Foreign sanctions continue to affect international companies doing business in Russia. When refusing to contract with certain Russian customers or obliging Russian partners not to re-sell goods to sanctioned persons or supply goods to Crimea, obstacles may arise under Russian competition law. In particular, restricting the resale of supplied goods is, as a rule, prohibited under Russian competition law. Further, companies with a dominant market position may refuse to enter into a contract or treat counterparties unequally only for economic, technical, or other justified reasons. When assessing market dominance, the relevant goods market can sometimes be defined very narrowly, such as a single medicine, specific consumables, or spare parts. Last, but not least, the coordination by one entity of market behavior of two or more other entities that are active on another market may be regarded as a prohibited coordination, such as a manufacturer coordinating the behaviour of its dealers

However, currently there are apparently no cases in which the Federal Antimonopoly Service (FAS) has pursued violations of Russian antitrust law that were caused by the compliance with anti-Russia sanctions. According to an interview with the Head of FAS, Igor Artemyev, conducted in 2014, FAS could have opened dozens of cases against foreign companies in connection with the sanctions, but *“the position of the Russian Government is not to use such tools, at least at this stage, in order not to worsen the relations”*⁶. Apparently, this position of the Russian Government has remained unchanged since 2014. In 2015, the Head of FAS commented on the Apple’s announced prohibition of sales of its products in Crimea⁷, however, FAS did not take any actions against the company. At the same time, within the investigation against *LG Electronics* (see page 4 above) FAS requested information from resellers of LG smartphones on whether or not they do sell goods in Crimea and in the city of Sevastopol, and whether or not they have ever received from other entities, e.g. importers of goods into Russia, instructions not to sell goods in Crimea. If the political position changes, we cannot exclude that FAS may start to investigate restrictions of sales to Crimea and punish international businesses for antitrust violations.

Cooperation between Competitors. Merger Control Filing.

In 2016 a new merger control filing requirement had been introduced, triggering FAS approval for agreements on joint activities between competitors on the territory of Russia. This requirement continues to raise a number of questions in its practical implementation.

⁶ <https://ria.ru/20140923/1025286137.html>

⁷ <https://fas.gov.ru/publications/3599>

The filing requirement applies to both corporate and contractual joint ventures, i.e. irrespective of whether or not the joint venture encompasses the creation of a legal entity. It can also apply in case the joint venture agreement is concluded only between foreign entities. As a precautionary measure one should assume in such a scenario that the additional RUB 1 billion threshold for foreign-to-foreign transactions does not apply. It is sufficient for the filing requirement that the joint venture agreement concerns not solely the Russian market, i.e. it can concern several countries with Russia being one of them.

As far as the determination of “competitors” is concerned, this term includes both competitors on the sales markets as well as competitors on the purchasing markets. In addition to the merger control filing, general restrictions on anticompetitive behaviour (cartels) must be carefully considered. The FAS approval in the context of the merger control filing is deemed to grant an exemption from these general restrictions. Based on the clarifications on joint ventures between competitors that FAS had issued already in 2013, one may expect FAS to impose restrictions – in particular time limits – when approving non-compete clauses in the context of such a cooperation between competitors.

Personal Liability of Management

In a rare, possibly even the first, court case in this respect, the Commercial (*Arbitrazh*) Court of the City of Moscow ordered the disqualification of the CEO of a Russian legal entity for violation of Russian antitrust laws. The CEO has been barred from serving as CEO of any Russian entity for the duration of one year. This is a sign of the Russian antitrust authority’s fight against bid rigging, now in practice inflicting personal liability on the individuals involved.

In a tender concerning the supply of office equipment, OOO TIRION and OOO Company FILAKS had agreed on bid rigging that lead to maintaining of prices. FAS’s department in the Moscow Region (“**UFAS of Moscow Region**”) recognized the companies’ actions of as violation of the Russian Competition Law. The companies were fined for this violation in accordance with the Code of Administrative Offences of the Russian Federation.

Taking into account the severity and degree of public danger of the violation, additionally the UFAS of Moscow Region filed a claim with the Commercial (*Arbitrazh*) Court of the City of Moscow, requesting to impose on the General Director (CEO) of OOO Company FILAKS administrative liability in the form of disqualification from serving as CEO. The court followed the position of the UFAS of Moscow Region and decided to disqualify the General Director of OOO Company FILAKS for a period of one year.

In recent years there were several cases of disqualification of state officials, but disqualification of CEO of a private legal entity is a precedent and a clear sign that the risk of individual liability has shifted from theoretical to real.

/ Legislative Developments in 2017-2018

Differentiated Liability for Antitrust Offences

Amendments to Article 14.32 of the Russian Code of Administrative Offences⁸ came into force in 2017, providing for differentiated fines for various types of antitrust offences whereby the less dangerous offences entail lower liability.

The amended penalties scale sets forth administrative fines as follows:

- for cartels in the amount from 3% to 15% of the annual turnover of the liable company on the relevant market (previously 1% to 15% of the annual turnover),
- for concluding an anticompetitive vertical and other agreement in the amount from 1% to 5% of the annual turnover of the liable company on the relevant market (previously 1% to 15% of the annual turnover),
- for illegal coordination of economic activities in an amount ranging between RUB 1 million and RUB 5 million irrespective of the company's turnover (previously 1% to 15% of the annual turnover),
- for concerted actions between competitors in the amount from 1% to 3% of the annual turnover of the liable company on the relevant market (previously 1% to 15% of the annual turnover).

The amendments illustrate the current enforcement practice of FAS whereby the focus is made on investigations of cartels on all markets.

⁸ <http://asozd2.duma.gov.ru/main.nsf/%28SpravkaNew%29?OpenAgent&RN=52643-7&02>

/ Upcoming Legislative Developments in 2019

Competition Authority to Increase Attention on Digital Platforms

FAS is pursuing further amendments to the Russian Competition Law (the draft law also being referred to as Fifth Antimonopoly Package⁹). The draft amendments proposed by FAS have been in discussions between FAS and the Russian government that are still ongoing.

FAS is aiming to address issues arising due to the increased significance of internet-related business. Provisions shall be introduced into the Russian Competition Law that allow FAS to better assess and qualify the activities of entities that own digital platforms, in particular regarding the determination of a dominant market position. At that, the FAS suggests that an entity operating a digital platform can be recognized as having a dominant market position if the digital platform occupies more than 35% of the market and provides network effects to its owners that empowers the entity to significantly influence the market.

Potentially Uber, Facebook, booking.com and many other online players may qualify as owners of digital platforms and could face restrictions provided for by the amended law.

The draft amendments further foresee extended time frames for the review of merger control filings. According to FAS's proposal FAS would obtain the right to extend the review period for up to three years for transactions or other actions of a cross-border nature. Likewise, FAS is seeking more flexibility for itself to impose certain conditions or requirements in connection with a merger clearance. These efforts by FAS were apparently triggered by the Bayer/Monsanto case in which FAS imposed certain conditions on the parties, but FAS obviously felt that the legislative basis for imposing such conditions was not satisfactory.

Antitrust Compliance Program

In connection with an initiative on the introduction of a new concept for Russia – a "**corporate antitrust compliance program**" – into both the Russian Competition Law and the Russian Code of Administrative Offences, the FAS developed a draft law aimed at encouraging companies to implement special antitrust compliance measures. According to the draft law, companies with an effective antitrust compliance system in place, if held liable for antitrust violations, will be granted a benefit of possible mitigation of liability. Furthermore, the draft law foresees an obligatory implementation of an antitrust compliance program by a wide range of business entities including state corporations, natural monopoly subjects, business

⁹ <http://en.fas.gov.ru/documents/documentdetails.html?id=15345>

entities with the majority stake held by the state as well as companies active in regulated industries.

This initiative by FAS has been the subject of discussions for several years. As of January 2019 the draft law¹⁰ has still not been submitted to the State Duma. However, businesses expect that the draft amendments will move further through various stages of the legislative process in 2019.

On the other hand, current legislation allows businesses to already now implement internal compliance programs in order to minimize antitrust risks. The Methodological Recommendations¹¹ had been prepared by FAS in 2017 and are primarily addressed to the defence and industrial sectors as well as companies involved in state defence orders, but are also intended to serve as guidance for companies in other business sectors.

Increase of Fines for Impeding FAS Investigations

Another FAS initiative¹² that is to introduce **turnover-related fines** for companies creating obstacles to inspections of FAS, including "dawn raids", remains a draft law, too.

As early as 2017 the FAS suggested to increase the fine for impeding access to the company's premises or otherwise impeding inspections carried out by the FAS from the current RUB 5,000-50,000 to an amount between 0.1% and 0.5% of the total annual turnover of the company from sales of all goods.

The FAS illustrated the need for this amendment by stating a Lenovo case as an example. FAS had sent to Lenovo a number of official requests for provision of information in connection with the suspected conspiracy in a tender. However, Lenovo neither complied with these requests in a timely manner nor presented complete information. In addition, the company subsequently impeded a "dawn raid" by the FAS at the company's premises.

Parallel Import. Ongoing Initiative by FAS to Permit Parallel Import.

FAS has been advocating the legalization of parallel import for years. In October 2018 FAS presented a draft law to amend the Russian Civil Code in order to partially legalize the parallel imports of goods in Russia, i.e. the import of original goods without the trademark owner's consent.

¹⁰ <http://regulation.gov.ru/projects#npa=50178>

¹¹ Methodological Recommendations on the Introduction of Internal Control over Compliance with Antitrust Legislation, State Defence Orders Legislation and Legislation Regulating Procurement Activities for Defence and Industrial Complex Enterprises and Executors of State Defence Orders, approved by Order of the Government of the Russian Federation No. 795-r dated 26 April 2017, are available at: <https://fas.gov.ru/documents/561689>.

¹² <http://regulation.gov.ru/projects#npa=63034>

Currently Russia is one of the few countries that apply the so-called principle of national exhaustion of rights with regard to trademarks. This approach is mirrored by the principle of regional exhaustion applicable within the Eurasian Economic Union. According to the principles of national or regional exhaustion, the trademark owner's rights are considered exhausted for a particular country or region once goods bearing the trademark have been put on the market in that particular country or region by the trademark owner or with its consent. The exhaustion does not extend to other countries or regions, which allows the trademark owner to prevent unauthorised use of its trademark outside the home country or region, including to prohibit parallel imports by third parties into the region where the trademark owner is already selling its goods.

The recent initiative aims only at a partial legalisation of parallel imports, mentioning cases when goods are in short supply or not available in Russia (including goods under sanctions), overpriced goods, or goods whose quality significantly differs from the quality of the same goods sold in other countries. Parallel imports of such goods may be permitted for a term of up to five years. Additionally, locally produced branded goods may be excluded from this permission.

At the same time, the new draft law cannot be implemented until the relevant amendments are made to the regulations of the Eurasian Economic Union that establish the regional principal of exhaustion of trademark rights for its member states.

Foreign Investments into Russian "Strategic" Entities

The law on foreign investments is separate from the Russian Competition Law, but it is also administered by FAS and can have a procedural impact on merger control filings.

FAS has proposed amendments to the so-called Strategic Investments Law which concerns investments by foreigners in Russian enterprises of strategic importance, in order to expand the list of enterprises that are the subject matter of this law, to strengthen measures of supervision and to increase the negative consequences arising from a violation.

Specifically FAS proposes to expand the concept of "strategic entities" in order to cover more businesses that are currently not regarded as "strategic". The amended law will likely regard Russian business partnerships, farm enterprises, producers' co-operatives and state and municipal unitary enterprises as "strategic entities", and apply the restrictions of the Strategic Investments Law to them.

The FAS also aims to expand its authority in this area to include in particular the authority to conduct inspections – both regular and unplanned – of "strategic" entities and of foreign investors, in order to discover if control over such entities has been obtained in contravention of the Strategic Investments Law. The proposed amendments also allow for the compulsory sale at public auctions of interests (shares) acquired by foreign investors in violation of the Strategic Investments Law.

/ Cross-border Markets / Eurasian Economic Union

In 2017-2018 the antitrust practice in the Eurasian Economic Union (the EEU) has continued to evolve, with the Eurasian Economic Commission (the EEC) acting as a **supranational antitrust authority** of the EEU. The EEU member states are Russia, Belarus, Kazakhstan, Armenia and Kyrgyzstan.

Automotive, machinery, pharmaceuticals and IT/telecom are focus areas for the near future according to the EEC's statements. Enforcement practice still remains fairly limited, but an increase in activity is to be expected over the next years.

In 2016 the EEC had investigated Caterpillar¹³ who had a wide dealership network in Russia, Kazakhstan and Belarus, with dealers being appointed as exclusive dealers within their assigned territories. As a result of consultations with the national competition authorities and the EEC, Caterpillar amended its distribution agreements with the dealers that are active in the EEU. Following *Caterpillar*, companies active in the EEU should carefully consider whether or not to pursue (or continue) any **territorial restrictions within the EEU**.

In 2017, the EEC continued this approach. In particular, in another case the EEC indicated that the companies PAO NLMK and OOO VIZ Steel abused their dominant market positions by offering different prices for dealers located in different countries within the EEU. The decision was adopted in September 2017.

These cases demonstrate that the territory of the whole EEU should be taken into account upon establishment of distribution structure in this region.

¹³ <http://www.eurasiancommission.org/ru/nae/news/Pages/29-07-2016-4.aspx>

/ Our Team



Stefan Weber, Local Partner and Head of Noerr's Moscow office, heads the Antitrust & Competition practice of Noerr in Moscow. Stefan Weber assists international businesses on Russian merger control issues, strategic law filings, distribution structures, joint ventures and M&A transactions, tender-related issues, proceedings with the FAS, ongoing compliance advice, compliance manuals and commercial policies, trainings and investigations, as well as the coordination of antitrust issues in CIS countries.



Tatiana Dovgan, Senior Associate, has significant experience in various areas of antitrust law, including due diligence of distribution contracts and other commercial agreements regarding compliance with Russian competition law as well as assessment of business practices for potential liability risks in respect of abuse of dominance, cartel activity and other antitrust violations. She assists clients with the implementation of antitrust compliance programs, trainings, antitrust audits and mock dawn raids. She also deals with merger control clearances in Russia and CIS.



Artem Kara, Senior Associate, advises clients from different industries on numerous aspects of antitrust law, such as merger control procedures, vertical and distribution agreements, information exchange, market dominance, tenders. He also advises foreign clients on strategic investments laws and on compliance issues from a Russian antitrust perspective, including investigations, trainings and compliance manuals. He also represents businesses in proceedings with the FAS and advises on unfair competition.

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