

## 6. Competition Protection Law

Antitrust matters in Russia are mainly regulated by the Federal Law on Protection of Competition (the “Competition Law”) and fall under the auspices of the Federal Antimonopoly Service (“FAS”).

The Competition Law has extra-territorial effect and applies to agreements concluded and actions taken outside Russia, including by non-Russian persons, if they affect competition in Russia. The Competition Law does not apply to agreements and actions committed on cross-border markets - i.e., markets of at least two countries of the Eurasian Economic Union to which Russia is a member - if such agreements and actions fall within the jurisdiction of the Eurasian Economic Commission, which is a supranational authority in the Eurasian Economic Union.

The Competition Law and related legislation address the following areas that may be relevant for foreign investors:

- Abuse of market dominance;
- Anticompetitive agreements and concerted practices between companies;
- Anticompetitive agreements between companies and government authorities;
- Requirements for procurement tenders by government authorities, government enterprises and private companies;
- Requirements for the transfer of state-owned property;
- Government aid;
- Establishment of companies;
- Mergers and acquisitions; and
- Unfair competition and advertising.

## 6.1 Abuse of Market Dominance

Dominant entities are subject to certain restrictions on their activities. Determining whether a particular entity holds a dominant position involves a complex evaluation of various factors, including, most importantly, the definition of a market and the entity's market share. When determining market share FAS normally reviews the entire group of entities, including all persons and legal entities related by a common controlling share ownership, and contractual or other de facto management control, rather than looking at the dominant entity in isolation.

For entities with a market share exceeding 50% there is a presumption of market dominance. Entities with a market share between 35% and 50% are deemed dominant, provided their dominant position has been established by FAS. For entities with a market share not exceeding 35% there is a presumption of non-dominance.

Different (lower) thresholds apply to certain industries. For example FAS deems a financial organization to be a dominant entity according to the criteria set by the Russian Government (and with respect to credit organizations, together with the Russian Central Bank). A financial organization whose share in any single market in the Russian Federation does not exceed 10%, or whose share does not exceed 20% in a commodity market if the commodity also circulates in other commodity markets in the Russian Federation, may not be deemed dominant.

The Competition Law also uses the concept of “collective dominance”, which is deemed to exist if all of the following criteria are met:

- the market share of up to three companies exceeds 50%, or the market share of up to five companies exceeds 70%, provided the share of each such company is or exceeds 8% and at the same time exceeds the respective shares of other market players;

- during a continuous period of time (at least one year) the shares of companies active on the relevant market are stable or fluctuate insignificantly, and there are barriers to market entry;
- goods sold or purchased by the companies cannot be substituted, any price increase is not proportionate to the respective decrease in demand and the information on prices and terms of selling or purchasing the goods is publicly available.

For those in a dominant position, the Competition Law prohibits any actions and inactions which may lead to restriction of competition and/or damage interests of other economic interests or an indefinite group of consumers, being both legal entities and individuals buying goods and services, in particular, any of the following activities:

- Setting and/or maintaining monopolistically high or low prices;
- Withdrawal of goods from circulation if this leads to higher prices for such goods;
- Creation of discriminatory conditions, i.e. those which place one or more business entities in an unequal position as compared to other entities in their ability to access the market for particular goods;
- Unjustified imposition of contractual terms that are disadvantageous to the other party or do not relate to the subject matter of the contract;
- Stopping or decreasing the production of goods for which there is consumer demand if it is possible to produce such goods on a profitable basis;

- Unjustified refusal to enter into a contract with particular customers if it is possible to provide the relevant goods to such customers;
- Unjustified setting of different prices for the same goods;
- Creation of barriers to market entry or exit for other business entities;
- Violation of pricing rules established by legislation;
- Price manipulation in the wholesale and (or) retail electricity markets.

However, certain of the above activities may be allowed if the dominant entity can prove that the positive effects of a particular activity outweigh its negative consequences pursuant to the criteria set in the Competition Law.

The prohibitions against the abuse of market dominance do not apply to the exercise of intellectual property rights.

In order to prevent abuse of dominance the Russian Government may introduce mandatory rules of non-discriminatory access on product market for those dominant entities, whose share exceeds 70% in the relevant market and who are not operating as a natural monopoly. Such rules can only follow a valid decision of FAS on abuse of dominance and must provide for a wide variety of conditions, including publication of information on (i) the supply of goods in the market, (ii) full list of consumers to be supplied in priority to others if the supply is limited, (iii) material terms of supply agreement, and other information.

## 6.2 Anticompetitive Agreements, Concerted Actions and Actions of State Bodies Limiting Competition

### 6.2.1 Agreements Limiting Competition

The Competition Law specifically prohibits cartels, i.e. agreements concluded between competitors, if such agreements lead or may lead to the following:

- Setting or maintaining prices, discounts, bonus payments, or surcharges;
- Increase or reduction of prices or manipulation of prices at tenders;
- Division of the market by territory or according to the volume of sales/purchases, assortment, or the range of sellers or buyers;
- Refusal to deal with particular sellers or customers;
- Ceasing or decreasing production of goods.

The term “competitors” covers not only entities supplying goods on the same market, but also the entities that purchase goods on the same market.

The Competition Law also specifically prohibits vertical agreements, i.e. agreements between companies at different levels in the supply chain, if they: (i) lead to resale price fixing, save for setting a maximum resale price; and/or (ii) impose an obligation on the buyer not to allow the sale of a competitor’s products unless the sales are organized by the buyer under a trademark or other means of individualization of the respective manufacturer or supplier.

The Competition Law specifically prohibits agreements between economic entities acting in wholesale and/or retail electricity markets and commercial or technological infrastructure markets if such

agreements lead to price manipulation in the wholesale or retail electricity markets.

In addition, the Competition Law generally prohibits other agreements that lead or may lead to restriction of competition as may be determined by market analysis. These are agreements which impose unfavorable conditions on the counterparty, set different prices for the same goods without a valid objective justification, create barriers for third parties entering or exiting a certain market, or set conditions for participating in professional or other associations.

Lastly, the Competition Law prohibits “coordination of economic activities” by economic entities if such coordination may lead to restriction of competition. “Coordination of economic activities” is understood as coordination of the actions of economic entities by a third person who does not belong to the “group of persons” of such economic entities and does not act on the market where coordination is taking place. Actions pursuant to a vertical agreement are not treated as coordination of economic activities.

At the same time, the Competition Law provides certain exemptions from the above restrictions, in particular:

- The Competition Law permits vertical agreements (i) that are concluded between economic entities each having a market share of 20% or less in the market of a product in relation to which the agreement is concluded; and/or (ii) that are commercial concession (franchise) agreements concluded in written form;
- Save for cartels, an agreement may be recognized as permissible if it can be proved that (i) the agreement does not lead to elimination of competition or impose excessive restrictions on the parties or third parties and (ii) the positive effects of the agreement, including socio-economic effects, outweigh the negative consequences pursuant to the criteria set in the Competition Law;

- An agreement on joint activities, even if it may technically be viewed as a cartel, may be recognized as permissible if it can be proved that (i) the agreement does not lead to the elimination of competition or impose any restrictions on third parties and (ii) the positive effects of the agreement, including socio-economic effects, outweigh its negative consequences pursuant to the criteria set in the Competition Law. In fact, the agreement on joint activities cannot be recognized as a cartel if it has been earlier pre-approved by FAS;
- Some agreements are exempt from all restrictions if entered into between companies of the same group of persons and either party to the agreement controls, is controlled by or is under common control with the other party to the agreement. Control for this purpose is understood as the ability of one person or entity to determine directly or indirectly the decisions taken by the other entity either through exercise of more than 50% of voting shares in the entity or by performing the functions of an executive body of the entity;
- Agreements on intellectual property rights are exempt from all restrictions specified above.

In addition, the Russian Government has introduced general block exemptions and block exemptions in a number of economic areas (e.g. credit and insurance organizations). The general block exemptions specify certain conditions which automatically render a vertical agreement permissible, as well as conditions which ensure permissibility of an agreement.

## 6.2.2 Concerted Actions Limiting Competition

The Competition Law specifically prohibits concerted actions between competitors acting on the same market, if such concerted actions lead to the following:

- Setting and/or maintaining prices, discounts, bonus payments, or surcharges;
- Increase or reduction of prices or manipulation of prices at tenders;
- Division of the market by territory or according to the volume of sales/purchases, the range of marketable goods, or the range of sellers or buyers;
- Refusal to deal with particular sellers or customers unless such refusal is provided for by federal legislation;
- Ceasing or decreasing production of goods.

Under the Competition Law “concerted actions” are defined as actions carried out by economic entities without agreement and that meet the following criteria: (i) the outcome of the actions is in the interest of each of the participating economic entities, (ii) each economic entity is aware of the actions due to a public announcement made by one of the economic entities participating in the concerted actions, and (iii) the actions of each of the economic entities are based on the actions of other economic entities and do not result from circumstances equally affecting all economic entities in the market.

In addition, the Competition Law prohibits concerted actions made by economic entities acting on the wholesale and/or retail electricity markets and commercial or technological infrastructure markets if such agreements lead to manipulation of prices in the wholesale and/or retail electricity markets.

The Competition Law generally prohibits concerted actions between competitors that lead to restriction of competition, including creation of unfavorable conditions for a counterparty, setting of different prices for the same goods without economic or technological justification, or creation of barriers for third parties trying to enter into or exit from a certain market.



Certain concerted actions may be permitted provided it can be demonstrated that their positive effect, including socio-economic effect, outweighs their negative consequences pursuant to criteria set in the Competition Law.

The above prohibitions do not apply to concerted actions taken (i) by persons whose aggregate market share does not exceed 20% and individual shares do not exceed 8%, or (ii) among the same group of companies if one of the participants controls or is under common control with the other participant of concerted actions.

### 6.2.3 Actions and Agreements Involving State Bodies Limiting Competition

The Competition Law also contains certain restrictions applicable to anticompetitive actions and agreements involving federal executive state bodies, the Central Bank, non-budgetary funds, regional and municipal state bodies and organizations performing state functions or providing state services.

The Competition Law specifically prohibits (i) restrictions in relation to the establishment of legal entities, (ii) restrictions on the movement of goods within Russia or other restrictions on the sale, purchase or exchange of goods, (iii) limitations on the right to choose suppliers, (iv) steps that grant state preferences in breach of prescribed procedures, or (v) discriminatory conditions, etc.

## 6.3 Requirements for Tenders and Price Quotations

The Competition Law lists actions that are prohibited during tenders (including government tenders) and when seeking price quotations if they lead to restriction of competition. Such actions include setting preferential conditions for participation in tenders, breaching procedures for determining the winner, and restricting participation in tenders. In addition, when conducting public procurement tenders or seeking price quotations, it is prohibited to restrict competition by including into tender lots products that differ technologically and

functionally from the products, services and works that are the subject matter of a tender.

In addition to the Competition Law, detailed requirements for public procurement tenders and price quotations are outlined in Federal Law No. 44-FZ “On the Contractual System for the Purchase of Goods, Works and Services for State and Municipal Needs.” Special rules concerning tenders organized by state corporations and state-controlled companies are outlined in Federal Law No. 223-FZ “On Procurement of Goods, Works and Services by Certain Types of Legal Entities.” Finally, tenders for the transfer of state property are also subject to special procedures similar to public procurement tenders.

## 6.4 State Aid

The Competition Law defines state (or municipal) aid as granting an economic entity certain privileges over other market participants, ensuring more favorable conditions for its activity in the relevant market by transferring property and (or) civil rights, preferences or state (or municipal) guarantees.

State (or municipal) aid may be granted with preliminary written approval of FAS, subject to a few exceptions specified in the Competition Law, for the following purposes:

- Ensuring vital services for the population in Arctic regions and equivalent areas;
- Developing science and education;
- Conducting fundamental scientific research;
- Protecting the environment;
- Development and conservation of the cultural heritage;
- Developing sports and physical culture;

- Agricultural production;
- State defense and security;
- Rendering social services for the population;
- Protecting health and labor; and
- Rendering support to small or medium businesses.

In order to provide state (or municipal) aid, the authority intending to grant the aid must submit an application to FAS for approval with supporting documents (including a draft of the grant indicating the goals and amounts of the aid, a list of the beneficiary's activities over the two years preceding the date of the FAS application, and other information required by the Competition Law).

FAS should rule on the application within one month of the date of filing of a complete application but may extend the review period to two months if it believes that the state (or municipal) aid might restrict competition.

## 6.5 Establishment of Companies, Mergers & Acquisitions and Joint Ventures

The Competition Law stipulates that a transaction is subject to state control if it meets certain thresholds and involves:

- main production (fixed) assets or intangible assets that are located in Russia;
- voting shares, participatory interests or rights in Russian commercial and non-commercial legal entities;
- voting shares, participatory interests or rights in foreign companies supplying goods to the Russian Federation worth more than RUB 1 billion during the year preceding the transaction;

- joint ventures in Russia between competitors; or
- the assets of Russian financial organizations.

#### 6.5.1 Establishment of Companies

The founders must obtain consent from FAS prior to the establishment of a new company (be it Russian or foreign) if its charter capital is paid in kind with the shares or property of a Russian legal entity and the new company acquires in that payment more than 25%/50%/75% of the shares in a Russian joint stock company or more than  $\frac{1}{3}$  / 50% /  $\frac{2}{3}$  of the participatory shares in a Russian limited liability company, or where the company acquires more than 20% of the main production (fixed) assets or intangible assets located in Russia (exclusive of most types of buildings and land plots) of another legal entity, and where the thresholds set in the Competition Law are met.

According to specific conditions provided by the Competition Law, the establishment of a company whose charter capital is paid using the shares or property of a Russian financial organization may be subject to mandatory FAS notification requirements. The relevant filing must be made before the new company is established.

#### 6.5.2 Mergers and Acquisitions

##### 6.5.2.1 Mergers

The consolidation or merger of legal entities (save for financial organizations) is subject to the prior approval of FAS if the aggregate asset value of these entities and their “group of persons” exceeds RUB 7 billion or the aggregate revenue earned by the entities and their “group of persons” from the sale of goods during the past calendar year exceeds RUB 10 billion. The procedures for obtaining such approval are similar to the procedures used for acquisitions.

The thresholds for consolidations or mergers involving financial organizations are set by the Russian Government depending on the type of financial organizations involved.

Intra-group consolidations or mergers may be exempt from the requirement to obtain prior FAS approval, provided certain conditions are met, but a limited number of these transactions may require post-transaction notification to FAS, subject to certain additional requirements being applied (outlined in more detail below).

The following constitutes a “group of persons”:

- a company (partnership) and an individual or legal entity, if such individual or legal entity, by virtue of participation in this company (partnership), or in accordance with authority received from other persons, including on the basis of written agreement, has more than 50 percent of the total number of votes carried by voting shares/participation interest in the charter capital of this company (partnership);
- a legal entity and an individual or legal entity, if such individual or legal entity exercises the functions of the sole executive body of this legal entity;
- a company (partnership) and an individual or legal entity, if such individual or such legal entity on the basis of the constituent documents of this company (partnership) or a contract made with this company (partnership), is entitled to issue mandatory instructions to this company (partnership);
- legal entities in which the same individuals make up more than half of the management council and (or) the board of directors (supervisory board, fund’s council);
- a company and an individual or legal entity, if the sole executive body of such company has been appointed or elected at the proposal of such individual or legal entity;
- a company and an individual or legal entity, if more than half of the members of the management council or board of

directors of such company have been elected at the proposal of such individual or legal entity;

- an individual and his/her spouse, parents (including adoptive), children (including adopted), brothers, sisters and half-brothers and half-sisters thereof;
- persons who, for any of the reasons specified above, belong to a group with one and the same person, as well as other persons belonging to the same group with each of such persons for any of the reasons specified above;
- a company (partnership) and individuals and/or legal entities if such individuals/ legal entities (for any of the reasons specified above) are part of one “group of persons” and at the same time such individuals/legal entities (whether by virtue of participation in this company (partnership) or in accordance with authority received from other persons) jointly have more than 50% of the votes represented by voting shares (participatory interest) in the charter capital of this company (partnership).

#### 6.5.2.2 Acquisition of Interests, Assets and Rights in a Russian Company

##### *Acquisition of Shares or Participatory Interests in a Russian Company*

When an individual, legal entity or “group of persons” acquires more than 25%/50%/75% of voting shares in a Russian joint stock company or more than  $\frac{1}{3}$  / 50% /  $\frac{2}{3}$  of participatory shares in a Russian limited liability company, such persons, entities or group must receive prior approval from FAS if:

- The aggregate book value of the assets of the acquirer and its “group of persons” plus the target and its “group of persons” exceeds RUB 7 billion and the book value of the total assets of the target and its group exceeds RUB 250 million; or

- The aggregate revenue earned by the acquirer and its “group of persons” plus the target and its “group of persons” from the sale of goods over the past calendar year exceeds RUB 10 billion and the balance sheet value of the total assets of the target and its group of persons exceeds RUB 250 million.

### *Acquisition of Assets Located in Russia*

When an individual, legal entity or “group of persons” acquires the right of ownership or the right to use the main production (fixed) assets located in Russia or intangible assets of a Russian or foreign entity (subject to certain exceptions provided in the Competition Law), if the acquired assets account for more than 20% of the aggregate book value of the main production (fixed) assets and intangible assets of the transferring entity, such persons, entities or a group of entities involved in the acquisition must receive prior approval from FAS if:

- The aggregate book value of the assets of the acquirer and its “group of persons” plus the target and its “group of persons” exceeds RUB 7 billion and the book value of the total assets of the target and its group exceeds RUB 250 million; or
- The aggregate revenue earned by the acquirer and its “group of persons” plus the target and its “group of persons” from the sale of goods during the past calendar year exceeds RUB 10 billion and the book value of the total assets of the target and its group exceeds RUB 250 million.

For the purposes of the above calculation, the main production (fixed) assets or intangible assets of an entity to be transferred should not include land plots and non-industrial buildings, constructions, premises and parts thereof or unfinished construction objects.

### *Acquisition of Rights in a Russian Company*

When an individual, legal entity or “group of persons” acquires rights conferring the ability to determine the commercial behavior of the target company (including as a result of change of indirect control over a Russian target company) or the right to perform the functions of its executive bodies, such persons, entities or group of persons must receive prior approval from FAS if:

- The aggregate book value of the assets of the acquirer and its “group of persons” plus the target and its “group of persons” exceeds RUB 7 billion and the book value of the total assets of the target and its group exceeds RUB 250 million; or
- The aggregate revenue earned by the acquirer and its “group of persons” plus the target and its “group of persons” from the sale of goods over the past calendar year exceeds RUB 10 billion and the book value of the total assets of the target and its group exceeds RUB 250 million.

### *Mergers and acquisitions made outside of Russia which require Russian anti-trust approval*

When an individual, legal entity or “group of persons” acquires more than 50% of the voting shares of, or any right of control over, a legal entity incorporated outside Russia, or the right to perform the functions of its executive bodies, the acquirer must receive prior approval from FAS if:

- Such target foreign legal entity controls a Russian subsidiary, or such target foreign legal entity supplied goods to the Russian Federation worth more than RUB 1 billion during the year preceding the transaction; and
- The aggregate book value of the assets of the acquirer and its “group of persons” plus the target and its “group of persons”



exceeds RUB 7 billion and the book value of the total assets of the target and its group exceeds RUB 250 million; or

- The aggregate revenue earned by the acquirer and its “group of persons” plus the target and its “group of persons” from the sale of goods over the past calendar year exceeds RUB 10 billion and the book value of the total assets of the target and its group exceeds RUB 250 million.

### *Joint ventures in Russia between competitors*

When competitors enter into an agreement on joint activities in Russia (including joint ventures, co-marketing, co-promotion, etc), they must first receive prior approval from FAS if:

- The aggregate book value of the assets of the parties and their “groups of persons” exceeds RUB 7 billion; or
- The aggregate revenue earned by the parties and their “groups of persons” from the sale of goods over the past calendar year exceeds RUB 10 billion.

In determining the threshold for asset and revenue values, FAS takes into consideration not only the acquirer and the target company or the parties, but also all persons (individuals or legal entities) in the acquirer’s and target’s or the parties’ “group of persons.”

Where a merger or acquisition takes place between entities in the same “group of persons” that are related to each other through other than a shareholding of over 50% (e.g., through management control, contractual control or other de facto control), the Competition Law permits a 45-day post-transaction notification of FAS, provided the group structure is submitted to FAS no later than one month before the transaction and the group structure does not change until after the transaction.

The Competition Law contains separate conditions and thresholds for the acquisition of an interest, asset or right in a financial organization

subject to pre-acquisition FAS notification; these acquisitions should be considered on a case-by-case basis.

## 6.6 Procedures and Timing

If FAS determines that an establishment of a company or a merger or acquisition may restrict competition or strengthen a dominant position, it may request additional information and documentation. FAS may also require the parties to take measures to ensure competition.

After all documents have been submitted, FAS has 30 days to review the application or notification. If FAS believes that the transaction may lead to restriction of competition, the review period may be prolonged for an additional two months, during which time FAS places information about the transaction on its official web-site and invites all interested parties to voice their opinions on the transaction.

## 6.7 Unfair Competition and Advertising

Unfair competition is prohibited in Russia. Aside from unfair competition rules FAS also enforces the rules on unfair advertising. In general, unfair competition is considered to be an action committed by a legal entity or individual, that (i) is aimed at acquiring a competitive advantage in a commercial activity, (ii) is contrary to the Competition Law, business customs, or the requirements of good-faith, reasonableness and fairness; and (iii) has caused or may cause losses to other competing legal entities or damage their business reputation.

Specifically, a commercial entity may be liable for unfair competition if it:

- disseminates false, inaccurate or distorted information that may cause losses to another commercial entity or damage the entity's business reputation;

- misleads consumers about the nature, methods and place of production, as well as consumer characteristics and quality, of goods;
- incorrectly compares the goods produced or sold by another commercial entity with the goods of other commercial entities;
- sells goods that illegally use another's intellectual property or means of individualization to identify a commercial entity, products, or services, such as trademarks, logotypes and other objects of intellectual property;
- creates confusion with a competitor's business or products provisions on disparaging statements;
- receives, uses and discloses commercial, official or other secrets without the consent of the commercial entity to which this information belongs; or
- otherwise competes unfairly (e.g., uses other person's business reputation).

## 6.8 Agreement on the Eurasian Economic Union

Russia is party to the Agreement on the Eurasian Economic Union dated 29 May 2014 along with Belarus, Kazakhstan, Armenia and eventually Kyrgyzstan (the "Agreement"). The Agreement is effective as of 1 January 2015 and concerns numerous legal matters in the member states, including antitrust. The Eurasian Economic Commission is the main enforcement authority dealing with antitrust issues.

The Agreement contains antitrust prohibitions similar to those outlined in the Competition Law. These include unfair competition, abuse of dominant positions, anticompetitive agreements and coordination of economic activities. Anticompetitive agreements with state bodies, tenders and price quotations, as well as establishment of

companies and mergers and acquisitions do not fall within the scope of the Agreement. The main criterion to be met in order for the Agreement to cover a particular violation is that such violation occurs on a cross-border market. No distinct definition of cross-border markets is set in the Agreement, and it is expected to be determined later by a decision of the Eurasian Economic Commission.

The Eurasian Economic Commission has enforcement powers similar to those of FAS, including the right to request information from companies, initiate and investigate antitrust cases and impose fines. In addition it is entitled to request national competition authorities to conduct antitrust inspections and share the information gathered during inspections.