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## Amendments to Russian Competition Law

### **I. OVERVIEW**

In July 2009, President Medvedev signed into law several acts amending the existing competition regulations (the “Amendments”)<sup>1</sup>. Most of these Amendments came into effect on August 23, 2009. This memorandum summarizes and describes their effects.

In essence, the Amendments: (a) expand the scope of application of Federal Law No. 135-FZ dated July 26, 2006 (as amended on July 2009), On Protection of Competition (the “Competition Law”); (b) increase the monetary thresholds for pre-closing approval and post-closing notification of mergers and acquisitions; (c) amend certain procedural aspects and the list of documents and information required for pre-closing approval and post-closing notification of mergers and acquisitions; (d) clarify the criteria for recognition of a group of persons; (e) amend the requirements that apply to vertical agreements; (f) specify procedures for the recognition of an entity with a market share less than 35% as having a dominant position; (g) introduce procedures for the antimonopoly authorities’ inspections and extend the Federal Antimonopoly Service of the Russian Federation’s (the “FAS”) powers; and (h) modify the regime of administrative and criminal liability for violations of Russian antitrust legislation.

### **II. KEY DEVELOPMENTS**

#### **A. SCOPE OF APPLICATION OF THE COMPETITION LAW**

The Amendments extend the scope of application of the Competition Law by stating that the Competition Law shall apply to agreements and actions performed by or between persons (whether corporate or individual, foreign or domestic), provided that (amongst other conditions) such agreements and actions are performed in relation to

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<sup>1</sup> Such acts include: (i) Federal Law No. 164-FZ as of July 17, 2009, On Amending the Federal Law On Protection of Competition and Certain Legislative Acts of the Russian Federation; (ii) Federal Law No. 173-FZ as of July 17, 2009, On Amending the Articles 17.1 and 53 of the Federal Law On Protection of Competition; (iii) Federal Law No. 160-FZ as of July 17, 2009, On Amending the Code of Administrative Offenses of the Russian Federation and Certain Legislative Acts of the Russian Federation; and (iv) Federal Law No. 216-FZ as of July 29, 2009, On Amending the Article 178 of the Criminal Code of the Russian Federation.

shares (participation interests), or rights with respect to any commercial legal entities, if such entities carry out activities on the territory of the Russian Federation or in any other way affect competition on the territory of the Russian Federation. This is an important change to the Russian Competition Law, which traditionally regulated only Russian legal entities or entities having assets in Russia. It is worth mentioning that these new regulations apply not only to agreements, but also to actions.

## **B. MERGER CONTROL OVER ECONOMIC CONCENTRATIONS**

### **1. Changes in Thresholds**

The Amendments increase the thresholds that determine whether a transaction (as stated in Article 28 of the Competition Law) requires pre-closing approval<sup>2</sup>. The new thresholds are met when:

- i. the combined asset value of the acquirer and target exceeds RUR 7 billion (approximately USD 220 million or EUR 154 million<sup>3</sup>), where the total assets of the target also exceed RUR 250 million (approximately USD 7.85 million or EUR 5.5 million);
- ii. the combined annual revenues of the acquirer and the target for the preceding calendar year exceed RUR 10 billion (approximately USD 314 million or EUR 220 million) in the preceding calendar year where the total assets of the target also exceed RUR 250 million (approximately USD 7.85 million or EUR 5.5 million); or
- iii. the acquirer, target or any entity within the acquirer's or target's group is included in the FAS's Register of entities having a 35% or more market share for a commodity (the "FAS Register")<sup>4</sup>.

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<sup>2</sup> Notifiable transactions include acquisitions of shares or participation interests; acquisitions of fixed production and/or intangible assets exceeding 20% of the total assets of a seller; and acquisitions of rights to determine the conditions of business activity of an entity or to exercise the powers of its executive body.

<sup>3</sup> Currency conversions in this memorandum are based on the September 1, 2009 exchange rate (RUR 31.84 to USD 1 and RUR 45.43 to EUR 1).

<sup>4</sup> A post-closing notification to FAS is also subject to increased and clarified thresholds including: (a) the aggregate asset value or total annual revenues of the acquirer and target for the preceding calendar year exceeding *RUR 400 million (approximately USD 12.5 million or EUR 8.8 million)*; and (b) the total assets of the target exceed *RUR60 million (approximately USD1.9 million or EUR 1.3 million)*. The inclusion of the acquirer, target or any entity within the acquirer's group or target's group in the FAS Register is no longer grounds for post-closing notification, as this is now the (separate) grounds for pre-closing approval.

These asset values and revenue thresholds apply to the buyer's and target's entire group. These new thresholds also apply to the foundation of an entity, if the charter capital of the entity is paid with shares and/or with assets (other than monetary funds) where the newly founded entity acquires rights due to such shares (or participation interests) or assets, as specified in Article 28 of the Competition Law.

## **2. Other Amendments**

The Amendments exclude transactions whereby one party has, by virtue of its ownership in another party, or by virtue of powers received from other persons, over 50% of the total number of votes/equity of such another party from pre-closing approval and intra group transaction rules authorizing the party to conduct such transactions without pre-clearance control by FAS.

The Amendments made changes to the merger review procedure, namely: (a) expanding the information that must be included in an application to the FAS (among other things, the new provisions require an applicant to disclose information about its beneficial owner(s)); (b) the application/notification must be completed by the acquirer-founder (as opposed to any other interested party, as allowed previously); (c) requiring that FAS's decisions on the results of the application review shall be reasoned; and (d) establishing that an applicant's failure to provide information requested by FAS shall be a formal ground for FAS's prohibition of the transferal transaction.

## **C. GROUP OF PERSONS**

The Amendments extend the definition of "group of persons" by including a new criterion: if persons (corporate or individual) are included within the group of persons (under any of the grounds established in the Competition Law) and together control over 50% of the total number of votes/equity of a legal entity, then they form a group within that entity.

## **D. HIGH (OR LOW) MONOPOLY PRICES**

The previous version of the Competition Law required the FAS to use two methods to determine the existence of high (or low) monopoly prices: (i) a cost-based method; and (ii) an analysis of comparative markets. The Amendments establish that an analysis of comparative markets is no longer mandatory and shall be used only if the FAS can find such a market in Russia or abroad. Importantly, since the analysis of comparative markets is no longer mandatory, the FAS has a significantly increased level of discretion in reaching its determination. In addition, there have been some clarifications of the definition of a comparative market and how high (or low) monopoly prices can be fixed.

**E. DOMINANT POSITION**

The Amendments establish new qualitative criteria for determining whether an entity has a dominant position. They set forth the following conditions for the FAS's determination that an entity has a dominant position where such an entity may have a market share of less than 35% of the market for a commodity (previously, the FAS could declare that an entity had a dominant position only if it had at least a 35% market share or in certain other limited cases where the market share is less than 35%): (a) its market share for a commodity is higher than that of any other legal entity; and (b) it can exercise a dominant influence on the general conditions of the circulation of goods in a particular market.

**F. VERTICAL AGREEMENTS**

The new regulations on vertical agreements (which are in general and with certain limitations permitted in Russia) establish specific prohibitions with respect to conditions of vertical agreements including prohibitions on: (i) conditions which lead, or may lead, to the fixing of a goods' resale price; or (ii) conditions, according to which, a party agrees not to trade the goods of another party's competitor, unless such a party has a trademark or a proprietary name licensing agreement with the other party.

**G. FAS INVESTIGATIONS**

The Amendments extend the FAS's powers to conduct investigations under the Competition Law. The FAS is now entitled to make certain new orders aimed at preventing the restriction of competition, and to require in particular that a company shall: (a) inform the FAS in advance of selling more than a specified volume on the commodity exchange; or (b) apply for FAS approval of the start-up pricing procedure in the course of selling on the commodity exchange. The FAS may also order the return of property improperly granted by state or municipal preferences; The FAS is entitled to file a claim in court seeking the invalidation of legal acts, whether valid or not, if such acts create unreasonable barriers for conducting business.

The Amendments introduce a new procedure and establish grounds and conditions for inspections carried out by antimonopoly authorities, as well as rules for documenting and preserving evidence of the violations identified during inspections. FAS's powers are extended by giving its officials certain new rights, namely: (i) the right to enter a company's territory or premises for inspection; (ii) the right to examine places, premises (except for the private apartments of the inspected persons), documents, and belongings of the inspected persons; and (iii) the right to demand the provision of documents and information during the course of the inspection.

The Amendments also establish: (i) a three-year limitation period for cases brought by the FAS for violations of the antimonopoly legislation; (ii) a procedure for extension of up to six months of the term for the execution of a FAS order upon the defendant's reasoned request; and (iii) an opportunity to merge or separate the cases upon violation of the antimonopoly legislation by a FAS commission.

## **H. LIABILITY FOR ANTIMONOPOLY VIOLATIONS**

### **1. Amendments to the Regulation of Administrative Liability**

Amendments to the Regulation of Administrative Liability for antimonopoly violations introduced into the Code on Administrative Offenses of the Russian Federation (the "Administrative Offenses Code"), entered into force on August 22, 2009. Key provisions of these include:

- i. the introduction of disqualification as a measure of administrative liability that shall also apply to state and municipal officials (in addition to company officials).
- ii. establishing liability for the participation in agreements restricting competition, introducing liability for coordination of business activity prohibited by Russian competition legislation, and increasing the amount of administrative fines imposed on company officials for such offenses. The minimum fine is now set at RUR 20,000 (approximately USD 630 or EUR 440) and the maximum fine is RUR 50,000 (approximately USD 1,570 or EUR 1,100).

The Amendments introduce new rules for the calculation of a fine based on turnover, which stipulates that fines for a "single-product company" (one that receives more than 75% of its income from the sales of one product) that violates the antimonopoly legislation will differ from those of a non-single product company. The fines for single-product companies shall range from 0.3% to 3% of the violator's revenues from the sale of goods (works or services) on the market where the violation occurred, but shall not be less than RUR 100,000 (approximately USD 3,100 thousand or EUR 2,200) (for other companies these amounts remain the same, from 1% to 15% but not less than RUR 100,000).

In addition, the Amendments state that the first legal entity that discloses information concerning: (a) agreements restricting competition, or (b) participating in concerted actions, shall be exempt from potential administrative liability for these offenses. The disclosed information must meet certain requirements (including, most notably: that such information had not been not available to the FAS before the disclosure and that the entity has ended its participation in the agreement and/or actions; and that the information provided is sufficient to identify and investigate a violation) in order to qualify for relief.

iii. Parallel amendments have been made to the liability rules for abuses of dominant positions in a particular commodity market (although there is one difference: the law caps turnover-based fines at 2% of the violator's revenues from the sale of all goods (including services)). A lower cap is set out for liability for abuses of dominant positions by entities with a market share of less than 35 % (but which is recognized by FAS as having a dominant position) in a separate article.

iv. The Amendments introduce: (i) administrative liability for wholesale and retail electricity companies for violations of the procedure and terms for the disclosure of necessary information by such companies; and (ii) administrative liability for state and municipal officials who fail to provide information or who provide improper information regarding entering, amending, and executing state or municipal contracts.

## **2. Amendments to the Regulation of Criminal Liability**

Amendments to Article 178 of the Criminal Code of the Russian Federation providing for the criminal liability for prevention, restriction or elimination of competition shall enter into force on October 28, 2009. These amendments clarify the provisions establishing criminal liability for preventing, restricting or eliminating competition, specifying that such acts be performed by means of: (i) entering into agreements or engaging in concerted actions that restrict competition; or (ii) repeated abuse of a dominant position (by fixing and maintaining monopolistically high or low prices, unreasonable refusal or evasion from entering into agreement, or restricting access to the market). The criminal liability for the above offences has been tightened by increasing the applicable fines (up to RUR 1 million (approximately USD 31,400 or EUR 22,000)), the terms of imprisonment (up to 7 years of imprisonment), adding as a possible punishment the deprivation of the right to hold specific posts or to engage in a specific activity. The definition of a "repeated abuse of a dominant position" states that this provision is applicable if the violation occurs more than twice in a three-year period and that, during such a term, the violator had previously been subjected to administrative liability.

The Amendments establish the conditions for immunity from criminal liability for a person who assisted in the investigation of the violation and who reimbursed all damages (or transferred to the federal budget the income it received as a result of the unlawful actions), provided that his or her actions do not constitute any other criminal offense.

**I. OTHER CHANGES**

Below are short summaries of additional changes introduced by the Amendments:

- i. Amendments to the procedure for the transfer of state and municipal property clarify the procedure for entering into agreements regarding state and municipal property without bids (auctions or tenders); these amendments ensure information rights to provide access to the tender procedure.
- ii. The Amendments clarify the content of rules that should be established by the Government of the Russian Federation for the provision of non-discriminatory access to the markets of natural monopolies.
- iii. The Amendments detail the rules of granting state and municipal preferences.
- iv. The Amendments introduce new rules for an antimonopoly regime for the results of innovative activity. Some provisions regarding the prohibition of high monopoly prices and certain agreements and concerted actions shall not apply to goods developed as a result of innovative activity.

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Any questions regarding the application of the Competition Law may be discussed with Scott Senecal, Murat Akuyev or Vladimir Frolov in the Moscow Office (tel. +7 495 660 8500).

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