

Russian Anti-Trust Regime Comprehensively Overhauled

By Allen & Overy

On 26th October, 2006, Federal Law No. 135-FZ dated 26th July, 2006 "On Competition" (the "New Law") comes into force. The New Law will replace, and comprehensively overhaul, the anti-trust regime which has been in place in the Russian Federation since the early 1990s.

The Old Laws

Until this October, Russian anti-trust rules have been contained in two pieces of legislation (the "Old Laws").

! Federal Law No. 948-1 dated 22nd March, 1991

"On Competition and Restriction of Monopolistic Activity in Commodities Markets" applied to all companies and businesses other than financial institutions ("commercial organisations"). Under this law, the prior consent of the Federal Antimonopoly Service (the "FAS") would be needed for: the acquisition of more than 20% of the voting shares or participation interests of a commercial organisation; the right to control its business activity; or more than 10% of its fixed or intangible assets, where:

- the combined assets of the acquirer and its group, and the target, exceed 3,000,000,000 roubles;
- the acquirer or the target is included in the Register of Monopolists (as a "registered monopolist"); or
- the acquirer is part of a group that already controls the target's business.

! Federal Law No. 117-FZ dated 23rd June, 1999

"On the Protection of Competition on the Financial Services Market" applied to financial institutions. Under this law, the prior consent of the FAS would be needed for: an acquisition of more than 20% of the voting shares or participation interests of a financial institution; the acquisition of more than 10% of the fixed or intangible as-

sets of a financial institution; the acquisition of the right to control the entrepreneurial activity or act as the executive body of a financial institution; a merger or accession involving a financial institution; or the establishment of a financial institution or alteration of its charter capital, where the target's charter capital exceeds:

- in the case of a bank: 160,000,000 roubles;
- in the case of an insurance company: 10,000,000 roubles; and
- in the case of any other financial service company: 5,000,000 roubles.

The Old Laws had a number of significant disadvantages. For example, transactions requiring FAS consent were different for commercial organisations and financial institutions; the triggers for FAS consent were completely different for commercial organisations and financial institutions; and in any case, the thresholds themselves were simplistic.

The New Law

The New Law has changed the anti-trust regime in a number of ways; the most significant changes are described below.

(a) Unified legal framework: The New Law covers all companies and businesses, including financial institutions, consequently the anti-trust regime is now contained in a single piece of legislation.

(b) Scope of transactions covered by the New Law: The New Law applies to the following transactions regardless of whether they take place in relation to a commercial organisation or a financial institution (the "Controlled Transactions"):

- (I)** the acquisition by a person or group of persons of voting shares in a joint stock company which, when aggregated with any exist-

- ing shareholding in the same company, would give the acquirer or its group more than 25%, 50% or 75% respectively of the voting shares in that company;
- (ii) the acquisition by a person or group of persons of a participation interest in the charter capital of a limited liability company which, when aggregated with any existing participation interest in the same company, would give the acquirer or its group a participation of more than one third, one half or two thirds respectively in the charter capital of that company;
- (iii) the acquisition by a business entity or group of persons of the right to own, use or possess fixed assets and/or intangible assets of another business entity (“**Transaction Assets**”) if the book value of the Transaction Assets exceeds:
- (A) in the case of a commercial organisation, 20% of the book value of fixed and intangible assets of the business entity which is disposing of the Transaction Assets; and
- (B) in the case of a financial institution, a threshold to be specified by the Central Bank;
- (iv) the acquisition by a person or group of persons of the right to determine the terms of business conduct of a business entity or to act in the capacity of its executive authority, whether pursuant to a trust management agreement, joint venture agreement or agency agreement; and
- (v) the creation of a commercial organisation if its charter capital is to be paid up with shares or participation interests in, and/or other assets of, a financial institution, provided that such transaction also constitutes one of the transactions specified in sub-paragraphs (i) through (iii) above.

(c) Thresholds at which FAS consent must be sought: The New Law states that the prior approval of the FAS must be obtained before a Controlled Transaction can be carried out, if the parties to the transaction exceed certain financial thresholds. In this respect it is similar to the Old Laws; except that, under the New Law, the thresholds have been changed so that the approval of

the FAS is needed for a Controlled Transaction where the target is a commercial organisation, if:

- (i) the aggregate value of assets of the acquirer and its group when, combined with the aggregate value of assets of the target *and its group*, exceeds 3,000,000,000 roubles; or
- (ii) the aggregate revenue of the acquirer and its group from the sale of products, works or services for the preceding calendar year when, combined with aggregate revenue of the target and its group, exceeds 6,000,000,000 roubles and the value of assets of the target and its group exceeds 150,000,000 roubles (which is a new threshold).

FAS approval will also be needed where either party to a Controlled Transaction is a registered monopolist. Where the target is a financial institution, the financial threshold is based on the aggregate value of assets of the parties to the transaction but the specific amount still has to be stipulated by the Central Bank.

(d) Mergers and takeovers: The New Law states specifically that FAS consent is needed for mergers between commercial organisations, or the takeover of one commercial organisation by another, where:

- (i) the aggregate value of assets of the parties to the transaction and their respective groups exceeds 3,000,000,000 roubles; or
- (ii) the aggregate revenue of the parties to the transaction and their respective groups from the sale of products, works or services for the preceding calendar year exceeds 6,000,000,000 roubles; or
- (iii) any party to the transaction is a registered monopolist.

Similar consent is needed for mergers with, or takeovers of, financial institutions but the applicable thresholds still have to be stipulated by the Central Bank.

(e) Establishment of new commercial organisations: Under the New Law, it is necessary to notify the FAS about the establishment of a new commercial organisation only where:

- (I) the charter capital of the new company is paid up with shares, participation interests or assets of another commercial organisation; the

establishment of the company would constitute a Controlled Transaction; and

- (A) the aggregate value of assets of the founders of the company and their respective groups, and of the commercial organisation whose shares, participation interests or assets are being contributed to the new company, exceeds 3,000,000,000 roubles; or
 - (B) the aggregate revenue of the founders of the company and their respective groups from the sale of products, works or services for the preceding calendar year, and of the commercial organisation whose shares, participation interests or assets are being contributed to the new company, exceeds 6,000,000,000 roubles; or
 - (C) the commercial organisation whose shares, participation interests or assets are being contributed to the charter capital of the new company is a registered monopolist; and
- (ii) the charter capital of the new company is paid up with shares, participation interests or assets of a financial institution; the establishment of the company would constitute a Controlled Transaction; and certain financial thresholds to be stipulated by the Central Bank are exceeded.

In all other cases, there is no longer any need to notify, or obtain consent from, the FAS in relation to the establishment of a new company.

(f) Exemption for intra-group transfers: The New Law has created a specific exemption for Controlled Transactions which take place between members of the same group of companies (the “**intra-group exemption**”). In order to qualify for this exemption:

- (i) the parties to the transaction must belong to the same group of persons;
- (ii) a list of members of the group in the prescribed form, describing the relationship of group members to one another, has been filed with the FAS prior to the relevant Controlled Transaction; and
- (iii) there have been no changes to the composition of the group since the date when this list was filed.

If the intra-group exemption applies then FAS merely needs to be notified if a Controlled Transaction has occurred, within 45 days of the transaction being completed.

(g) Procedure and timing for review of anti-trust applications: Under the Old Laws, FAS had 30 days in which to consider an anti-trust application and to issue its written answer. This time period has not changed under the New Law. However, the New Law allows the FAS to extend this initial period for up to two months, if the FAS believes that the transaction may result in the restriction of competition and that it needs more time to review further information. If the FAS extends the initial period, it will also place information about the transaction on its internet site and accept submissions concerning the competition effect of the transaction from interested persons.

(h) Extra-territorial scope: The New Law specifically provides that it applies to any agreement entered into outside the Russian Federation where such agreement “relates to” assets located in the Russian Federation, shares or participation interests in Russian companies, or rights in respect of Russian business entities; and this agreement leads or may lead to restriction of competition in the Russian Federation. The New Law does not explain what is intended by the expression “relates to” but the prudent approach is probably to give it an expansive interpretation (i.e. to assume that even a transaction which has an indirect impact in the Russian Federation is caught).

Definition of a “Group” of Persons under the New Law

The New Law defines a “group” of persons far more exhaustively than the Old Laws. The New Law presents 14 cases in which the relevant persons are deemed to be part of the same group.

- (a)** A person (“**Person A**”) is part of the same group with another person (“**Person B**”) where Person B owns or controls over 50% of the total number of votes in Person A (represented by voting shares or participation interests in the charter capital of Person A).
- (b)** Two or more persons (the “**Relevant Persons**”) are part of the same group with a person which owns or controls over 50% of

- the total number of votes in each Relevant Person (represented by voting shares or participation interests in the charter capital of the Relevant Person).
- (c) Person A is part of the same group with Person B if Person B is acting as the single-member executive body (e.g. general director) of Person A.
 - (d) Relevant Persons are part of the same group with a person acting as the single-member executive body of the Relevant Persons.
 - (e) Person A is part of the same group with Person B if Person B has the power to give directions which are binding on Person A by virtue of Person A's constitutional documents or an agreement to which Person A is a party.
 - (f) Relevant Persons are part of the same group with a person which has the power to give directions which are binding on the Relevant Persons by virtue of their constitutional documents or agreements to which they are party.
 - (g) Person A is part of the same group with Person B if the single-member executive body of Person A was elected or appointed upon nomination by Person B.
 - (h) Relevant Persons are part of the same group with a person if the single-member executive bodies of the Relevant Persons were elected or appointed upon nomination by that person.
 - (i) Person A is part of the same group with Person B if more than 50% of Person A's management board or board of directors (supervisory council) was elected upon nomination by Person B.
 - (j) Relevant Persons are part of the same group with a person if more than 50% of each Relevant Person's management board or board of directors (supervisory council) was elected upon nomination of that person.
 - (k) Person A is part of the same group with Person B if more than 50% of the members of each person's management board and/or board of directors (supervisory council) consists of the same individuals.
 - (l) Persons who are members of the same financial and industrial group form a group.
 - (m) A person, his spouse, his parents (whether natural or adoptive), children (whether natural or adoptive), blood and non-blood siblings, form a group.
 - (n) All other persons which are included in the same group of persons with the persons listed in paragraphs (a) to (m) above on any of the above grounds.

The problem with the definition of the "group" under the New Law is that it is unclear whether group simply means the acquirer, its parent and their respective subsidiaries (the narrow definition) or whether it also includes each controlling person above the acquirer's parent and their respective subsidiaries all the way up to the ultimate beneficial owner of the acquirer or target (the wide definition). We have reason to believe that the FAS favours the wide definition, in which case the New Law will not substantively change the operation of any threshold based on the "group" of an acquirer or target.

Penalties

It is contemplated that the Administrative Code of the Russian Federation will shortly be amended to introduce new (and more severe) penalties for violations of the New Law. We understand that the amount of penalties will be increased significantly, and in some cases may be based on a percentage of the turnover of the offending companies. □