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ANTITRUST COMPLIANCE IN THE CONTEXT OF APPLYING A RISK-BASED APPROACH TO ANTITRUST CONTROL

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Abstract: *Legal issues of antitrust compliance are of particular relevance for research due to the need to determine the legal consequences of this initiative for market participants in the Russian Federation following the adoption of amendments to the Law of the Russian Federation on Protection of Competition. According to this law, antitrust compliance has become part of the regulation of competitive relations in the Russian Federation. At the same time, a risk-based approach is being introduced in Russia in order to increase the effectiveness of control and supervision activities. In Russia, antitrust compliance forms an integral part of a risk-based approach. The authors of this article attempt to determine the legal significance of antitrust compliance for market participants, considering it as an integral element of a risk-based approach. The work as well identifies current issues and problems associated with its application in terms of a balance of interests. The article concludes that the models to stimulate the implementation of antitrust compliance in Russia have been established. It states that the model in question a development potential, and at the same time - several shortcomings. Both these sides allow us to consider it as an actual direction for scientific and practical research to justify the adjustment of antitrust enforcement in order to ensure the balance of interests.*

Keywords*: antitrust compliance, risk-based approach, control, supervision, the balance of interests, competition, risk category, efficiency, economy.*

INTRODUCTION

Legal issues of antitrust compliance are of relevance for research in connection with the need to determine the legal consequences of this initiative for market participants in the Russian Federation following the adoption of amendments to the Competition Law. Based on these changes, antitrust compliance has become a part of the regulation of competitive relations in the Russian Federation. At the same time, a risk-based approach is being introduced in Russia in order to increase the effectiveness of control and supervision activities. In Russia, antitrust compliance is also an element of a

risk-based approach in antitrust control. Despite the considerable volume on the issues of antitrust compliance, it has been investigated to a small extent. However, the use of compliance as part of a risk-based approach in the framework of control and supervision activities directly affects the rights and legitimate interests of citizens, public interests, and the balance of interests. Thus, antitrust compliance as an integral element of a risk-based approach makes the relevant area of the research.

The subject of the survey is studied mainly by public law, which has led to the works and approaches developed by the administrative law as its theoretical basis. The issue of voluntariness of compliance predetermined, inter alia, the recourse to private-law, or mixed studies reflected in works on civil, business, and competition law. Besides, the review of legal remedies is impossible without addressing the legal issues of the procedure and process, which determine the need to appeal to the dogma of the procedural branches of law administrative, procedural law. The idea of the study arose under the influence of the works of Russian and international authors, such as D.M. Ashfa, V.A. Bodrenkov, V.V. Kvanina, D.A. Petrov, V.V. Fadeev, V.P.J. Wils, F. Brunet H. Tyuksbari, R.D. Tensi, A. Bereny, A. Riley, M. Bloom, and others.

METHODOLOGY

The philosophical basis of the work was, primarily, the idea of a balance of interests, as the objective basis of legal regulation. Among the central philosophical and scientific methods used in work are the dialectic, formal legal, legal hermeneutics, comparative historical and empirical methods. Since antitrust compliance and a risk-based approach are applied in many countries, elements of the comparative legal method were also used in work.

RESEARCH RESULTS AND DISCUSSION

At the beginning of March 2020, the primary law of the Russian antimonopoly legislation (hereinafter - the Competition Law) (Federal law No. 33-FZ, 2020) was amended to establish the rules of the so-called antitrust compliance (hereinafter referred to as compliance). According to Art. 9.1. of this law, antitrust compliance is defined as a system of internal compliance with the requirements of antitrust laws.

The active introduction of the concept of antitrust compliance into scientific and practical use is primarily associated with the initiatives to amend the antitrust law of 2016. Then, the relevant draft law (Draft of the Federal Law “On Amendments to the Federal Law On Protection of Competition”, and the Code of the Russian Federation on Administrative Offenses”, 2017) was supposed to supplement the list of basic concepts of antitrust law with the following: “24) the internal system for ensuring compliance with the requirements of antitrust law (antitrust compliance) is a set of legal and organizational measures provided for by an internal act (acts) of his entity or another person from among persons belonging to the same group of persons with such an economic entity, if such internal acts apply to such an economic entity, and are aimed at compliance with the requirements of antitrust laws and the prevention of its violation".

The same bill was supposed to join the implementation of compliance programs by companies with the application of administrative liability. Similar initiatives have been found in the literature (and not only in Russian). Notably, F. Brunet (2012) stated the need to reduce fines if there is a compliance system. On the one hand, the existence

of compliance was supposed to be established as an additional extenuating circumstance when applying liability for committing administrative offenses provided for in Art. 14.31. - 14.33. (The Code of the Russian Federation N 195-FZ, 2001) of the Administrative Code of the Russian Federation. On the other hand, it was proposed to supplement Chapter 14 of the Code of Administrative Offenses with Article 14.31.1., establishing liability for "failure to comply the internal acts to organize the internal system for ensuring compliance with the requirements of the antimonopoly legislation of the Russian Federation (antitrust compliance)."

Moreover, it is interesting to note that if for the lack of compliance the fixed upper and lower thresholds of the administrative fine were established, then compliance as an extenuating circumstance implied a decrease in the so-called turnover-based fine of 1/8 of its base amount: in case of circumstances extenuating the administrative liability, with some exceptions, "the size of the administrative fine imposed on a legal entity shall be reduced for each such circumstance by one-eighth of the difference in the maximum amount of the administrative fine provided for the commission of this administrative offense, and the minimum amount of the administrative fine provided for the commission of this administrative offense." In practice, the turnover-based fines (fines as a percentage of the proceeds (Pisenko, Tsindeliani, Badmaev, 2010)) on the market of violation are usually much higher than ordinary administrative fines.

As V. Kvanina (2019) states, the text of legislative draft related to compliance has subsequently undergone significant changes. The provisions on administrative liability have been excluded, and the very concept of antitrust compliance has been changed. However, the glossary of the Competition Act in Art. 4 was supplemented by paragraph 24), which defined the concept of an internal system for ensuring compliance with the requirements of antitrust legislation, almost similar to the initially proposed wording, except for the absence of the term antitrust compliance and some legal and technical changes.

V. Bodrenkov and Yu. Prokhorov state that the concept of antitrust compliance was not legalized, but remained widespread in the scholar and practice literature and legal slang, succinctly expressing the above system of organizational and legal measures (Bodrenkov, Prokhorova, 2019; Popondopulo, Petrov, 2019; Fadeev, 2019; Gerbel et al., 2014). Moreover, as V.V. Fadeev notes, "the main idea of the antitrust compliance is that the subject itself develops the rules of conduct to comply with the requirements of antitrust laws, and exercises the control over their implementation" (Fadeev, 2019). As V.V. Krymkin (2018) notes, compliance is "as a rule, a corporate program (policy) with elements of measures to prevent corruption. The introduction of the system of antitrust compliance is aimed at minimizing the antitrust risks of business entities." Indeed, one cannot fail to admit that competent compliance can help a company avoid violating the law (Sergacheva, 2017; Leiba, 2015) primarily if the threat of such a violation stems from the ill-considered market behavior of such a company on the part of its management in terms of prohibitions on antitrust laws. In the works of foreign authors (Tewksbury, Tansey, Berenyi, 2015), there is a point of view that today compliance is one of the significant components of the success of any business entity.

Moreover, some authors (Riley, Bloom, 2011) suggested that the antitrust authority should have the right to impose a compliance system on business entities. At the same time, opposing views (Wils, 2013) have also been established, stating that it is possible to avoid violation of antitrust laws without introducing compliance. Based on this approach, one cannot but conclude that in this case, compliance will be a waste of

time, effort, and money, and the costs spent on its development, implementation, and realization will inevitably ultimately pass to consumers.

Meanwhile, the introduction of the institution of compliance into the antitrust regulation also joins it with the control and supervisory activity of the antimonopoly body, whose functions in Russia are performed by the Federal Antimonopoly Service. At the same time, one of the actively fostering areas of development and improvement of state control and supervisory activities in Russia is the so-called risk-based approach (hereinafter referred to as the RBA). Its active implementation is connected, primarily, with the novels of 2015, which supplemented the legislation on control and supervision (hereinafter referred to as the Control Law) (Federal law No. 294-FZ, 2008) with the relevant provisions on the RBA.

According to the Decree of the Government of the Russian Federation No. 806 (August 17, 2016), the state control over the compliance with the antimonopoly legislation of the Russian Federation was included in the list of federal-state control (supervision) in respect of which the RBA applies. Following part 2 of Art. 8.1. of the Control Law, "the risk-based approach is a method of organizing and implementing the state control (supervision), in which, in the cases provided for by this Federal Law, the choice of intensity (form, duration, frequency) of control measures, measures to prevent violation of mandatory requirements is determined by the assignment of the activities of a legal entity, individual entrepreneur and (or) production facilities while carrying out such activities to a certain risk category or a certain class (category) of danger."

It is important to note that the Control Law does not link the RBA and, in particular, the categorization of risks with the presence of any legal and organizational measures provided for by the internal act (acts) of the business entity aimed at observing the requirements of any legislation and preventing its violations. Instead, the Control Law establishes that the classification of danger to a particular class (category) is carried out by the state control (supervision) body taking into account the severity of potential negative consequences of possible non-compliance by legal entities and (or) individual entrepreneurs with mandatory requirements. Concerning a specific risk category - also taking into account the probability of non-compliance with the compulsory relevant requirements and vests the Government of the Russian Federation with the power to determine the criteria for classifying the activities of the legal entities, individual entrepreneurs and (or) their use of production facilities to a specific risk category or a particular risk class (category) if these criteria are not established by federal law.

The relationship between compliance and the risk-based approach in antitrust control emerged due to the Decree of the Government of the Russian Federation No. 213 (hereinafter - Resolution No. 213) (March 1, 2018). Decree 213 established that one of the grounds for transferring a legal entity from one risk category to another is "the functioning of the system of legal and organizational measures for at least one year on the day of the decision to assign (change) the risk category aimed at the compliance by such a legal entity with the requirements of the antimonopoly legislation of the Russian Federation provided for by an internal act (acts) of a legal entity or another person from among persons included in one group with the legal entity if such internal acts apply to a legal entity."

It is probable that the use of compliance to change the risk category will be carried out through the mechanism laid down by the amendments on compliance to the Competition Law. On the one hand, the content of amendments to the Competition Law

evidences its exclusively voluntary character: a legal entity has the right to design a system for ensuring internal compliance with antitrust laws.

On the other hand, the new Article 9.1., which was introduced into the Competition Law to regulate compliance relations, introduced a public legal regime for such regulation, establishing a new authority for the antimonopoly body to coordinate certain documents of a legal entity, considered as confirmation of its legal and organizational measures of compliance with antitrust laws and prevention of its violation. Under article 9.1, the legal entity is entitled to send the relevant documents (internal acts) to the federal antimonopoly body to establish their compliance with the requirements of the antimonopoly legislation. Further, the Federal antimonopoly agency within thirty days considers the directed internal act (acts) or a draft of such acts. It gives an opinion on their compliance or non-compliance with the requirements of the antimonopoly legislation.

Competition Law in Art. 4, para 15 establishes that the antimonopoly body is the Federal Antimonopoly body and its territorial bodies. Thus, the Competition Law granted the right to coordinate compliance acts only to the central apparatus of the Federal Antimonopoly Service. Considering that in the final version of the pro-compliance amendments to the antimonopoly legislation, the relationship between administrative liability and compliance was excluded: the primary motivation for applying compliance is the possibility of transferring a legal entity from one risk category to another under the rules of Decree 213 (from medium to moderate risk; from moderate to low risk). Such a transfer entails a reduction in the intensity of scheduled inspections down to zero: for the medium risk category - no more than once every three years; for the moderate risk category - no more than once every five years; in respect of legal entities and individual entrepreneurs engaged in business activities classified as low risk, scheduled inspections are not carried out.

At the same time, we would like to mention the explanatory note to the draft of Federal Law No. 789090-7 “On Amendments to the Federal Law “On Protection of Competition” (September 5, 2019), which was subsequently adopted and introduced amendments to compliance in the antitrust laws. According to this note, if the Federal Antimonopoly authority issues an opinion to the business entity on the conformity of the internal act (acts) or draft(s) of the act with the requirements of the antimonopoly legislation, the specified ruling entity cannot be found to have violated antitrust laws if its actions are carried out within the framework of the agreed compliance rules. As V.V. Kvanina (2019) noted, "it is challenging to assess the inconsistency of the bill and the explanatory note to it ...” What we need to note is that this note does not even mention the exemption from administrative liability. Still, it generally states the impossibility of recognizing a person as a violator of antimonopoly legislation if it agreed to its compliance with the Federal antitrust body.

Since the explanatory note is not a source of law, the only specific legal significance of the agreement between the legal entity of compliance with the antimonopoly body is expressed in the possibility of changing the risk category. Compliance itself, subject to its substantial advantages, lack of formalism, should also help the legal entity to organize the internal work to minimize/eliminate its antitrust risks (risks to violate antitrust laws). However, it must be understood that de lege lata, i.e., a person violating antitrust laws, should inevitably entail the recognition of such a person as a violator with all the ensuing legal consequences, regardless of whether or not such compliance was or was not previously agreed by an antimonopoly body.

So, the rule that the existence of antitrust compliance may be the basis for extenuating administrative liability was excluded from the planned changes. This rule primarily reflected the conclusions from the content of the scientific and practical discussion, during which the issue of stimulating the introduction of antitrust compliance by business entities was raised.

Different points of view were expressed (Sokolovskaya, 2016; Gorshkova et al., 2016), including that the existence of compliance itself is a sufficient incentive measure, since, as D. Ashfa mentions (2019), it objectively minimizes the risks of a violation of antitrust laws. As noted in the literature (see Ashfa, ibid), concerning the report of the Analytical Center under the Government of the Russian Federation, many of the foreign jurisdictions "refer to the information interaction with legal entities on issues of antitrust compliance and do not always connect its implementation with the possibility of extenuating liability" (Analytical report of the Office of Competition Policy of the Analytical Center under the Government of the Russian Federation "Antitrust Compliance: current practice and development prospects, 2015). The experience of the European Commission, the EU law enforcement antitrust body, indicates that “in the framework of antitrust proceedings and the decision to impose a fine, it does not take into account the availability of these documents and the compliance with the requirements contained therein.” (compliance documents – authors’ emphasized) (Compliance with competition rules: what's in it for business?, n.d.).

Returning to the legal issues of the importance of the existence of compliance between a legal entity and the ratio of compliance and risk-based approach, one should note that Decree 213 introduces compliance as the basis for changing the risk category for a legal entity. However, it determines the application of such factors by the presence of other additional conditions as well. In addition to fulfilling the compliance conditions for changing the risk category, the legal entity must also meet such condition as "absence within three years on the day of the decision to assign (change) the risk category of a decision that has entered into legal force on imposing an administrative penalty on a legal entity, its officials, to an individual entrepreneur for an administrative offense under Art. 14.31 - 14.33, 14.40, 14.41, Parts 2.1 - 2.3, 2.5 and 2.6 of Art. 19.5 and Art. 19.8 of the Administrative Code of the Russian Federation on administrative offenses,” that is, articles establishing liability for violation of various prohibitions of antitrust laws.

Thus, in the Russian antitrust regulation, a model has been formed in which the compliance incentive system is associated with the voluntary abandonment of the monopolistic practice. Based on the proposed legal model, companies can develop the following algorithm for reducing antitrust risks and costs of processes and sanctions: the Compliance-Lawful Behavior-Risk Category Change Model (C-LB-RCC). Such a model can also be terminologically designated as: “Think, Act Legally and Transition (TALT)." The condition on the availability of compliance agreed with the antimonopoly authority, and the requirement on the absence of administrative liability for these violations in the specified period must be fulfilled in aggregate. It is also necessary to understand that violation of one of the conditions for the legal entity in the period after the change of the risk category must be interpreted as a failure to fulfill such conditions and return to the previous risk category.

Also, the urgent problem of ensuring a balance of interest in such a model seems to be the question of the possibility of changing the risk category in the opposite direction - from the low to moderate category and from moderate to medium risk. At

least other norms of Decree 213, which specify that "the activities of legal entities and individual entrepreneurs engaged in business activity, are assigned to a certain risk category when exercising state control over compliance with the antimonopoly legislation of the Russian Federation, are carried out taking into account the severity of potential negative consequences, possible non-compliance with the requirements of the antimonopoly legislation of the Russian Federation, estimates of the likelihood of non-compliance, as well as the scale of business activity and socio-economic importance of the industry (sphere) of the economy in which the activity is carried out."

Obviously, this approach has the potential for further development in specific antitrust regulations. So, further research is necessary to study the issue of the possibility of applying the model to other forms of antitrust control, in addition to scheduled inspections. Topical subjects for research are, in particular, the issues of diversification of risk categories, detailing the application of the rules on changing the risk category, for example, taking into account the characteristics of markets and industries, and alike. The issue of inclusion in the mandatory conditions for changing the category the very fact of absence of a decision of the antimonopoly body on violation of antimonopoly legislation and/or court decisions that have entered into legal force and are recognized should also become a topic of research.

CONCLUSION

1. Theoretically, antitrust compliance is a system of organizational and legal measures, the application of which allows a market participant (enterprise, business entity, and corporation) to reduce the risks of violation of antitrust laws.

1.1 From the perspective of a market participant (business entity), the application of antitrust compliance is based on his voluntary choice to implement such organizational and legal measures. At the same time, his motivation is to avoid antitrust investigation and sanctions that may be provoked by the unwilful economic behavior of the enterprises, as well as the decrease of state scrutiny to such an entity due to its transition to a less dangerous risk category.

1.2 From the position of the state, the implementation of compliance by market participants can contribute to their more responsible market behavior in terms of antitrust regulation and related prohibitions and restrictions. Thus, the state is interested in encouraging the implementation of compliance in the organizational and legal system of business entities.

1.3 At the same time, the use of antitrust compliance by business entities will be justified for market participants and the state only if in practice, it leads to a reduction of abuse by business entities, individually or collectively, of their market power to the detriment of consumers, the public interest. Thus, the state system of encouraging the introduction of antitrust compliance by business entities should consist of such elements, and act in such a way as to stimulate, in the long run, business entities to lawful behavior in terms of antitrust regulation.

2. Antitrust compliance is normatively associated with a risk-based approach in the organization and legal regulation of control and supervision in the field of competition protection.

3. The reduction of fines for violation of antitrust laws cannot be considered as a measure of stimulating the implementation of compliance or contributing to a more

formal than the substantive introduction of organizational and legal measures to prevent violations, as well as corruption risks.

4. At the same time, in Russia today a model has been formed to stimulate the introduction of antitrust compliance by companies, in which the primary motivation is a change in the risk category, which reduces the intensity of certain forms of control and supervision measures - scheduled inspections concerning a person who has negative statistics on being brought to administrative responsibility for violations of antitrust laws.

4.1 The considered model has development potential and, at the same time - some shortcomings, which together allow us to recognize it as an essential area for scientific and practical research to reasonably adjust antitrust enforcement to balance the interests.

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REFERENCES

1 Analytical report of the Office of Competition Policy of the Analytical Center under the Government of the Russian Federation "Antitrust Compliance: current practice and development prospects". (2015). Retrieved from: http://ac.gov.ru/files/publication/a/7838.pdf.

2 Ashfa, D.M. (2019). The system of internal ensuring compliance with the requirements of antitrust law: corporate advantage and state incentives. Actual issues of modern competition law: proceedings of scientific papers. Moscow: Justicinform, 3, 164.

3 Bodrenkov, V.A., Prokhorova, Yu.G. (2019). Antitrust compliance: competitive advantage and guarantor of business development. Competition law Journal, 2, 28 – 31.

4 Brunet, F. (February 10, 2012). The role of antitrust compliance programs in competition law enforcement. New Frontiers of Antitrust Conference, Paris. Concurrences No 2. Retrieved from: www.concurrences.com.

5 Compliance with competition rules: what's in it for business? (n.d.). Retrieved from: http://ec.europa.eu/competition/antitrust/compliance/index_en.html.

6 Decree of the Government of the Russian Federation No. 213. (March 1, 2018). “On approval of the criteria for classifying the activities of legal entities and individual entrepreneurs engaged in economic activities as risk categories in the implementation of state control over compliance with the antimonopoly legislation of the Russian Federation”. Retrieved from: http://www.pravo.gov.ru.

7 Decree of the Government of the Russian Federation No. 806. (August 17, 2016). “On the application of a risk-based approach in organizing certain types of state control (supervision) and amending certain acts of the Government of the Russian Federation” (together with the “Rules classifying the activities of legal entities and individual

entrepreneurs and (or) the production facilities used by them to a certain risk category or a certain class (category) of danger. Retrieved from: http://www.pravo.gov.ru.

8 Draft of the Federal Law "On Amendments to the Federal Law On Protection of Competition", and the Code of the Russian Federation on Administrative Offenses". (2017). Retrieved from: http://regulation.gov.ru/.

9 Draft of the Federal Law No. 789090-7. (September 5, 2019). "On Amending the Federal Law On Protection of Competition". Retrieved from: https://sozd.duma.gov.ru/.

10 Fadeev, V.V. (2019). Antitrust compliance as a circumstance that excludes the liability of a legal entity. Russian Competition Law and Economics Journal, 1, 34 – 37.

11 Federal law No. 294-FZ. (December 26, 2008). "On the protection of the rights of legal entities and individual entrepreneurs in the implementation of state control (supervision) and municipal control". The Rossiyskaya Gazeta. No. 266. Retrieved from: https://rg.ru/2008/12/30/prava-kontrol-dok.html.

12 Federal law No. 33-FZ. (March 1, 2020). "On amendments to the Federal law On the protection of competition". Retrieved from: http://www.pravo.gov.ru.

13 Gerbel, S., Belova, O., Bolshakov, A., Abdulmenov, A., Martemyanov, V. (2014). Blitz survey: What is antitrust compliance? Competition and law Journal, 5, 18 – 21.

14 Gorshkova, E., Voichenko, S., Radchenko, T., Martemyanov, V., Gavrilov, A. (2016). "Discounts" Formula for compliance. Competition and Law Journal, 2.

15 Krymkin, V.V. (2018). Antitrust compliance system: relevance and problem field. Lawyer Journal, 11, 72 – 77.

16 Kvanina, V.V. (2019). Antitrust compliance: what's new? Competition law Journal, 4, 45 – 48.

17 Leiba, A. (2015). Fourth antitrust package. EJ-Lawyer Journal, 18-19, 4.

18 Pisenko, K.A., Tsindeliani, I.A., Badmaev, B.G. (2010). Legal regulation of competition and monopoly in the Russian Federation: course of lectures. Moscow: Russian Academy of Justice, Statut.

19 Popondopulo, V.F., Petrov, D.A. (2019). Antitrust compliance: current status and prospects. Information and analytical journal "Arbitration disputes", 2, 55 – 64.

20 Riley, A., Bloom, M. (2011). Antitrust Compliance Programmes – Can Companies and Antitrust Agencies Do More? Journal of Competition Law, 21, 39-40.

21 Sergacheva, O.A. (2017). Prospects for the development of antitrust compliance in Russia. Lawyer Journal, 7, 18 – 20.

22 Sokolovskaya, E. (2016). Antitrust compliance: instructions for use. Competition and law, 2, 3 – 4.

23 Tewksbury, H., Tansey, R.D., Berenyi, A. (2015). Promoting Antitrust Compliance – The Antitrust Division's Subtle Shift Regarding Corporate Compliance: A Step Toward Incentivizing More Robust Antitrust Compliance Efforts. The Journal of the Antitrust, Unfair Competition and Privacy Law, 24(2).

24 The Code of the Russian Federation N 195-FZ. (December 30, 2001). "On administrative offenses". The Rossiyskaya Gazeta, No. 256. Retrieved from: https://rg.ru/2001/12/31/admkodeks-dok.html.

25 Wils, W.P.J. (2013). Antitrust Compliance Programmes and Optimal Antitrust Enforcement. Journal of Antitrust Enforcement, 1(1).