

Antimonopoly compliance. Challenges and benefits of an internal control strategy



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Businesses are ready to comply with the antimonopoly legislation, but they cannot always get preferences or full-fledged assistance from the regulator. Vadim Kuzmin, Head of the TMT and Antimonopoly Regulation Practice at Tomashevskaya & Partners Law Firm, spoke about how the regulator's attitude to this system has developed. The article deals with the nuances of coordination of local acts with antimonopoly authorities.

Many companies are ready to implement a system of internal control over compliance with the antimonopoly legislation in order to reduce the risks of violations. However, this process requires significant costs from the business. Antimonopoly compliance should be developed in accordance with the specifics and needs of the company, an employee should be added to the staff, and personnel should be regularly trained. At the same time, the authorities do not provide additional benefits for voluntary compliance with the law. We have to weigh the pros and cons to determine whether a system of internal control over compliance with the antimonopoly legislation is so necessary.

Representatives of the Federal Antimonopoly Service (FAS) have been saying since 2013 that companies need to implement a self-monitoring system. This provision was included in the Strategy for the development of competition and antimonopoly regulation in the Russian Federation for the period 2013-2024. Businesses were promised to lower the threshold of liability for violation of antimonopoly legislation. The FAS mentioned new circumstances mitigating administrative liability. They assured that in some cases, legal entities will be completely exempted from such liability. Such mitigating measures, as the antimonopoly service management believed, would encourage businesses to adopt an internal system of antimonopoly legislation. As a result, the burden on the FAS and its territorial bodies would be significantly reduced. However, the regulator may not always take into account all business needs for various reasons.

We will tell you how the legislator's attitude to the need to implement an internal antitrust compliance system has changed. Let's list what benefits were promised to volunteer companies and what provisions were eventually approved in regulatory acts. We will explain what the regulator takes into account the business community's wishes. We will indicate what a company should pay attention to if it wants to coordinate the antimonopoly compliance system with the Federal Antimonopoly Service.

FAS representatives do not go beyond the letter of the law

Employees of the antimonopoly authorities do not consider the antimonopoly compliance system to be a mitigating circumstance for a company. This may be due to the fact that they want to avoid conflict with the prosecutor's office. In the current Administrative Code, compliance is not mentioned as a reason for reducing the penalty, so supervisors prefer not to focus on this.

Antimonopoly compliance may become grounds for mitigation of punishment

The Federal Antimonopoly Service offered special business incentives. For companies that have implemented a system of internal control over compliance with the antimonopoly legislation, we wanted to create a favorable business regime. Such proposals are reflected in the draft law of 2016, which was prepared by the FAS (ID 02/04/06-16/00050178).

The authors of the draft proposed to add a special note to Article 13.41 of the Administrative Code on liability for abuse of a dominant position in the commodity market. If a company has effective antimonopoly compliance and stopped the violation before the FAS issued a decision, then this can be considered a condition for mitigating the administrative penalty. Under the draft law, companies could pre-coordinate their compliance system with the Federal Antimonopoly Service. This would simplify the process of proving that such a document exists and the system functions in the organization.

The State Legal Department of the President gave a negative response to the bill. The review was motivated by the fact that the administrative legislation already has an open list of mitigating circumstances. Therefore, the official who makes up the administrative material is already entitled to consider the compliance system as a mitigating circumstance.

The Antimonopoly Service takes into account cases where an employee exceeds their authority

Business representatives pointed out non-obvious gaps in the current regulation. They raised important questions about existing norms, which, in their opinion, need to be finalized. This happened during the discussion of the bill. For example, they offered to release a legal entity from administrative responsibility if the violation involved an excess of the performer, that is, when the violation occurred due to the actions of one of the employees without the knowledge of the management.

The Antimonopoly Service is aware of cases when the company's management not only does not initiate a violation, but also does not know about it at all.

In some cases, employees of competing companies may secretly agree among themselves not to participate in certain tenders, or share confidential information about potential buyers. They can also opt

out of deliveries in favor of other companies, which is an informal arrangement that violates the rules of fair competition. However, it often turns out that neither the company itself nor its managers initiate such actions and do not know about existing agreements.

The main motivation of employees is to get a higher bonus for their work and achieve personal benefits, rather than to benefit their company. This creates a difficult situation where the actions of individual employees can lead to negative consequences for the company as a whole. Obviously, in such cases, organizations should not be held accountable for the actions of their employees if there is sufficient evidence.

A specific employee should be recognized as a responsible person, and it is he who should bear both administrative and disciplinary responsibility for violations. However, this is only possible if the employee has become familiar with the provisions of the antimonopoly compliance system and has been trained to counteract illegal behavior.

FAS to evaluate the company's antimonopoly compliance system

The concept of an internal compliance assurance system for antimonopoly legislation was introduced in 2020. Companies were given the opportunity to send documents of such a system to the FAS to assess whether they meet the requirements of the antimonopoly legislation (Federal Law No. 33-FZ of 01.03.2020 "On Amendments to the Federal Law "On Protection of Competition").

The legislator listed the requirements for the content of the internal local act on the organization of the antimonopoly compliance system. This document should include not only definitions of key concepts, but also a detailed description of the processes and procedures that help ensure that the company's employees comply with the requirements. In addition, the legislator drew attention to the fact that organizations are required to publish information about the existence and content of this local act on their official Internet resources (Article 9.1 of Federal Law No. 135-FZ of 26.07.2006 "On Protection of Competition", hereinafter-the Law on Protection of Competition).

For more than a year, businesses could not get the FAS to explain how to apply the provisions of the new article of the Law on Protection of Competition. The Agency suggested using methodological recommendations for executive authorities (Methodological recommendations on the creation and organization by federal Executive authorities of a system of internal compliance with the requirements of antimonopoly legislation, approved by Government Order No. 2258-rof 18.10.2018).

The Antimonopoly Service explained how to develop a compliance system and coordinate it much later, in Clarifications No. 20 "On the System of Internal Compliance with the Requirements of Antimonopoly Legislation" (approved by the Federal Antimonopoly Service). Protocol No. 4 of the FAS Presidium dated 02.07.2021, hereinafter referred to as Clarifications No. 20.

FAS checks companies with antimonopoly compliance less

If a company has not been held administratively liable for violations of antimonopoly legislation for three years and it has been operating a compliance system for more than a year, then the level of risk for scheduled inspections by the FAS decreases. This means that the business moves from the category of "medium" and "moderate" risk to "moderate" and "low" risk. This is the only incentive for companies to implement the antimonopoly complex. The Government approved it in Resolution No. 213 of 01.03.2018 "On Approval of 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".

A company may voluntarily declare an anti-competitive agreement

The motivation for a business is to voluntarily declare an uncompetitive agreement. In this case, the company will not be held accountable. However, it is difficult to call this opportunity a real incentive for many organizations for several reasons.

First, the legislator allowed them to voluntarily declare the existence of an anti-competitive agreement in Article 14.32 of the Administrative Code long before they began to talk about the regulatory settlement of antimonopoly compliance. It turns out that the current initiative is rather a repetition of existing norms than an innovative step. Secondly, if the implemented antimonopoly compliance system reveals other violations that the FAS will also identify, then the organization will still bear administrative responsibility.

In the text of Explanation No. 20, there is nothing about what liability measures are applied to an organization that has successfully implemented an antitrust compliance system. They also don't mention how to encourage organizations to adopt and implement compliance systems. Meanwhile, to ensure the operation of the antimonopoly compliance system, companies incur costs: they increase their staff and train employees. These costs could be offset by a special favorable treatment for organizations that have implemented the system. Practitioners helped the FAS prepare explanations on the development and approval of compliance systems, but the agency did not include most of the proposals in the final version.

FAS uses the best practices of internal compliance to initiate an antimonopoly case

So far, the regulator has not indicated whether the antimonopoly body has the right to request a report on detected violations of the antimonopoly legislation from the organization where the compliance system was implemented. In theory, the FAS authorities could use such a report as indirect evidence of the commission of an offense and use it to initiate an antimonopoly case. Based on current trends in antimonopoly regulation, this possibility cannot be ruled out.

Business explained how to coordinate the compliance system with the regulator

What exactly should a company specify in the local acts that make up the antimonopoly compliance system, the legislator defined in Article 9.1 of the Law on Protection of Competition. However, the elements are formulated quite broadly and in general phrases.

In the antimonopoly compliance system, it is important to clearly define which official will be responsible for its functioning. This can be either a special employee or a separate department. You should also indicate how a company will introduce employees to the local act — through training, internal seminars, or sending out written materials.

It is also necessary to include requirements for the risk assessment procedure and specify measures that reduce these risks and control the system's functioning itself. At the same time, the legislator does not indicate how many requirements for the procedure for conducting an assessment should be included in the local act and what these requirements are.

It is not clear what measures should be taken to reduce the risks of violating the antimonopoly legislation. To reduce risks, companies are encouraged to take preventive measures, adopt local acts, automate processes, and train employees. By preventive measures, the regulator means detailed verification and approval of transactions, actions and agreements that may potentially create a risk of violation of the antimonopoly legislation.

The FAS has approached the requirements for the procedure for conducting risk assessment democratically. The regulator pointed out that the risk assessment procedure itself is more important than the requirements for it. If the company has described the risk assessment procedure in the local act, but has not listed the assessment requirements, the antimonopoly authorities will consider the condition on the existence of a risk assessment procedure fulfilled.

A company can conduct preliminary examinations and involve third-party specialists in them. In addition, you can send agreements to the FAS that, as a general rule, are not subject to control. As a risk mitigation measure, the FAS will also evaluate local acts in which a company can set out requirements, describe acceptable behavioral patterns of employees, and approve the forms of standard contracts.

In order to control how the system functions, the FAS suggests performing continuous monitoring. This measure includes not only collecting information about the organization of business processes, but also their thorough analysis and evaluation of their effectiveness.

It is important to monitor not only the overall performance of the system, but also the quality of employee training. You should also regularly update the system's requirements to meet new business realities and changes in legislation. It is equally important to monitor how effectively a company copes with violations that have already been identified.

FAS recommends that companies set up an anonymous hotline. Feedback will become an important source of information about the work of the antimonopoly system within the company.

It is not necessary to post the texts of documents on the adoption of the antimonopoly compliance system. It is enough to indicate the names of acts, their numbers, if any, and the date of adoption.

Resolve disputes in a dialogue with the Federal Antimonopoly Service

Follow the Explanations, but keep in mind that there is no need to appeal against the actions or omissions of the FAS. At least until the legislator or regulator allows such a possibility in the relevant administrative regulations.

Independently control the time frame within which the antimonopoly authority must make a decision, communicate with performers and resolve disputes at a personal reception.

FAS should explain what shortcomings it sees in local acts

Based on the FAS explanations, the internal act on antimonopoly compliance, which specified all the elements of Article 9.1 of the Law on Protection of Competition, complies with the law. The regulator must issue a positive opinion to the company (paragraph 3 of section V of Explanatory Note No. 20).

If the Federal Antimonopoly Service issues a negative opinion, it must indicate the reasons and drawbacks in local acts or indicate in which provisions they contradict the antimonopoly legislation. Then the organization will be able to eliminate the shortcomings and send the revised version for approval.

The regulator often goes beyond the deadline for approving antitrust compliance acts. This creates difficulties for businesses, as companies cannot know in advance whether their documentation meets the legal requirements. Sometimes companies receive responses that make it impossible to understand how the FAS evaluates documents and information submitted for approval.

In some cases, the antimonopoly authority reports in its response that it cannot evaluate the submitted draft documents and does not indicate which provisions of local acts need to be finalized. Such responses can be explained by the fact that the antimonopoly compliance legislation is insufficiently regulated. The regulator is guided by only one article in the Law on Protection of Competition, which defines the procedure for implementing the compliance system and sets requirements for it.

The legislator is not ready to standardize compliance systems

In 2022, the Association of Compliance Managers commissioned Autonomous Non-Profit Organization "Republican Research Institute of Intellectual Property" to develop a draft of State standard so that antimonopoly compliance systems in companies could be standardized. "Republican Research Institute of Intellectual Property" created the draft of State standard R70433-2022. Rosstandart approved it by Order No. 1181-art. dated 25.10.2022. This State standard describes in detail the goals, principles, and objectives of the antimonopoly compliance system. We have established how such a system is organized and who controls it. They presented a standard list of documents of the antimonopoly compliance system and listed the requirements for such documents.

Rosstandart decided to postpone the new State standard for one year, but in fact its implementation in practice did not take place. FAS held a joint meeting with industry experts and scientists and stated that State standard is too imperative. In addition, the meeting decided that the form of the standard is not suitable for compliance. Some participants expressed concern that the document would create additional barriers and even harm business. As a result, Rosstandart's order No. 1181-st of 25.10.2022 was canceled. Without an approving document, State standard does not entail any legal consequences. Even if guided by it, it will not affect how the FAS will coordinate antimonopoly compliance.

The regulator stated that the approval of the company's antimonopoly compliance documents does not apply to either state function, nor to public service (section V of Clarifications No. 20). In other words, the antimonopoly body is not obliged to develop regulations that define a clear procedure for assessing the compliance of antimonopoly compliance with the law. Also, the service should not establish an exhaustive list of non-normative documents that are issued after the evaluation of documents sent by the company for approval.

Dominant market players and monopolists were invited to test antitrust compliance

Initially the FAS proposed to assign the responsibility to develop and implement such a system to persons who occupy a dominant position in the commodity market, and to subjects of natural monopolies. However, this idea was later abandoned.

Most dominants sell goods, perform work, and provide services at government-regulated rates. If such companies would organize an internal system of antimonopoly compliance, then in accordance with the legislation on state regulation of prices (tariffs) these costs would need to be taken into account as part of such tariffs. Consequently, the cost of goods, works or services to consumers would increase significantly.

Nevertheless, the obligation to develop and implement antimonopoly compliance was partially implemented. Currently, this requirement is fulfilled by federal executive authorities (National Competition Development Plan in the Russian Federation, approved by the Government of the Russian Federation). By Presidential Decree No. 618 of 21.12.2017).