The Provision of Natural Monopoly Reforms by Formation the Condition for Non-discriminatory Access in Russian Competition Legislation.

In keeping with item 1 e) of the Plan of Measures of the First Stage of Reform of Electric Power Engineering in the Russian Federation, approved by the Instruction of the Russian Federation Government of August 3, 2001, # 1040-r the Russian MAP has elaborated the Draft Federal Law "On Introduction of Amendments and Additions to the RSFSR Law «On Competition and Restriction of Monopolistic Activity on Commodity Markets» (hereinafter referred to as the Law on Competition), The Draft Law has been prepared for the purpose of promoting structure reforms in the spheres of natural monopolies, legislatively ensuring the principles of non-discrimination both in the access and creation of conditions for production (marketing) of goods (jobs and/or services) by natural monopolies.

The general pace of economic and structure reform in Russia meets the principal goal of the antimonopoly legislation - development of a market economy, specifically on the basis of promotion of competition- The reforms underway in the Russian fuel and energy complex (including the supply of power, gas, and oil products), railway transport communications, civil aviation have uncovered a number of problems hampering the development of market relations, connected both with the utilization of the relevant natural monopolistic segments, and with development of competition on the related markets. One of the pivotal problems is providing non-discriminative conditions for activity on the aforementioned basic markets of the real sector.
Structural and Behavioral Aspects of Competition Development Measures

The purpose of structure reforms in the basic sectors of production infrastructure is the development of the markets in potentially competitive spheres of activity. This objective is attained with the help of structural and behavioral measures. The former include the separation of natural monopolistic forms of activity (including the transportation of oil, gas and electric power, services of the railway transport infrastructure, traffic control, airport services) from potentially competitive forms of activity (extraction and transportation of oil and gas, generation and marketing of electric power, air transportation, etc)-. According to the experience of Russia and other countries that have carried out, or are in the process of carrying out structure reforms, the creation of a competition environment in potentially competitive spheres of activity is impossible without, enacting behavioral measures, including, in particular, the opening of access to the natural monopolistic market of jobs (services).

Where Do Problems Arise? What is the Nature of the Problems?

Electric Power Engineering. The creation of the federal wholesale market of electric power and capacity (FOREM), including on the basis of large thermal powder stations, has formed the conditions for development of competition relations in the sphere of electric power generation. At the same time, only a scarce number of large consumers have managed to achieve me right to access FOREM due to the opposition of both the regional power generating companies and the regional authorities.

The export of electric power is permissible. But at the same time There is no guaranteed access to the transit of electric power, which places the freedom of foreign trade under doubt.
**Air Transportation** The separation of airports and air transportations has been completed only in half of the airports of federal significance. One of the reasons of procrastination of this process was the fact that the principles of relationships between air companies and airports have not been clearly regulated.

**Oil and Gas Extraction,** The emergence of small and medium oil and gas extractive organizations furthers the development of deposits, which are "uninteresting" to large companies- This could ensure a more complete extraction of resources, solve the problems of employment, and attract investment to the real sector. However, there are problems with utilization of the existing gathering and preparation infrastructure. Oil companies - owners of associated gas dispose of no capacities for profitably processing it (due to refusal of oil refineries from processing it on the terms of tolling, but only on the terms of purchase and sale at understated prices) and selling it at the internal market (among other things, because of problems with accessing the pipes). The problems of access to pipes emerge also in oil transportation. Independent gas stations, not included in VINK, encounter problems with obtaining resources at market prices, with the processing of oil at oil refineries; etc.

**Communications.** Alternative communication operators work in discriminative conditions compared to communication operators- subsidiaries, subordinates or companions of owners of a fixed network infrastructure. The inconsistency of the structure and level of tariffs to the actual expenses (understated local and overstated long-distance) in conditions of a lack of separate accounting, as well as license restrictions on rendering long-distance services by alternative operators and their direct access to OAO Rostelecom (or another long-distance operator, for instance, OAO Transtelecom), aggravate the problems.
**Railway Transportations.** Mass-scale granting of individual tariffs, departmental telegrams and instructions of the Russian Railway Transport Ministry, which combines economic and power functions, and anti-competition actions of railroads distort the actual market situation, create unequal conditions for freight owners, forwarding agents, proprietors of the rolling stock, and infringe the interests of economic entities and citizens.

**General Nature of the Problems**

Those who intend to receive a service have at their disposal a lesser volume of information in negotiations with the proprietor (operator) of the infrastructure- In reality, the user cannot exercise his right to equal contractual terms with the economic entity dominating on the commodity market (sometimes because this information is proclaimed commercial and is not subject to disclosure, and the information that can be revealed becomes inaccessible under some or other pretext).

The procrastination in negotiations (for Instance, if the issue is considered by an authorized body of power or the court) is less damaging to the proprietor of the infrastructure than to its counteragents. The unsettled relations with individual counteragents cannot exert a considerable influence on the economy of an infrastructure company. At the same time, a delay or disruption in receiving infrastructure services can lead to considerable losses or force the counteragents from the market.

There is still a considerable degree of uncertainty concerning the outcomes of negotiations with an infrastructure company. During the negotiations campaign, the prospects of its outcome largely depend on the '-' goodwill" of the infrastructure proprietor, whose market, power and possibilities are unequal with the counteragents. If the negotiations have been taken to court,
constructive agreements become practically impossible. This often leads to repealed violations with respect to one and the same economic entities.

**How are these Problems Being Dealt with in Russia? Why is it not Sufficient?**

The abuse of economic entities' dominance on commodity markets remains the most widespread form of violation of the antimonopoly legislation. In 1997-2000, the antimonopoly bodies have considered approximately 8,200 applications in this connection. During that period, their total number grew 50%. Against the background of an overall upward tendency, there is a growing share of applications concerning the elements of violation of article 5 of the Law. Their number in 2000 was 2,378, or 48-6% of the total 4,897 applications, considered by the antimonopoly bodies on the basis of all articles of the Law. The amount of applications considered on the basis of this article of the Law increased 19% over 1999.

Sixty-five percent (1,533 applications) of the total amount of applications on article 5 of the Law falls on the fuel and energy complex, transport and communications. Complaints in the above economic sectors are filed mainly against the abuse of dominant position by natural monopolies, which account for 80% of the total applications considered (1,278 out of 1,533). Their largest share dealt with abuse in electric power engineering (708, or 55%), communications (388, or 30%), and the railway transport (182, or 14%).

In more than 30% of all cases, the violations were terminated voluntarily or during the consideration of the possibility of initiating proceedings, or in the process of consideration of cases of violation of the antimonopoly legislation (Quasi-judicial procedure enabling 10 to adopt a collegial decision, based on hearings with participation of parties to the case). In 15-20% of all cases, the
antimonopoly bodies issued instructions to eliminate the violations, obligatory for fulfillment Over 80% of decisions on instructions of the antimonopoly bodies, contested in court, were taken in favor of the latter. It is becoming more difficult to prove the violations because of the refusals of the applicants to participate in consideration of cases, which have become more frequent of late due to their reluctance to aggravate relations with natural monopolies, which is connected with the pressure exerted by natural monopolies on the applicants.

The Law on Competition contains only general provisions (article 5), prohibiting the restriction of access to the market and inclusion of discriminative conditions in agreements. The practice of the Russian MAP in preventing the abuse of dominance shows that it is often difficult to apply the aforementioned article due to the lack of definition of "discriminative (discriminating) conditions," and also due to the lack of explicit conditions under which the requirements of non-discrimination can be attained. Specialized (branch) legislation does not detail the branch specifics of access problems on individual markets- At best, there is a referral to the necessity of elaborating special rules by the RF Government, based on principles of non-discrimination. The discussion of this problem with counteragents of infrastructure operators shows that it is extremely difficult to stipulate the variety of real situations (for example, the quantity and specific of freight transported by railroads.) in any sort of rules. The individualization and discretion of contractual relations with the counteragents prevents the creation of non-discriminative conditions on the market.

The analysis of the practice of antimonopoly bodies in preventing the abuse of dominant positions on commodity markets by economic entities, whose actions restrict competition or infringe the interests of other economic entities, in revealing and terminating anti-competition agreements and coordinated actions
shows that ‘his activity is a priority in the work of the antimonopoly bodies. At the same time, the aforementioned cases of individual, albeit statistically significant (against the overall statistical background of violations of the antimonopoly legislation), detection and termination of monopolistic activities does not at all guarantee normal conditions of functioning, moreover development, of commodity markets. For example, in 2000 large oil companies purchased the controlling parcels of shares of 15 small and medium oil and gas extractive enterprises, whereas in 2001 this number surpassed 50. On the whole, there are 150 small and medium oil and gas extractive organizations in Russia. As a matter of comparison, there are 8,000 in the United State-s. The tendency in the gas fueling business is similar - in 2000 large companies have acquired large parcels of shares or fixed assets often independent gas stations, while in 2001 the figure exceeded 30.

The unsettled problems of access and lack of distinctive mechanisms of forming conditions for it result in the emergence of various forms of lobbying, directed at gaining individual advantages by particular economic entities. In so doing, economic entities often resort to the administrative resource - the promotion of the necessary decisions with support of deputies of the State Duma, leaders of the Russian Federation members, some executive authorities. For instance, during three months of its activity, the Working Group for Current Tariffs under the Government Commission for Tariff Policy in Railway Transport has considered over 50 applications for the granting of special rates or discounts off railway tariffs. In half of the cases these applications were backed by the aforementioned authorities.

The experience of settling conflicts with participation of the branch federal executive authorities shows that they can occupy the position of one of the parties, often precisely the position of the infrastructure operating organization- These agencies are accountable for the development of the
corresponding branches and participate in the management of enterprises of production infrastructure (as a rule, the state has a prevailing share in the charter capital or has the opportunity of direct or indirect control of economic activity) Therefore decisions can be taken on the basis of considerations of expediency, rather than the established rules.

The existing procedure of decision-making does not envision open discussion with the interested parties. At the same time, experts on technology, economy and law are presently concentrated in economic entities and associations of commercial organizations. They participate in working out individual decisions, but not in elaboration of the "rules of the game" (jointly with other participants in the market),

Practice shows that the solution of the problem of non-discriminative access to natural monopolistic spheres alone does not eliminate the problem of development of the related markets. As a rule, there are other "soft spots" - spheres of activity directly connected with natural monopolistic activities and those of an infrastructure nature,

Under such circumstances- there is a need to form a mechanism of securing entrepreneurial and consumer interests. It is necessary to introduce open procedures for attaining mutually acceptable conditions for access to the infrastructure. When measures of termination of violations are not efficient enough, it is necessary to intensify preventive measures.

Analyzing the practice of individual forms of antimonopoly control, envisioned by part V of the Law on Competition and directed at preventing the violations of the antimonopoly legislation, it is necessary to pay attention to the fact that it covers new transactions. The federal antimonopoly body exercises control over the creation, merger and affiliation of commercial organizations
(unions or associations) by an association, acquisition of voting stocks (shares) in the charter capitals of economic entities.

A number of recent major transactions on the purchase of oil processing enterprises (ANHK, Achinsky NPZ, Norski-Oil) by oil companies, that could lead to the emergence or strengthening of dominant positions of economic entities or to restriction of competition on the Russian Federation markets, compelled the Russian MAP to put forward behavioral requirements, aimed at ensuring competition terms of supply of oil products to the adjacent regions. Such requirements were set to OAO Gazprom during the purchase of the controlling parcel of shares of OAO Sibur. A similar decision should be proposed during the consideration of the application of OAO Svyazinvest for the creation of seven united communication enterprises on the basis of electric companies of the RJF members- The decisions of the Russian MAP are preliminarily discussed with the persons, whose activity on the corresponding commodity markets can be influenced by the transactions in question (although the obligatory nature of this procedure has not been sealed legislatively).

At the same time, there is no opportunity to similarly set the conditions for behavior of economic entities whose position on the market had formed before Russia started practicing the antimonopoly legislation- For instance, the emergence of new oil and gas extractive enterprises, which are starting to develop suspended or low-profit wells, requires the utilization of the infrastructure of oil and gas collecting pipelines and primary oil preparation installations. However, these specialized capacities belong to other economic entities. The existence of free capacities does not at all guarantee new enterprises' access to these assets.

The above examples illustrate the fact that the lack of behavioral measures of competition development directed at ensuring non-discriminative "rules of the
game/ has always put a brake on the pace of reform- The adoption of the necessary legislative decisions would enable to secure structural transformations in the economy.

**How Are these Problems Solved Abroad?**

The Directive of the European Union of December 19; 1996, concerning the general rules of functioning of the internal market of electric power stipulates that the structural reforms underway in countries of the European Union should be based on principles of openness, transparency, and lack of discrimination in the granting of access to the market. The European Commission is presently working out and plans to adopt the order of ensuring access to the markets in natural monopolistic spheres of activity via the mechanism of open hearings on the access.

Seeking to develop competition on the market of electric power generation and sale, the United States has envisioned a mechanism of securing non-discriminative access to services of the natural monopolies (electric power transmission). Economic, technical, and information requirements are formulated to guarantee non-discriminate access. Economic requirements determine a justified amount of payment for the services rendered by a network organization and operator. Technical requirements spell out technical specifications of connection and utilization of services, Information requirements establish the regime of access to information and the list of open information. Canada has similar experience in ensuring non-discriminative access.

The German market of electric energy, characterized with the prevalence of vertically integrated companies, employs the mechanism of non-discriminate access to services of natural monopolies (network organizations incorporated in vertically integrated companies), in accordance with which the antimonopoly
bodies participate (as arbitrators) in working out and adopting agreements on terms of access between independent manufacturers (or marketing organizations) and network organizations.

    Australia has always paid the closest attention to matters of non-discriminative access to infrastructure spheres of activity. This is largely the reason of considerable headway achieved in reforming such branches as electric power engineering and telecommunications. On applications of economic entities, certain spheres of activity can be declared as requiring guarantees of non-discrimination. Decisions on these matters are adopted by the Australian Commission for Competition and Protection of Consumer Rights (an analogue of the Russian MAP) on the basis of hearings with participation of the interested parties.

**Contents of the Proposed Draft Law. Its Place in the Hierarchy of Domestic Legislative Acts.**

    Ensuring access to goods manufactured (marketed) by natural monopolies and economic entities operating in natural monopolistic spheres of activity, as well as the spheres of infrastructure activity, is of paramount importance for development of market reforms. Non-discriminate conditions, their general principles and establishment procedure should be stipulated by the anti-monopoly legislation. These norms should be rather general, in order to be applicable in different branches and spheres on the basis of the established principles, and if there is a need, they can be concretized by the specialized (branch) legislation and other legislative acts.

    These norms should constitute the basis of other legislative acts. The plans of the Russian Government in reforming the railway transport and electric power engineering include the development of the antimonopoly legislation (introduction of amendments and additions to the Law on Competition and
federal and other legislative acts elaborated on its basis), namely ensuring non-discriminate access to electric networks and the railway infrastructure.

The notion of «discriminative (discriminating) conditions» should be defined as the terms of access to a commodity market (exit from the market), exchange of goods, consumption (purchase), production (sale) of goods, established by someone (economic entity'or executive authority), placing one economic entity' in inferior position in comparison to another economic entity on the corresponding commodity market. This is significant within the context of termination of violations of articles 5-8 of the Law on Competition in the field of restricting access to the market, as well as discriminative conditions of functioning on the markets and inclusion of discriminative conditions in agreements.

The procedure of preventing violations of the antimonopoly legislation in the area of non-discriminate access or conditions of sale of goods has an even greater importance. As it is difficult to regulate the actual situations on the market due to their diversity not only within the frames of the laws, but also of more detailed rules, it is necessary to create the mechanisms of "friendly" settlement of the interests of the infrastructure proprietor and its users with the arbitrating role of the antimonopoly bodies in the process of working out the access conditions (but not the terms of agreements to be formed afterwards within the frames of the elaborated conditions). The conditions should concern the requirements to information, technical and economic aspects. The principles of formation of access conditions should envision the protection of interests of the infrastructure proprietor, ruling out, however, the possibility of gaining monopolistic rent, using its exclusive position on the market.

Executive authorities and importantly, commercial organizations and their associations can be attracted to specify the requirements of non-discrimination. In a number of cases, it is up to the federal body responsible for regulation of
natural monopolies to set the tariffs and outline the circle of consumers subject to compulsory servicing.

The experience of employment of the antimonopoly legislation shows the necessity of adjusting the "soft spots" in the course of structural reforms, with respect to which the requirements of non-discrimination are decisive for development of competition. These are natural monopolistic spheres of activity, spheres connected with the activity' of natural monopolies, and infrastructure spheres of activity, based on special capacities, the creation of which is problematic for economic and technological considerations both for individual market participants and for their associations, and whose services are crucial for the prospects of development of competition on related commodity markets.

This Draft Law conforms to the norms of articles 8 and 34 of the Russian Constitution, directed at ensuring competition requirements. The Russian Civil Code also contains the norms of articles 1 and 10, guaranteeing free movement of goods sand services m the Russian Federation, non-admittance of abuse of dominant position of an economic entity on the market or restriction of competition. It contributes to development of the antimonopoly legislation m the area of preventing discriminative actions. At the same time it creates a system (in keeping with the antimonopoly legislation) basis for elaborating specialized legal acts regulating non-discriminative conditions of access to individual types of goods manufactured (marketed) by natural monopolies or economic entities operating m spheres connected with the activity of natural monopolies.

It also blends fully into the logic of lawmaking, fixed both by the acting legislative and other legal acts. For example, the Law "On Gas Supply in the RP" contains a special section on specifics of practicing the antimonopoly legislation, including the article stipulating non-discriminative access. The Statute on Granting Organizations Access to Local Gas Distributive
Networks has concretized the specifics of this access.

In accordance with the Plan of Measures of the first stage of reform of electric power engineering in the Russian Federation, the Russian MAP is the responsible executor in charge of working out the Order of Equal Access of Electric Power Consumers and Manufacturers to Services of Natural Monopolies in Power Engineering. According to the Plan of Priority Measures of Implementing the Program of Structure Reform in the Railway Transport for 2001-2002, it is planned to elaborate and approve the Rules of Equal Access to the Infrastructure of the Federal Railway Transport.

This Draft Law was elaborated with consideration of the experience of granting non-discriminate access to services of natural monopolies and economic entities operating in spheres connected with the activity of natural monopolies, accumulated by countries of the European Union, Australia, and the United States in the course of reforming the infrastructure economic sectors, including natural monopolistic spheres of activity.

**What Can Be Expected of the Adoption of the Proposed Amendments to the Antimonopoly Legislation?**

The adoption of the Draft Law would stimulate the development of competition and enhance the efficiency of the markets using the services of natural monopolies and the services of infrastructure markets. This is crucial for raising the effectiveness of the national economy. The Draft Federal Law submitted for consideration does not envisage an increase of the apparatus of the federal executive authorities and executive authorities of the Russian Federation members, or the corresponding budget allocations.