

**Deloitte.**



# Automotive news

October 2015





# Content

---

Federal legislation news	4
Government support measures	7
Court practices	8
Contacts	14

---

# Federal legislation news

## Environment protection duty

On 1 June 2015, Prime Minister Dmitry Medvedev and the Russian Government held a meeting to discuss a ceiling for non-tax payments payable by entrepreneurs and entities. The meeting came to a resolution imposing a moratorium on the environmental protection fee for a period until 1 January 2019.

Another resolution set recycling ratios at zero percent for all types of goods except for rechargeable batteries, tires, paper, incandescent light bulbs, and other categories of goods already recycled. The resolution requires that amendments to the rules be ready by 1 July.

At the same time, the Russian Ministry of Industry and Trade has drafted a proposal to set recycling ratios at 5 to 70 percent for 85 categories of goods in 2015, 124 categories in 2016, and 130 categories in 2017, with the number of categories totaling 130.

It is expected that the moratorium may already cease to operate in 2016-2017.

## Recycling duty

Subject to certain conditions, car exporters, who distribute their products to Kazakhstan, may be eligible for exemption from recycling duty.

The Kazakh Government is currently discussing a recycling duty, which is to be finalized this September. We also expect that the members of the Customs Union will harmonize their recycling duty legislation. The amendments that are expected to take effect on 1 July 2015, regarding the electronic vehicle registration certificate system, will standardize vehicle registration certificates across the Customs Union.

## Local contents

The Russian Government published Resolution No. 719 of 17 July 2015 "On the Approval of the Criteria for Classifying Industrial Products" as not having counterpart products manufactured in the Russian Federation. The Resolution takes effect from 1 October 2015.

Having met this criteria, car manufacturers may be eligible for tax benefits, subsidies, and public contracts.

## Parallel imports

The Russian Federal Antimonopoly Service has submitted a list of goods to the Russian Government, which would not require import consent from right holders. This list includes cosmetics, perfumes, hygiene products, health care products, pharmaceuticals, and other products. Spare parts have been excluded from the list on the proposal from the Ministry of Industry and Trade. (*Russian Government Resolution No. 84 of 31 January 2015*)

## Technical regulations

The Technical Regulation "On the Safety of Wheeled Vehicles" takes effect.

The Technical Regulation "On the Safety of Wheeled Vehicles",<sup>1</sup> approved by Customs Union Commission Resolution No. 877 of 9 December 2011, is effective from 1 January 2015.

The Technical Regulation sets forth trading/operation commissioning rules for wheeled vehicles, related safety requirements, compliance assessment processes for vehicles and vehicle components as well as the product labeling requirements for the single regulation compliance mark.

The Eurasian Economic Commission has passed a number of resolutions aimed at implementing the Technical Regulation. (Customs Union Commission Resolution No. 877 of 9 December 2011)

## Amendments to the Russian Civil Code

Extensive amendments to the Russian Civil Code (hereinafter referred to as the RCC) were enacted on 1 June 2015 by Federal Law No. 42-F of 8 March 2015 (hereinafter referred to as the Law). Inter alia, the amendments apply to the fulfilment of monetary obligations. In particular, the obligation to accrue interest at the refinancing rate for the use of funds for any monetary liabilities has been introduced, unless otherwise stipulated by law or by the agreement (item 1, Article 317.1 of the RCC).

Thus, depending on the position taken, this regulation enhances the ability to agree upon additional payments in a contract, provided the deferred payment is stipulated therein.

Moreover, the Law extends the range of the application of various contractual tools, in particular, the application of conditional deals (Article 327.1 of the RCC). Moreover, it stipulates the possibility of submitting representations (Article 432.1 of the RCC), and regulates subscription agreements, framework agreements, options to conclude an agreement, and option agreements.

The regulation of adhesion contracts has also been amended: the revised RCC allows, inter alia, a contract, whose conditions have been set by one party while the other party – due to the inequality of negotiation powers – is in a position that significantly inhibits the agreement of any other content in certain contractual terms and conditions, to be recognized as an adhesion contract.

Another significant amendment is the possibility of stipulating, in contracts, compensation for loss upon the occurrence of particular circumstances, including state authority decisions (Article 406.1 of the RCC). Alongside this, losses are differentiated from damages and can be recovered upon the breach of contractual obligations.

### Antitrust law

At its second reading, the State Duma of the Russian Federal Assembly adopted draft law No. 602468-6 "On Amending the Federal Law 'On the Protection of Competition', Other Russian Legislative Acts and Annulments of Separate Clauses of Russian Legislative Acts (to Promote Competition and perfect the antitrust policy)", also known as the "Fourth Antitrust Package". Inter alia, the draft law envisages a number of regulatory amendments, which may affect automotive companies:

1. The list of economic concentration deals may be extended due to the introduction of collaboration agreements. Such agreements include, in particular, cooperation agreements between automotive producers' captive banks and independent banks. Previously, the Federal Antitrust Service (hereinafter referred to as the FAS) approved clarifications to the procedure and methods for analyzing collaboration

agreements dated 8 August 2013, according to which some clauses of the agreements in question may be recognized as admissible (in particular, non-competition clauses), provided some conditions are met.

2. The concept of a vertical agreement may be specified in detail in regard to a market on which a 20 percent share is defined: according to the draft law, the 20 percent share is defined for a product market that is the subject of an agreement. The current law stipulates defining a 20 percent share on any commodity market, which makes it difficult to apply the regulation in practice and leads to a broad range of interpretations thereof.
3. The Russian Government may be empowered to establish rules for non-discriminative access to goods on separate product markets applicable to businesses, whose share on a specific commodity market exceeds 70 percent, provided that the business is not qualified as a natural monopoly.

Moreover, the FAS suggests including a new chapter in the draft law covering in detail, the issues related to recognizing actions on the market as unfair competition. In particular, the draft amendments will introduce a detailed description of the types of unfair competition related to the illegal acquisition and use of intellectual property rights to the Federal Law "On the Protection of Competition", including the illegal use of competitors' means of individualization, which may entail the risk of product confusion on the market or dishonest use of the popularity of another brand to promote products as well as industrial achievements (competitors' patents and secrets) to acquire unjustifiable benefits. In particular, this includes defamation of competitors, dissemination of false, inaccurate, and corrupted information as well as bans related to the illegal acquisition of legally protected secrets.

Consideration of the draft law at the third reading and its promulgation is expected to take place in September 2015.

<sup>1</sup> The Eurasian Economic Union was launched on 2 January 2015. Its members are Russia, Belarus, Kazakhstan, Armenia and Kyrgyzstan.



# Government support measures

## Car market boosting programs

As part of budget negotiations, the car market participants have proposed continuing the car market boosting programs, including subsidies provided in exchange for old cars returned for recycling or trade-in as well as subsidies for car loans or leases.

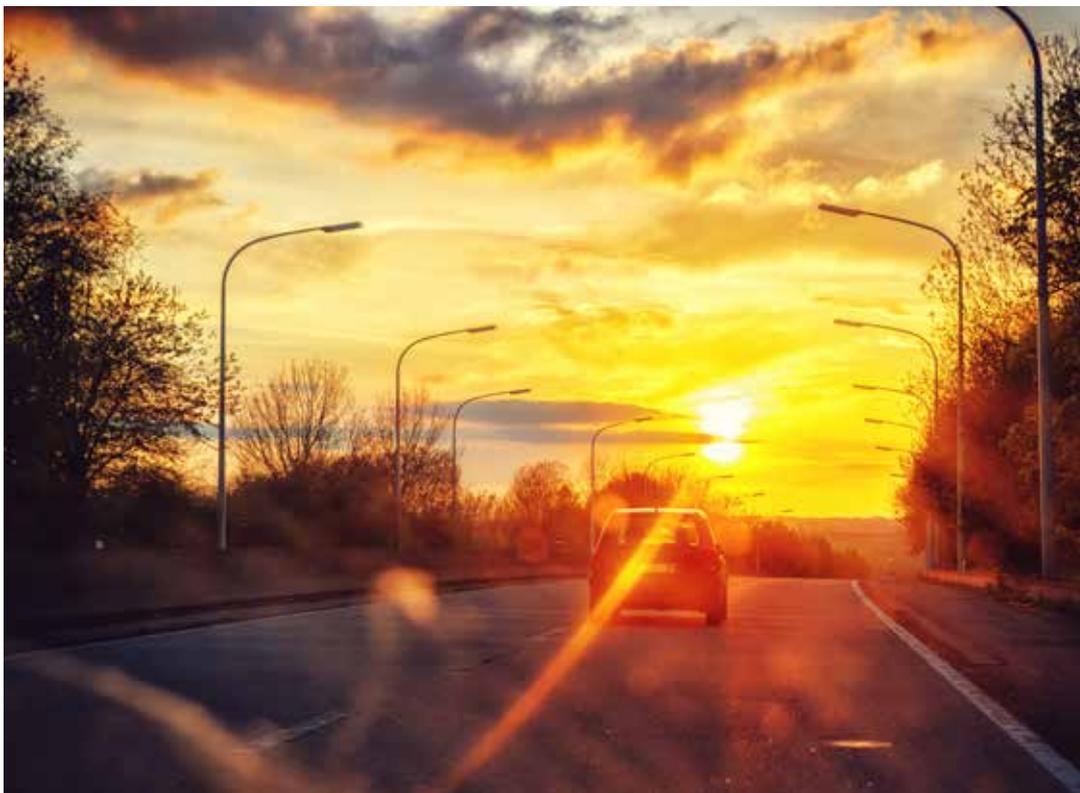
The Government is also drafting a resolution that would provide individuals leasing property with access to VAT exemptions.

## OEM manufacturer support

The Russian Ministry of Economic Development is considering additions and amendments to the regulation for manufacturing OEM components that is part of the commercial car-manufacturing regime (Order No. 73 by the Russian Ministry of Economic Development, Order No. 81 by the Russian Ministry of Industry and Energy and Order No. 58n of 15 April 2005). The amendments set forth a formula for defining an annual average level of local contents to enable elimination of the impact of foreign exchange fluctuations on the local contents level.

## Amended government procurement eligibility requirements for machine-building industry products from abroad

The government and municipal procurement ban, put into effect in July 2014, on certain machine industry products has been amended to make an exception for products originating not only from Russia, Belarus, and Kazakhstan, but from Armenia as well. As always, subject to compliance with the local contents requirements, products manufactured by certain producers resident in the Kaliningrad Special Economic Zone (SEZ) may be excluded from the scope of the ban. An updated list of foreign products banned from government procurement includes light motor cars, public land transportation, and other vehicles. Compliance with the required number of production steps, and the commercial manufacturing regime requirements for Kaliningrad SEZ resident manufacturers should be confirmed with an expert examination report issued by the Russian Chamber of Commerce and Industry. Regarding other products on the list, vehicles originating from Russia, Belarus, Kazakhstan, or Armenia should be supported with a Certificate of Origin. *The ban resolution is effective from 11 February 2015. (Russian Government Resolution No. 84 of 31 January 2015)*



# Court practices

## Transfer pricing court practices

### The Mazda Motor Rus case.

As mentioned previously, the Federal Arbitration Court for the Moscow district Resolution of 21 July 2014 canceled the Moscow Arbitration Court Resolution of 19 June 2013 and the 9th Arbitration Court of Appeal Resolution of 4 April 2014, with the case submitted for re-consideration to the Moscow Arbitration Court. Following the dispute reconsideration in line with the ruling of 17 December 2014, the Moscow Arbitration Court dismissed the claims by the appellant, with the 9th Arbitration Court of Appeal leaving the dismissal resolution unchanged by its ruling of 3 March 2015. Having reconsidered the case based on the instructions from the court of review, the courts resolved that the conclusion made by the tax authority, on the application of the resale price method, is justified due to the unavailability of identical products on the market.

The courts concurred with the conclusion of the tax authority regarding the inapplicability of the first method due to the unavailability of a wholesale market for identical cars from foreign car manufacturers, concluding, therefore, that the need to apply the resale price method is justified.

The Arbitration Court for the Moscow district left the court rulings unchanged, dismissing the appeal against the inappropriate use of the arm's length principle and specifying that only related Russian distributors could acquire foreign-made cars (regarding each of the brands) from foreign purchasers since no legal entity, other than a related distributor, may acquire cars directly from a foreign car manufacturer (supplier).

*Arbitration Court for the Moscow district Resolution of 16 June 2015, on case No. A40-4381/13*

### The Subaru Motor and Hyundai Motor CIS cases.

Based on the reconsideration of similar disputes related to the Subaru Motor case (Moscow Arbitration Court Resolution of 25 November 2014 and 9th Arbitration Court of Appeal Resolution of 5 February 2015) and the Hyundai Motor CIS case (Moscow Arbitration Court Resolution of 6 March 2015), the court of review and the appellate court dismissed the claims from the taxpayers, concurring with the tax authority conclusions that the first transfer pricing method is not applicable, as there is no wholesale market with foreign producers for identical cars, and therefore, the resale price method should be applied. The courts further supported the



conclusions by the tax authorities regarding the fact that distributors (i) are not exposed to key risks, (ii) do not own tangible assets and (iii) cannot be exposed to a negative profitability, with any losses incurred, in this case, to be compensated by their parent companies.

*Moscow District Arbitration Court Resolution of 10 June 2015 for case No. A40-89807/14 and 9th Arbitration Appellate Court of 8 June 2015 for case No. 09AP- 18467/2015*

### **The court dismisses the appeal by the Peugeot/Citroen manufacturer on the ruling of the Federal Tax Service (FTS) requiring additional property tax**

The Arbitration Court for the Northwestern District has dismissed the appeal from OOO PCMA Rus (the "Company"). The Company appealed against a ruling by the FTS Inter-Regional Inspectorate No. 8 requiring an additional property tax of RUB 4.4 million and a penalty/ interest of RUB 1.5 million to be assessed for the period from 30 January 2011 to 31 December 2011. The car manufacturer and the tax inspectorate disputed a period during which the Company was expected to make capital investments.

In 2009, the Company entered into an investment agreement with the Kaluga region to build a car manufacturing plant, acting as an assignee to ZAO PCA Rus, an initial investor. The local legislation provides that investment benefits for property generated and/ or acquired as a result of an investment project apply within a period of the first three years of such an investment project. The Company decided that the three-year period should apply from 2009 rather than from 2008, as the initial investment arrangement had been between ZAO PCA Rus and the Kaluga region. However, the court concluded that with the Company being an assignee to ZAO PCA Rus, the related arrangements and obligations apply from the start of the investment project rather than the date from which the Company became entitled to the investment benefits. Therefore, the Company may be entitled to investment benefits only within the three-year period from the start of the project, which is 29 January 2008.

A dealer filed a petition relating to an auto distributor in court requesting the unilateral termination of the dealer sale and service agreement, which acknowledged the defendant to be a dominant party on the wholesale

primary market in regard to the relevant automobile brand in Russia and acknowledged the defendant to be a dominant party on the wholesale primary automobile market in Russia, and to declare some clauses of the dealer agreement void.

The courts dismissed the claim on the basis that according to Article 5 of the Federal Law "On the Protection of Competition", a dominant position is a position of a business entity or several business entities on a particular product market. This allows them to affect the product's turnover on the respective market significantly and remove other business entities from this market and/ or hinder their access to this product market.

At the same time, a product market is the turnover space of a product, which cannot be substituted with another product, or of a group of interchangeable products from which the buyer can acquire a product based on an economic, technical, or other possibility or rationale, and this possibility or rationale does not exist beyond this space. Consequently, the specific features and consumer characteristics of the product are the key issues rather than the fact that it belongs to a particular brand. The withdrawal of a particular brand from the automotive market will have no impact on consumers' ability to buy vehicles of other brands present on the Russian market.

Based on the information above, the courts concluded that the auto distributor possesses no attributes of an entity dominating the vehicle market according to Article 5 of the Federal Law "On the Protection of Competition".

*Commercial Court of the Moscow district Resolution No. F05-5521/2015 of 25 June 2015, on case No. A40-79786/14. The ruling was supported by the Commercial Court of the Moscow district Resolution No. F05-8375/2015 of 7 July 2015, on case No. A40-181992/14 and the 9th Commercial Appeal Court Resolution of 21 August 2015, on case No. A40-185607/14.*

### **Restriction of competition for the auto lending market**

The Commercial Court of the Moscow district dismissed a bank's cassation appeal requesting the nullification of the judicial acts legitimizing the decision and instructions on a case concerning two credit organizations in breach of antitrust legislation, as well as the resolutions on the imposition of penalties for the breach.

A joint committee of the FAS and the Central Bank of Russia recognized the lending organization to be in breach of part 4, Article 11 of the Federal Law "On the Protection of Competition" due to the conclusion of a Cooperation Agreement.

The Agreement was concluded as the bank, being a subsidiary of a foreign auto group (Bank 1), did not hold a license to accept deposits from individuals, and stipulated the opening of accounts by another bank (Bank 2) for the borrowers of Bank 1 to service the loans of the latter.

Likewise, the Agreement obliged Bank 2 not to provide or create conditions for the clients of Bank 2 to purchase services from Bank 2 related to both repaying loans from Bank 1 and for other purposes, including the purchase of vehicles.

During the case hearing, it was determined that the banks had been potential competitors on the auto credit market for individuals when concluding the Agreement, and turned into actual competitors when fulfilling the Agreement. The committee determined that by concluding the Agreement on such terms, Bank 2 actually forfeited a number of future independent activities on the market, i.e. competition with Bank 1 in regard to the clients acquired by the former.

*Commercial Court of the Moscow district Resolution of 24 November 2014, on case No. A40-10517/2014*

#### **Legally valid refusal to extend dealer agreements**

A dealer and a distributor concluded a number of dealer agreements with conditions stipulating the possibility to terminate them after a six-month period and the right of the parties to reject their default extension by filing a termination notification in writing 30 days prior to the termination date.

After the distributor filed such a termination notification, the dealer filed a claim contesting the termination. The plaintiff claimed that the package of dealer agreements had been concluded under the joinder agreement model, and therefore the plaintiff could not influence the formulation and exclusion of the termination clause, as a result of which the condition should be recognized as onerous for the dealer, while the distributor's actions should be recognized as an abuse of that right.

The court ruled that the terms and conditions of agreements stipulating the possibility of terminating agreements upon their expiration and the right of parties to refuse to extend the agreements do not contradict the civil legislation; do not deprive parties of the rights which are typically stipulated by agreements of this kind; do not exclude or limit the liability of the parties towards each other for the breach thereof; and are not onerous for the parties.

*Commercial Court of the Moscow district Resolution No. F05- 12548/2014 of 17 November 2014, on case No. A40- 148901/13-34-904*

### Legally valid failure to meet a vehicle repair deadline

Upon the occurrence of an insured event, a citizen contacted a servicing station to have some repairs performed. Due to the complexity of the works to be performed, the plaintiff and the defendant agreed on a 90-day term for the repairs. The repairs were not performed within the agreed timeframe and the citizen filed a petition to the court to enforce a penalty.

Meanwhile, the repairs to the plaintiff's vehicle were carried out by the defendant based on an agreement between the defendant and an insurance company, which concerned the executor's obligation to carry out repairs.

Item 2.1 of the agreement stipulated that a repair cost estimation/inspection act (payment warranty) approved by the insurer was to be the basis for the commencement of repair works by the executor. Likewise, item 2.5 of the Agreement stated that if hidden defects are revealed, which were not included in the repair cost estimation/inspection act, the executor was to obtain written consent from the insurer to perform additional works prior to commencing them; repairs conducted without the insurer's written consent were not to be recovered.

The court ruled that since hidden defects had to be agreed upon by the insurer and repairs could not have been performed prior to this, the executor's failure to perform their obligations within the agreed 90-day period shall not serve as a reason to enforce a penalty.



### Intellectual property rights

#### A case on a well-known trademark.

An international auto producer petitioned the Intellectual Property Rights Court contesting a decision by the Federal Intellectual Property Service (Rospatent), which refused to recognize a trademark as well-known from 1 June 2017 on the territory of the Russian Federation in regard to 12th class goods in accordance with the International Classification of Goods and Services for the Registration of Marks (vehicles, parts, and accessories).

The Intellectual Rights Court Presidium concluded that the Intellectual Property Rights Court's ruling to refuse to satisfy the appellant's requirements was not justified because of the following reasons:

- Being the right holder to a number of trademarks legally protected in Russia, the producer has the right to produce products marked with the trademarks both independently and by delegating their production and/or distribution to third parties. Additionally, Russian law does not stipulate any requirement to mark the goods as "produced under the right holder's control".
- The notoriety of a trademark is not to be defined in relation to the particular producer, which may be different from the right holder of the trademarks, but in relation to the company producing products under the trademarks submitted for registration. The legal provisions on recognizing a trademark as well-known do not oblige the right holder to provide proof of using the trademark in the sense envisioned by item 2, Article 1486 of the RCC.
- The Intellectual Rights Court Presidium took into account the findings of a poll conducted by the Sociology Department of Moscow State University (Lomonosov) amongst Russian adults aged 18+, based on which the awareness rate of the trademark constituted 98.1 percent.
- Moreover, the court accepted as evidence publications in a specialized auto magazine from 2007 about this brand of vehicle becoming the most popular foreign brand as well as similar information from an information agency from 2005-2006. The court also indicated the necessity of taking into consideration (1) statements on the sales volume for vehicles under this brand from 2000 to 2007, (2) documents on placing advertisements, (3) information from the Automobile Manufacturers Committee at the Association of European Businesses on the sales statistics for this brand in 2006-2007, and (4) data from the largest advertising providers in Russia regarding expenditures on brand promotion.
- The Intellectual Rights Court Presidium also ruled that there was no need to prove corporate relations between the right holder and the vehicle producer in Russia, since the right holder proved the legal validity of using the trademark by the legal entity that actually used it, and this reasoning cannot be contested by any party.

*Intellectual Rights Court Presidium Resolution No. C01-1436/2014 of 2 March 2015, on case No. SIP-552/2014, Intellectual Rights Court Ruling of 18 June 2015, on case No. SIP-552/2014*



# Contacts

Should you have any questions regarding the material in this information bulletin, please contact our specialists from the Tax & Legal department:



**Svetlana Fedorova**

Partner

Tax & Legal Services

Head of the Automotive Services Group in the CIS

Tel: +7 (495) 787 06 00, ext. 2329

[sfedorova@deloitte.ru](mailto:sfedorova@deloitte.ru)



**Tatyana Kofanova**

Director

Tax & Legal Automotive Leader

Tel: +7 (495) 787 06 00, ext. 5210

[tkofanova@deloitte.ru](mailto:tkofanova@deloitte.ru)



## deloitte.ru

### About Deloitte

Deloitte refers to one or more of Deloitte Touche Tohmatsu Limited, a UK private company limited by guarantee (“DTTL”), its network of member firms, and their related entities. DTTL and each of its member firms are legally separate and independent entities. DTTL (also referred to as “Deloitte Global”) does not provide services to clients. Please see [www.deloitte.com/about](http://www.deloitte.com/about) for a more detailed description of DTTL and its member firms. Please see [www.deloitte.ru/en/about](http://www.deloitte.ru/en/about) for a detailed description of the legal structure of Deloitte CIS.

Deloitte provides audit, tax, consulting, and financial advisory services to public and private clients spanning multiple industries. With a globally connected network of member firms in more than 150 countries and territories, Deloitte brings world-class capabilities and high-quality service to clients, delivering the insights they need to address their most complex business challenges. Deloitte’s more than 225,000 professionals are committed to becoming the standard of excellence.

This communication contains general information only, and none of Deloitte Touche Tohmatsu Limited, its member firms, or their related entities (collectively, the “Deloitte Network”) is, by means of this communication, rendering professional advice or services. No entity in the Deloitte network shall be responsible for any loss whatsoever sustained by any person who relies on this communication.

© 2015 Deloitte & Touche Regional Consulting Services Limited. All rights reserved.