

**Intergovernmental Group of Experts on Competition Law
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**Cross-Border Anticompetitive Practices
by
Russia
(Unofficial Translation)**

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Globalization of world economic processes straight-forwardly affecting formation of national economies dictates that purposes of public antimonopoly regulation focus, on one side, on prevention of strengthening concentration, economically ineffective for the society, abuse of market power and concerted anticompetitive practices by market participants, on the other side – on creating healthy environment for effective market functioning and development, *inter alia*, through the system of legislative and law-enforcement measures encouraging competitiveness of Russian manufacturers on regional and world markets.

Increase in number of M&A transactions being witnessed in the global economy, dynamic activity of companies concerning elaboration of unified agreed and coordinated policy on the market so as to improve competitiveness and to receive competition privileges, challenges competition authorities worldwide, and, *inter alia*, the Russian authority, to elaborate joint competition policy. This issue is becoming more acute in the develop-momentum international and interregional integration and boost of formation of vertical business-groups and transnational corporations.

In the aforementioned circumstances the role of international cooperation, which in current circumstances is considered as an important factor for ensuring competition protection on the internal market of the Russian Federation and creation of healthy environment stimulating access of Russian exporters and investors to the external markets, in competition protection is becoming of more importance.

The FAS Russia reckons that the following general are to be satisfied conditions so as to develop practical interaction with foreign competition authorities:

- Effective legal foundation;
- Adequate guarantee of protection for confidential information provided within information exchange;
- Confidence by competition fellow competition authorities;

- Respect and prestige of the Authority among international competition supported by practice.

The above mentioned conditions may be met due to:

1. harmonization of competition legislation;
2. dynamic international cooperation between competition authorities;
3. experience of the authorities on transactions consideration and cartel investigation.

1. Nowadays, in general, competition legislation in developed and developing countries tends to become more harmonized. Thus, “the third antimonopoly package” of amendments to the Federal law “On Protection of Competition” and certain legislative acts of the Russian Federation entered into force in 2012 to improve competition legislation in accordance with the best world practices. The “third antimonopoly package”, *inter alia*, amended the following:

- control over economic concentration;
- cartels.

- Legal provisions regulating economic concentration equally cover both Russian-and-foreign-legal entities relations (Article 3 of the law on Protection of Competition”, in particular, it is foreseen that transactions, achieved between Russian and (or) foreign persons or entities abroad the Russian Federation, are considered only if such agreements or actions have impact on competition environment in Russia.

The Law lists transactions subject to antimonopoly control, it also sets forth the following threshold: antimonopoly control is **exercised over transaction the aggregate proceeds of which exceed 33,3\$ mln.** Transactions, other actions carried out abroad the Russian Federation of the amount that exceeds 33,3\$ mln., are not subject to the approval of the antimonopoly body, since such transactions do not have any impact on the Russian market. The aforementioned threshold is one of the highest in the world.

- In accordance with the best world practices the “third antimonopoly package” introduced the notion “cartel”, meaning agreements between companies-

competitors, and significantly shortened the list of *per se* prohibitions, which are considered as cartels. Such prohibitions cover agreements on price fixing, bid-rigging, market allocation, stopping of production and refusal to conclude a contact. Moreover, the amendments foresee that criminal prosecution is carried out only on cartel agreements, while other agreements and concerted practices do not invoke criminal responsibility.

2. The FAS Russia cooperates with international organizations, foreign public authorities, participates in elaboration and execution of international treaties and agreements of the Russian Federation.

So, by 2012 the Authority concluded and has now been executing a certain number of (around 50) multilateral and bilateral treaties and agreements with foreign competition authorities and integration *fora* (Austria, Bulgaria, Brazil, Hungary, Venezuela, Vietnam, Denmark, Italy, China, Korea, Latvia, Mexico, Mongolia, Poland, Romania, Slovakia, USA, Ukraine, Finland, France, Czech Republic, Sweden, Estonia, Interstate Council for Antimonopoly Policy, BRIC), which cover various areas of cooperation.

Due to growing necessity of interaction between competition authorities in consideration of transaction of economic concentration and investigation of certain cases of violation of the antimonopoly legislation of a cross-border character, the FAS Russia began to conclude **bilateral cooperation agreements of an absolutely new type**, which clearly provide for interaction mechanisms when investigating and exercising control over violations of the antimonopoly legislation. Such new-type agreements allow to develop breakthrough forms of cooperation (Mexico, EU, Hungary, Austria, Spain, Italy).

3.1. Interaction when considering transactions

The following presents illustrative examples of interaction of the FAS Russia with other competition authorities when considering transactions:

- consultations between the FAS Russia and the General Directorate on Competition of the European Commission of the European Union on the merits of the transaction on acquisition of Sun Microsystems by Oracle Corporation.

Submissions on this transaction to be approved were filed for consideration with competition authorities from different countries, *inter alia*, the FAS Russia, and with the European Commission as well. For the FAS Russia to have a consistent and accorded position on the issue it was very important to understand what consequences of the transaction in question were foreseen and expected by the European colleagues.

The provisional condition set forth by the European Commission to conduct such consultation was that the companies in question waived their confidentiality rights concerning the transition at issue, by this step the companies confirmed that they agreed on the consultations to be carried out between the FAS Russia and the European Commission entitling both Authorities to exchange confidential information. These waiver-Letters of the companies sent to the FAS Russia and the European Commission stipulated that the provided confidential information was to be exchanged only for the aforementioned consultation purposes and only for the common position to be elaborated, thus prohibiting this information to be transmitted to other persons and to be used for other purposes and for investigation of other cases.

Upon receipt of the Letters from the respective companies the FAS Russia and the European Commission conducted phone consultations during which new approaches to the market analysis and transaction consideration were discussed; concerns about ensuring competition between these companies' operation markets were discussed as well.

- Interaction of the FAS Russia with the Department of Justice of the USA, the Federal Trade Commission of the USA and the European Commission

Upon having considered submissions of Graftech Holdings Inc и Graftech Seadrift Holding on acquisition of 81,1% shares of the share capital of the Limited Liability Partnership «Seadrift Coke L.P.», and having held that the transaction in question may have negative impact on competition environment of world's market of graphitized electrode, the FAS Russia forwarded its opinion on the transaction in question to the aforementioned authorities with recommendation to take into

consideration the position of the FAS Russia when considering the alike transaction in the EU and the USA, in case the same submissions were filed with these authorities.

- Consideration by the FAS Russia of a cross-border transaction (with remedies imposed) on acquisition of certain amount of RUSAL company's assets by Alcoa company (world's biggest aluminum producers)

The FAS Russia approved the transaction having imposed on Alcoa company certain behavioral remedies so as to ensure competition.

- Request, sent to the FAS Russia by the Hungarian Competition Authority, on provision of information on transaction concerning acquisition by RosGas AG Company of EMFESZ Company (the second largest seller of the gas in Hungary after the German company E.On), belonging to Gazprom group of persons

It was also indicated that Gazprom denied its affiliation to the transaction in question. The request was forward for the purposes to assess the level of impact on the Hungarian market of natural gas supplies. The FAS Russia in its turn officially requested Gazprom, and as soon as it received the official answer thereof the FAS Russia forwarded it to the Hungarian competition Authority.

At present moment the FAS Russia has never experienced prevention of international cartels. However, the Authority has experience of international interaction when investigating cases of abuse of dominance. The example of this is investigation conducted jointly by Russian and Kazakh Competition Authorities against anticompetitive practice by companies operating on the international telephone communication market.

The legal basis for such interaction was the Agreement on Implementation of Agreed Antimonopoly Policy, signed by competition authorities of the CIS-states so as to coordinate activity on creation of legal and organizational foundations for prevention, restriction and suppression of monopolistic activity and unfair competition on the CIS common economic space.

During investigation the signs of violation of the antimonopoly legislation when calculating tariffs on roaming communication services were detected.

Respective investigations were carried out and proceedings against respective dominant operators were initiated on the basis of the national effective legislation.

Conducted investigations were aligned with regular consultations between representatives of the Competition Authorities of Russia and Kazakhstan, within which the algorithm of joint activities was elaborated. Representatives of the FAS Russia participated in the controlling procedures run by the Kazakh colleagues.

At the end of October 2010 the Competition Authorities of both countries terminated considering the cases, conviction judgments on which were rendered simultaneously. It is worth noting that Russian and Kazakh cellular communication operators had announced reduction of tariffs on international roaming communication services before the Decisions on the cases at hand were rendered.

Challenges for interaction between competition authorities

One of the main challenges for interaction between Competition Authorities is a problem of confidential information exchange, since the right to set the information to the confidential treatment is enjoyed exclusively by the right holder and without the consent thereof such information is not to be transferred to other persons.

The FAS Russia is unable to receive confidential information from the foreign Competition Authorities, therefore, this causes significant obstacles for considering transactions of a cross-border character or concluded abroad the Russian Federation, and investigation of the antimonopoly legislation violations. The information at issue is important for the FAS Russia to conduct comprehensive analysis of the market and activity of undertakings operating on the market in question, so as to receive evidence of the antimonopoly legislation violation and to assess potential outcome of transactions' conclusion or other activities run by undertakings.

Therefore the FAS Russia is working hard on overcoming these challenges, which would make interaction in cross-border transactions' consideration with foreign Competition Authorities more effective.

