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Cross-Border Cartels

Contribution of the Russian Federation

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The Russian Federation
Cross-border cartels
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Cartel conduct is known as the most egregious of competition law violations. According to experts, in the Russian Federation the approximate damage from cartels is estimated at 2% of GDP and almost 2 trillion rubles annually. However, its secretive character makes cartels notoriously difficult to detect and prosecute.

The fight against cartels has become one of the priority areas for the FAS Russia. In the Strategy for Economic Security of the Russian Federation for the period until 2030 approved in May 2017 by the President of the Russian Federation, the prevention of cartels was included among the main tasks of the state in the field of ensuring economic security.

In modern conditions of globalization of economic processes and increasing digitalization, cartels often lose their local character and become international. This fact poses even greater threat to the economy of the Russian Federation.

In its practice, the FAS Russia when conducting investigations also has dealt with cartel cases that have a cross-border nature.

The main difficulty of combating such cartels is the fact that they are concluded by major international players outside the territory of the Russian Federation. Such anticompetitive agreements are very difficult, and sometimes almost impossible, to trace.

One of the best examples in cross-border cases is the decision made in 2015 by the FAS Russia regarding the cartel of largest liner shipping companies A.P. Moller-Maersk A/S (Denmark), CMA CGM SA (France), Hyundai Merchant Marine Co. LTD (Korea), Orient Overseas Container Line Limited (Hong Kong), Evergreen Marine Corp. (Taiwan) Ltd (Taiwan)¹.

The FAS Russia found them to have violated the ban on concerted actions², which led to the setting of surcharges to the freight rates in the market of liner container transportation on the Asia-Russian Federation route in 2012-2013. The geographical boundaries of the commodity market covered 12 states.

The FAS Russia established that in 2012-2013, the information on the setting of general rate increases (GRI) was published on the website of one of the carriers, after which the rest of the market participants set the same markups. After another

¹ <http://en.fas.gov.ru/press-center/news/detail.html?id=44347>

² <http://en.fas.gov.ru/press-center/news/detail.html?id=44353>

decrease in freight rates, carriers again set the GRI premium relatively synchronously and uniformly in order to increase or maintain prices.

Such actions led to periodic price increases and had negative effects on consumers. This position was confirmed by a large number of respondents that took part in the poll of the FAS Russia analyzing the negative consequences of anticompetitive behavior of cartelists. Due to the publication of information that all key market participants were relatively synchronized and uniformly increased the basic freight rate, the buyer in the course of negotiations had a weaker position than the carrier. The most negative impact of this behavior was for medium and small enterprises, who were forced to agree with the established premium to the freight rate.

The annual container turnover from Asian ports to the Big Port St. Petersburg is about 550 thousand loaded containers. The repeated introduction of surcharges by USD 250-950 per container during the year, even with their partial or temporary application, has a negative impact on the foreign trade of the Russian Federation and on the cost of goods for Russian consumers.

At the same time, one should note that domestic participants in foreign economic activity completely depend on the quality and cost of services of foreign companies, since there is not a single Russian company among the 16 container operators in this market.

According to the antimonopoly legislation of the Russian Federation, such concerted actions are prohibited for legal entities-competitors, the aggregate share of which in the relevant commodity market exceeds 20%, and the share of each of which in the product market exceeds 8%.

Thus, the FAS Russia found listed liner shipping companies having violated the provisions of the Federal Law as of July 14, 2006 No. 135-FZ "On Protection of Competition"³ (Law on Protection of Competition).

On September 7, 2016, the Moscow Arbitration Court upheld the decision of the FAS Russia regarding the cartel of liner shipping companies⁴.

In 2017, a settlement agreement was concluded between the liner shipping companies and the FAS Russia⁵ in the Appeal Court. The cartelists stopped the violation and undertook obligations aimed at providing fair conditions for consumers of container shipping services.

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[http://en.fas.gov.ru/upload/documents/Federal%20Law%20On%20Protection%20of%20Competition%20\(as%20amended%20in%202015\).pdf](http://en.fas.gov.ru/upload/documents/Federal%20Law%20On%20Protection%20of%20Competition%20(as%20amended%20in%202015).pdf)

⁴ <http://en.fas.gov.ru/press-center/news/detail.html?id=47097>

⁵ <http://en.fas.gov.ru/press-center/news/detail.html?id=49003>

Besides, within the Eurasian Economic Union (EAEU), the member of which is the Russian Federation, the FAS Russia has experience in participating in investigations conducted by the Eurasian Economic Commission (EEC) that, in accordance with the Treaty on the EAEU, has the power to start an investigation in case there are possible signs of violation of the general rules of competition in cross-border markets.

One of the recent examples of such interaction was a cartel case investigated in 2018-2019 in the cross-border market for production of medical equipment.

At the beginning of 2018, the Ministry of National Economy of the Republic of Kazakhstan applied to the EEC with a statement about possible signs of violation of antimonopoly legislation carried out by Delrus in the cross-border market.

The EEC was able to establish that the applicant, the Kazakh company "Scuderia" intended to acquire services for the calibration of ultrasonic sensors of the Fibroscan device from the Russian company "Delrus CJSC". However, "Scuderia" received an unjustified refusal and an offer to apply to the Kazakh company "Delrus RK", where such a device cost 2.5 times more.

In the course of the investigation, the EEC found out that "Delrus CJSC" and "Delrus RK" actually divided the market of medical equipment on a geographical basis.

The EEC Board established the existence of an anticompetitive agreement between "Delrus CJSC" and "Delrus RK", the implementation of which is evidenced by the refusal of the Russian company to provide the Kazakh consumer with necessary services. At the same time, competitors knew about each other's activities, corresponded and redirected buyers in accordance with the geographic principle of the service territories.

Thus, the EEC found "Delrus CJSC" and "Delrus RK" having concluded a cross-border anticompetitive agreement and imposed fines on its participants. Also, fines were assigned to the Directors General of "Delrus CJSC" and "Delrus RK"⁶.

As part of the investigation of the EEC, the FAS Russia conducted an audit of "Delrus CJSC", suspected of a cross-border anticompetitive agreement. In addition to materials for the EEC, the FAS Russia identified signs of violation of the antimonopoly legislation conducted by "Delrus CJSC" also within the borders of the Russian Federation.

Occasionally, in its practice the FAS Russia deals with the situation when cross-border anticompetitive agreements are concluded at tenders and take the form of a cross-border bid rigging case. Since the FAS Russia is among a few authorities in

⁶ Decision on the case: <https://www.alta.ru/tamdoc/19kr0165/> (Russian version only)

world has the powers to control public procurement, the bid rigging detection is a big part of its work.

According to statistics, 88% of all cartels investigated by the FAS Russia was bid rigging, some cases of which were of cross-border nature. The persons involved in these investigations often do not independently carry out their activities in the territory of the Russian Federation: they can be represented by the subsidiaries of international companies - distributors/dealers, etc. Manufacturers of products do not, as a rule, directly participate in tenders, and therefore cannot be held liable for bid rigging in the Russian Federation.

Regardless the fact that these cases pose a big complexity for the FAS Russia and therefore are regularly initiated, recently the FAS Russia investigated a few cross border bid rigging cases mainly in the markets of production and sale of medical products and equipment, as well as construction services.

For instance, in 2019, the FAS Russia found a number of companies, some of which were foreign legal entities, having violated the Law on Protection of Competition by concluding and participating in an anticompetitive agreement at the tender for airport construction. The violation led to the restriction of access to the market for the implementation of the investment project for the construction of a new airport complex on the territory of the international airport of Irkutsk. In order to ensure competition, the FAS Russia issued the requirements to the participants of the anticompetitive agreement so to eliminate the actions restricting other market players to have access to the market of construction services⁷.

As a rule, cartels operate where it is economically profitable, and pay little attention to any administrative or state boundaries. If it is profitable economically, such barriers will unlikely stop the participants of cartel agreements. From this point of view, international cooperation aimed at effectively and operatively combating cross border cartels is extremely necessary.

In order to effectively combat cross-border cartels, the FAS Russia uses all possible channels of communication with other foreign competition authorities both in a bilateral and in multilateral formats.

The FAS Russia actively uses bilateral relations based on provisions of Memoranda, agreements, working plans in order to consult foreign competition authorities within the investigation process taking into account that the antimonopoly legislation of the Russian Federation provides for the prosecution of anticompetitive agreements reached outside the Russian Federation if they affect the state of competition in our country.

⁷ <https://fas.gov.ru/news/28043> (Russian version only)

For instance, a similar investigation against liner shipping companies described above was also conducted, including but not limited to, by the European Commission and competition authorities of the USA, People's Republic of China, Japan. Thus, the FAS Russia used the mechanisms provided for in bilateral cooperation documents to carry out consultations with foreign counterparts from European Commission and the People's Republic of China aimed at experience and practices exchanging.

The FAS Russia also has established strong ties with its BRICS counterparts in the format of BRICS Contact Group on Cartels created in 2019, the goals of which are to discuss specific cases for conducting joint investigations in the BRICS space, as well as improving existing and developing new mechanisms to identify anti-competitive agreements.

The Contact Group carries out its work by holding face-to-face meetings, so-called "missions", at the level of leaders and experts of the international and anti-cartel divisions of the BRICS competition authorities with the involvement of developers of special programs and algorithms for identifying digital cartels.

To date, two "mission" of the Contact Group took place in November 21, 2011 in Moscow and in March 2020 in Brasilia. The Contact Group is a good example of cooperation when foreign competition authorities that use different tools come together to unify these mechanisms and work out the consolidated efforts to most effectively combat cartels.

The experience of the FAS Russia in detecting and preventing cross-border cartels, showed serious gaps in the international legal regulation of combating cross-border cartels.

Despite having experience in cooperating with foreign competition authorities, while investigating cross-border cartels the FAS Russia faced with obstacles that especially relate to the process of exchange of information with foreign counterparts.

For instance, the FAS Russia unfortunately never received leniency from foreign economic entity, thus the interaction with big and experienced competition authorities from developed countries that have much experience in this regard, could be limited to exchange of only general information.

Besides, one of the problems of investigating cross-border cartels in the Russian Federation is limited timelines set for investigation and consideration of a cross-border cartel case that does not differ from deadlines to investigate a national cartel. However, in foreign jurisdictions, given the complexity of collecting and analyzing information, cross-border investigations usually require more time to be completed.

One cannot be wrong saying that the effectiveness of the process of cross-border cartels prosecution heavily depends on the levels of interaction and trust among

competition authorities. This problem especially gains its momentum when there is a need for cooperation between countries with different states of economic development.

The existing legal framework and recommendations of international organizations established by OECD or ICN are mostly relevant and focused on developed countries with strong law enforcement structures, between which there are already strong cooperation mechanisms. Developing countries, poor countries that even do not have the terminology related to cartels and therefore any cartel enforcement experience, and countries where competition authorities are relatively small or young, cannot apply these guidelines in practice.

Competition regimes are emerging in developing countries that are not yet ready to tackle cross-border anticompetitive practices, and even if their laws are adequate, most of these countries lack the capacity to enforce such regulations, given the political pressure from home countries of cartel participants.

Thus, nowadays there is a need of development of modern international mechanisms for combating cross-border cartels, taking into account the interests of all countries regardless of their socio-economic development that will serve as a step to converge procedures for combating cross-border cartels around the world.

The FAS Russia is convinced, and both its national practice and global examples confirm there is today the lack of common principles and rules on an international level regulating the interaction of competition authorities when investigating cross-border cartels.

Such common principles should bring closer the legal requirements and enforcement procedures used in different countries to combat cross-border cartels that in particular include the evidence gathering, leniency programs and the exchange of information related to it, investigation approaches and decision-making with particular emphasis of developing and poor countries.