

8th United Nations Review Conference on Competition and Consumer Protection

19-23 October 2020

Room XIX, Palais des Nations, Geneva

Friday, 23 October 2020

Competitive Neutrality

Contribution of the Russian Federation

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Introduction

Principle of competitive neutrality is established in the fundamental law of the Russian Federation – the Constitution of the Russian Federation, which states that "in the Russian Federation recognition and equal protection shall be given to the private, state, municipal and other forms of ownership"¹. Establishing the common rules of competition for economic entities of all forms of ownership is the main principle of the Federal Antimonopoly Service of the Russian Federation (FAS).

The FAS exercises its functions in the different fields. It is empowered to exercise control over compliance of economic entities with the competition law, control over observing competition rules by the authorities, including control over state preferences (state aid), control over public procurement, including the sphere of state defense and security, control over activity of natural monopolies, control over allocation of property, resources and rights on a competitive basis stipulated in the sectoral legislation, control over advertising law compliance, control over foreign investments in strategic industries, control over unfair competition, as well as control over compliance with competition rules in the sphere of intellectual property.

Principle of competition neutrality is also expressed in assessment by the FAS of sectoral and functional policies and issuing conclusions on their influence on state of competition in the relevant markets. Such conclusions are presented to the Government of the Russian Federation in the process of adoption of sectoral policy.

Unfortunately, nowadays violations of antimonopoly legislation are very often exercised by public authorities. The typical violations are restriction of competition in public procurement, provision of state preferences and subsidies, setting of requirements and limitations to economic entities by public authorities as well as in establishment of state enterprises.

¹ Part 2 of the Article 8 of the Constitution of the Russian Federation

Tools to address competitive neutrality

The FAS has a number of tools for combating anticompetitive practices that have negative influence on the state of competition. These are control over actions of public authorities, control over public procurement and allocation of state preferences. It should be noted that Russian antimonopoly legislation has no limits or exceptions for control over state actions. Proceedings of proving of violations of antimonopoly legislation are the same in relation to entities of all forms of ownership.

For example, in the period of 2008-2011 the FAS investigated "three waves of cases" against oil companies of different forms of ownership: OJSC "Rosneft" (state enterprise), OJSC "Gazprom neft" (partly state-owned company), OJSC "Lukoil" (private company), TNK-BP (private company with foreign capital). The cases were investigated and reviewed in accordance with the Russian antimonopoly legislation, regardless of the form of ownership and structure of assets. The investigations resulted in the imposition of fines amounting to a total of more than 470 million euros.

Apart from the Law on Protection of Competition,² the FAS Russia is empowered to exercise control over compliance with such laws as the Law on Federal Contract System³, the Law on Trade⁴, and the Law on Electric Power Sector⁵. Compliance with provisions of these laws is tremendously important for competitive neutrality.

The FAS exercises its powers in relation to public authorities in the form of control over their compliance with antimonopoly legislation. Article 15 of the Law on Protection of Competition prohibits authorities from carrying out actions or inactions that prevent, restrict or eliminate competition. Such actions include the introduction of restrictions on the creation of economic entities in any economic sector, the establishment of unreasonable requirements for economic entities, the introduction of restrictions on the free movement of goods, the prioritization of access to information to certain economic entities and the creation of discriminatory conditions.

In addition, Article 16 of the Law on Protection of Competition prohibits authorities from entering into agreements with each other and with economic entities, if such agreements lead (or may lead) to the prevention, restriction or elimination of competition, in particular via the increase, reduction or maintenance of prices,

² Federal Law dated July 26, 2006 No. 135-FZ "On Protection of Competition"

³ Federal Law dated April 5, 2013 No. 44-FZ "On the System of Public Procurement Contracts for Products, Work or Services for State and Municipal Needs"

⁴ Federal Law dated December 28, 2009 No. 381-FZ "On Principles of State Regulation of Trade Activity in the Russian Federation"

⁵ Federal Law dated March 26, 2003 N 35-FZ "On Electric Power Sector"

unjustifiable establishment of different prices for the same product, division of the product market or establishment of barriers for new players to enter the market.

Administrative liability in the form of a fine or disqualification for up to three years results from violation of these standards by officials.

The FAS controls the compliance with competitive neutrality principle in the course of public procurement and tenders. The actions that lead (or may lead) to prevention, restriction or elimination of competition in the course of tenders are prohibited, including: coordination of activities of the participants of tenders by the tenders' organizers or customers; creation of preferential conditions for participation in the tender to one or several participants, including by means of access to information, unless is determined otherwise by the Federal Law; violation of the order of procedure of estimation of a winner or winners of the tender; participation of the tender's organizers or of the tender's customers and (or) employees of the tender's organizers or employees of the tender's customers in the tender.

Competitive neutrality can also be affected by the unlawful provision of state preferences. Antimonopoly legislation determines the procedure for the provision of state preferences and provides an exhaustive list of purposes for the use of state preferences.

Control over creation of state enterprises

The FAS is currently pursuing an active policy aimed at reducing the share of state enterprises and phasing them out of competitive markets.

The creation of state-owned enterprises in competitive sectors of the economy negatively affects the neutrality of competition. The practical experience of the FAS demonstrates that state-owned enterprises are one of the most frequent violators of antimonopoly laws, since companies take advantage of the possibility to cover losses from the federal budget.

The participation of state-owned enterprises in economic activity in competitive sectors of economy can have the most negative impact on market competition and slows down the development of particular industries. This is due to the fact that their owners provide for both unlimited access to budget funds and secure demand for their products. Consequently, enterprises can easily be involved in crowding out competitors or other discriminatory actions.

Most of the state-owned enterprises in Russia operate in areas with developed competition, for example in heat supply, water supply, sanitation, housing management, trade and services.

The elimination of state and municipal enterprises in all competitive sectors of the economy is one of the necessary measures to eliminate excessive state regulation.

In this regard, the FAS has developed amendments to the Law on State and Municipal Enterprises and the Law on the Protection of Competition⁶, according to which the FAS is empowered to issue a warning on liquidation or to take measures to terminate the activities of a state-owned enterprise that has been created or carries out activities in violation of antimonopoly legislation requirements.

In 2020, the given law came into force. The reformation of enterprises will help to protect markets from monopolization, promote more efficient implementation of state's industrial policy and labor productivity.

Remarkably, the FAS received an award in the 2019 – 2020 Competition Advocacy Contest of the World Bank and ICN in the category "Aligning industrial policies with competition principles" with the project "Transformation of enterprises in Russia".

Conclusion

Despite the extensive functions of the FAS in relation to state actions on the market in order to maintain competitive neutrality, a number of issues in this sphere still exist. In particular, there is an issue of providing administrative pressure on the competition authority in investigation of cases against state enterprises and state authorities, particularly at the regional level. However, in its practice the FAS has always resolved this problem successfully. Another issue is judicial reduce of penalties for state companies, as well as the reluctance of the courts to apply such sanctions as disqualification of senior officials of companies or public officials.

Nevertheless, the FAS does not consider its role in regulating state activity as a burden, but rather as opportunity to improve its own activities. Consequently, when dealing with cases involving state-owned companies, companies with state participation or the executive bodies of authority, the FAS should conduct a more thorough analysis of the market and substantiate its conclusions with more detailed proof in order to ensure that the decision reached is fair, legitimate, and based on a comprehensive in-depth investigation.

⁶ Federal Law No. 485-FZ dated December 27, 2019 "On Amendments to the Federal Law "On State and Municipal Unitary Enterprises" and Federal Law No. 135-FZ dated July 26, 2006 "On protection of Competition"