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INDEPENDENCE OF COMPETITION AUTHORITIES - FROM DESIGNS TO PRACTICES

Contribution by the Russian Federation

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INDEPENDENCE OF COMPETITION AUTHORITIES – FROM DESIGNS TO PRACTICES

-- Russian Federation --

1. Independence is a characteristic that was paid particular attention in the course of creation of the Russian competition authority more than 25 years ago, and this question remains in the FAS Russia's focus until today. The desire to achieve independence from external pressure is related first to the institutional and legal position of the authority, as well as its internal organization, including recruitment and budget formation principles.

1. Political independence

2. The FAS Russia works in the conditions under which the legal framework defining its activities, together with the characteristics of its institutional position ensure the independence of the authority from political influence.

3. The Federal Antimonopoly Service of the Russian Federation (the FAS Russia) exercises its functions in accordance with the Decree of the President of the Russian Federation No.636 "On the structure of the federal executive government bodies" dated 21 May 2012 (<http://www.rg.ru/2012/05/22/struktura-dok.html>), the Decree of the Government of the Russian Federation No. 331 "On Approving the Regulations on the Federal Antimonopoly Service" dated 30 June 2004 (<http://www.rg.ru/2004/07/31/fas-doc.html>), the Rules of the Federal Antimonopoly Service (http://www.fas.gov.ru/legislative-acts/legislative-acts_50641.html). The power of the Federal Antimonopoly Service is exhaustive and is set in accordance with the statutory acts mentioned above. The terms of reference of the Federal Antimonopoly Service is set by these normative and legal acts, as well as a number of federal laws¹ containing direct references to the competence of the authority. The FAS Russia is solely responsible for the execution of these powers.

4. The Government of the Russian Federation regulates the activity of the FAS Russia. The activity of the Federal Antimonopoly Service is guided by the Constitution of the Russian Federation, federal constitutional legislation, federal legislation, Decrees of the President and the Government of the Russian Federation, international agreements of the Russian Federation. Within its terms of reference, determined by the current legislation of Russia, the FAS Russia is an independent entity.

5. Absence of political pressure on the FAS Russia is ensured by the fact that the authority is directly subordinated to the Government of the Russian Federation, but does not make a part of it. On the one hand, it determines the status of the authority that is different from the status of the federal ministry. On the other hand, as the FAS Russia controls the relevant activity of authorities, this fact ensures the FAS Russia acts independently as an antimonopoly authority while bringing cases against authorities, primarily against federal ones.

¹ See Federal Laws "On Protection of Competition", "On Procedures for Foreign Investments in Business Entities of Strategic Importance for Russian National Defence and State Security", "On Contract System in State and Municipal Procurement of Goods, Works and Services", "On Advertisement".

6. The government cannot influence decision-making of the FAS Russia informally, as well as via issuing “statements of expectations”. When it comes to the formal FAS Russia's obligations in relation to the government, they are limited to provision of the annual report on the service activities, as well as the draft regulation on the authority's activities, of the proposal on the maximum number and the remuneration fund of the authority and the draft annual plan and forecast performance indicators of the FAS Russia.

7. This institutional and legal status of the agency's independence represents a challenge for the authority, by creating the possibility of a situation in which the FAS Russia's activities may not correspond with the government policies. However, the authority's accountability to the government through the above mechanisms, including the provision of annual reports, allows the government to monitor the compliance of the Service's activity to strategic objectives of economic development and development of activities of the authorities, established by the government (in accordance with the Federal Constitutional Law of 17.12.1997 number KZ-2 "On the Government of the Russian Federation"). For instance, the objectives of the state policy in the sphere of competition are identified in the document "Main Directions of Activity of the Government of the Russian Federation until 2018", approved in 2015.

8. According to the Rules of the Government of the Russian Federation (<http://www.rg.ru/2004/06/08/reglament-dok.html>) the main lines of action are determined by the chairman of the government. The Government of the Russian Federation coordinates work of the federal executive authorities, controls the execution of Decrees of the President of the Russian Federation, of plans and programs of the governmental development, and also issues decrees obligatory for execution in the Russian Federation.

9. Besides, the Government of the Russian Federation can fulfill a function of resolving emergent questions and issues, which require coordination of many federal executive authorities via meetings.

10. All this integrally contributes to the establishment of the situation where the service conducts independent policy within its competence, however not being isolated from national development directions.

11. It is noteworthy that the government itself is in favor of a greater independence of the FAS Russia as a mega-regulator, which combines the powers of the antimonopoly, procurement and tariff control. Minister of Open Government of the Russian Federation Mikhail Abizov at the FAS Russia's College meeting on 22 September 2015 said: "My expectation for the next 25 years is that this mega-regulator becomes more and more independent of the other public authorities. There should be no indisputable authority. Complete independence and at the same time maintaining a balance of interests - this is the direction in which we must develop further the antimonopoly policy" (<http://open.gov.ru/events/5513926/>).

2. Structure of the FAS Russia

2.1 Head

12. The appointment and dismissal of the head of the FAS Russia is not governed by political motives: there is no connection between the political majority at the Federal Assembly's chambers and the appointment of the Head of the FAS Russia. The appointment of head of the FAS Russia is not regulated by the political cycle, thus he or she does not abdicate with the change of the president, parliament or government.

13. The current head of FAS Russia – Mr. Igor Artemiev holds his position since 2004 (appointed by Decree of the Prime Minister of the Russian Federation Mr. Mikhail Fradkov on 10 March 2004 No. 329-p). The restrictions imposed on the head of the antimonopoly authority are common to all public civil servants of the Russian Federation and are listed in the Federal Law No. 79-FZ “About Public Civil Service of Russian Federation”.

14. A decree on the appointment/dismissal of the head of the FAS Russia is signed by the Chairman of the Government of the Russian Federation.

15. In the legislation of the Russian Federation, there is no prohibition on re-appointment of head of a federal executive authority, if such a decision is taken by the Government of the Russian Federation.

2.2 *FAS Russia's territorial bodies*

16. FAS Russia represents a powerful body of antimonopoly control with central unit and 84 regional offices, which have their own powers and competences stated by law. Territorial offices of the FAS Russia, as well as the central office, have autonomy in decision-making and are independent of regional authorities in the formulation and implementation of the competition policy.

3. Institutional development regarding independence

17. The beginning of the authority's formation took place in 1990 with the creation of the State Committee of the Russian Federation for Antimonopoly Policy and Support of New Economic Structures, which was the central organ for the antimonopoly policy and development of competition. In 1997, the State Committee of the Russian Federation for Antimonopoly Policy and Support of New Economic Structures was transformed into the State Antimonopoly Committee of the Russian Federation (Russia SAC), and its competences started to include restructuring of all the spheres of natural monopolies. In 1998 previous authorities responsible for competition policy were replaced by the Ministry for Antimonopoly Policy and Support of Entrepreneurship (MAP Russia), which, in turn, was abolished in 2004 with the creation of the FAS Russia.

18. Starting from this moment on, the Russian antimonopoly authority ceased to make part of the government, while remaining nevertheless in its direct subordination. On the one hand, it has downgraded the status of the authority, while on the other, since the FAS Russia controls relevant activities of the other public authorities, it ensures a more independent policy of the antimonopoly authority, when bringing cases against the public authorities, including in the first row federal ones. As an example, the following figures can be mentioned: in 2015 the FAS Russia carried out 552 inspections against the Russian authorities; as a result, 110 officials and 5 legal persons were brought to administrative responsibility. In 2014, regarding the same issue the FAS Russia carried out 700 inspections; 80 officials were brought to administrative responsibility.

3.1 *Extension of powers*

19. Several significant institutional changes in the structure of the FAS Russia over recent years should be mentioned. In 2015, in the Russian Federation the Federal Service for Defence Contracts (Rosoboronzakaz) and the Federal Tariff Service (FTS) were abolished, and the FAS Russia received competences of these authorities, which included price control on the defense products market, control of tenders for contracts on supply of defense products, as well as tariff regulation in infrastructure and other areas. As a result of these reforms, the Russian competition authority has acquired the features of an independent mega-regulator of the economic sphere, carrying out additionally the control over:

- economic entities' and authorities' compliance with competition law;
- implementation of public procurement;
- natural monopolies' activities;

- compliance with the advertising legislation;
- compliance with the trade legislation;
- foreign investment;
- competition in the field of intellectual property protection.

20. Extension of powers within one authority has resulted in bringing a synergistic effect, leading to more effective decision-making, because at the moment the same questions are considered from different angles. In this regard, the decisions made by the FAS are gaining greater legitimacy in the eyes of both the courts and the public, which results in a reduction of possibilities for political authorities to influence the performance of the FAS Russia's decisions. In this regard the statistics concerning success of appeals of the authority's decisions appears to be illustrative: in 2015 at courts 40 decisions of the FAS Russia were considered invalid, and 15 decisions were declared partially invalid (on 7446 FAS Russia's decisions on infringements, of which 1577 were appealed). In contrast, in 2010 106 and 25 decisions of the FAS Russia were claimed invalid and partially invalid respectively (on the total of 8415 decision, of which 1633 were appealed). Thus, the number of cases resisting successfully to court appeals has increased significantly after the extension of the FAS Russia's powers.

21. At the same time, decision-making in the multifunctional authority has become much more difficult to influence on from the outside, due to appearance of many different interests inside of it.

4. Decision-making

22. The Federal Antimonopoly Service is managed by the head, appointed and dismissed by the Government of the Russian Federation. The activities of the authority's head are supported by the work of his deputies (currently their number is eleven).

23. Head of the Federal Antimonopoly Service is personally responsible for implementation of its competences and for implementation of the state policy in the established sphere of activity.

24. The openness and collegiality in decision-making is carried out in several directions. When making decisions in the tariff regulation, decisions are made collectively with representatives of the industry at a meeting of the Board of FAS Russia. A requirement for the composition of the collegial body on tariff issues is the inclusion of representatives from various agencies, including the Ministry of Economic Development, Ministry of Energy, Ministry of Transport and others. The date and time of the Board meeting are announced in advance on the official website of the FAS Russia.

25. In cases of violation of the antimonopoly legislation of the case, the Commission considering a case consists of the FAS Russia's employees specialising in different core areas (always including lawyers, economists, representatives from sectoral departments; Chairman of the Commission is as a rule one of the deputy heads of the FAS Russia). All the interested parties can be present at meetings of the Commission.

26. The most important issues of the FAS Russia's activities are subject to discussion at the meeting of the Presidium of the FAS Russia, the collegial body, whose meetings are attended by FAS Russia's deputy heads and department heads.

27. Creation of collective bodies is carried out according to the Federal Law of 26.11.2006 number 135-FZ "On Protection of Competition" (hereinafter - the Law on Protection of Competition). Collegial bodies study and generalise the practice of antitrust authorities and provide explanations to antimonopoly legislation's application, and may review the decisions of the territorial bodies of FAS Russia. Decisions on creation of such collegial bodies, as well as their composition and work order are made by the head of the federal antimonopoly authority.

5. Authority's budget

28. The FAS Russia's budget is formed only with the Russian federal budget's sources. The federal budget is approved by the president after its consideration by the State Duma (the Russian parliament's lower chamber) and approval from the Federation Council (the Russian parliament's higher chamber). The federal budget is established for 3 years. However, due to current economic situation the budget for 2016 is set for 1 year only. Ministry of Finance of the Russian Federation is responsible for formation and execution of the budget.

29. The FAS Russia's budget is formed annually on the base of the maximum amount of funding approved by the Russian Ministry of Finance. While forming the budget, the approved number of staff and normative material costs are taken into account. Verifications of the FAS Russia's spending are conducted annually. No significant violations in the sphere of financial and economic activity of the FAS Russia have been revealed over its history.

30. The Federal Antimonopoly Service executes functions of the main administrator and recipient of the federal budget funds allocated for maintenance and implementation of the functions entrusted to it; the authority also approves its structure and staff schedule within the limits set by the Government and introduces proposals to the Ministry of Finance on forming the federal budget's project in relation to its own financial maintenance.

6. Relations with the Government

31. The Russian government ensures coordination of activities of federal executive authorities, supervises execution of the president's orders, plans and programs of national development, issues resolutions and orders that are binding for the Russian Federation. Thereby the government ensures that the federal executive authorities comply with the general directions of the country's development strategy.

32. FAS Russia's decisions can be overturned only by court and are not subject to reviews from other bodies, including the Russian government.

7. Authority's staff policy

33. In accordance with the Government's Decree of 30.06.2004 No. 331 «On Approval of Statement on Federal Antimonopoly Service" the FAS Russia's head is appointed and dismissed by the Government of Russian Federation.

34. The FAS Russia's head has deputies appointed and dismissed by the Government of Russian Federation. Deputy heads are appointed by the FAS Russia's head and report directly to him.

35. Qualification requirements on the FAS Russia's head are common to all senior posts of the public civil service of the Russian Federation and include:

- citizenship of the Russian Federation;

- higher education;
- not less than six years of experience at the public civil service or not less than seven years of experience of work within the university diploma's profession.

36. The procedure and conditions for entering the civil service at the FAS Russia are based on the general principles of the Russian civil service legislation, namely the Federal Law dated 27.07. 2004 № 79-FZ (edited on 02.04.2014) "On Public Civil Service of Russian Federation" (hereinafter - the Law on Civil Service).

37. Qualification requirements for civil service positions are established in accordance with the categories and groups of the civil service (senior, main and leading positions). These qualification requirements are established by the Decree of the President of the Russian Federation of 28.09.2005 No. 1131. For instance, for the top positions the requirement is set to the length of service, which cannot be less than six years of the public civil service or seven years of experience within the university diploma's profession; for junior positions there are no such requirements.

38. In addition, qualification requirements to civil service positions include the level of education, professional knowledge and skills necessary for the performance of work duties.

39. The selection of employees is carried out on a competitive basis (which means evaluation of the professional level of candidates and their compliance with the qualification requirements).

40. In order to carry out such competitions, the FAS Russia's personnel competition commission was created to permanently execute its functions (Order of the FAS Russia dated 29.06.2011 No. 552). Its structure includes the deputy head of the FAS Russia, representatives of the department for public service of the FAS Russia and of the legal department of the FAS Russia, a representative of department of the FAS Russia, in which the competition is held, and independent experts.

41. The personnel competition commission is formed so as to prevent the possibility of conflicts of interests which could affect decisions made by the personnel competition commission.

42. In addition, the FAS Russia on a competitive basis forms the Personnel Pool. If a citizen wishes to enter the civil service in the FAS Russia, but currently there are no vacancies, he or she has a right to apply for inclusion in a Personnel Pool on replacement of a certain position. Candidates for inclusion in Personnel Pool shall be approved by the Competition Commission.

43. For the employees recruited to public service in the FAS Russia a probationary period from 3 months to 1 year is set.

44. Information about job vacancies, requirements, procedure and conditions of receipt on the state civil service is published on the official website of the FAS Russia (<http://fas.gov.ru/civil-service/competitions/>).

45. The Federal Law No. 79-FZ "On Public Civil Service of Russian Federation" also establishes the cases in which a citizen cannot be admitted to the civil service, and a civil servant may not continue it. Such cases are if a person:

1. recognised incapable or having restricted capability by a court ruling that has taken effect;
2. convicted by a court ruling that has taken effect, with such conviction preventing him/her from exercising job responsibilities in a state service (civil service) position, or has a conviction that has not been cleared or extinguished in accordance with the procedure established by federal law;

3. refuses to undergo the security clearance procedure for access to data constituting state or other secrets protected by federal law, if the use of such information is incidental to the exercise of job responsibilities in the civil service position sought by a citizen or held by a civil servant;
 4. has a medical condition preventing his/her enrollment for civil service or its continuation and confirmed by an opinion issued by a medical institution. The health examination proceedings, the list of such diseases, and the form of the medical institution opinion shall be established by the Government of the Russian Federation;
 5. has a close kinship or an in-law relationship (parents, spouses, children, brothers, sisters, as well as brothers, sisters, parents, and children of spouses) with another civil servant, where the occupation of his/her civil service position involves direct subordination or control of one of them to/over the other;
 6. fails to observe the code of conduct requirements established by legislation;
 7. ceases to be a citizen of the Russian Federation or becomes a citizen of another state;
 8. holds citizenship of another state (states), unless stipulated otherwise by an international treaty to which the Russian Federation is a signatory;
 9. provides false documents or deliberately false information when enrolling for civil service;
 10. fails to provide or provides deliberately false information on income, property and property obligations as established by this Federal Law;
 11. avoids serving the army, without a legitimate reason;
 12. fails to provide the required information.
46. Thus, the cases establishing grounds for a person's inadmissibility for being a public civil servant in Russia are clearly specified by law.
47. Overall, the matters discussed – the FAS Russia's institutional and legal status, its internal organisation, the budget formation principles together with the recruitment policy – present the number of aspects highlighting the FAS Russia's commitment to ensuring independence from external political pressures.