

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Global Forum on Competition

REGIONAL COMPETITION AGREEMENTS: BENEFITS AND CHALLENGES

Contribution from Russian Federation

- Session III -

29-30 November 2018

This contribution is submitted by the Russian Federation under Session III of the Global Forum on Competition to be held on 29-30 November 2018.

More documentation related to this discussion can be found at: oe.cd/rca.

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JT03438725

Regional Competition Agreements: Benefits and Challenges

-- Russian Federation --

1. Nowadays due to the process of globalization and liberalization of trade, economies all over the world are facing new challenges. That is also relevant for Competition Authorities. The most common and serious challenge the Competition Authorities are facing today is existence of various cross-border violations of competition law as well as new ways and tools of this kind of violations.
2. Despite of the fact that cross-border violations of competition legislation become more and more common worldwide, global competition community has limited kit of the effective tools to combat this type of infringements. Due to the lack of tools of effective international cooperation national Competition Authorities have to solve this very difficult task solely. At the same time cross-border violations have features that differ them from antimonopoly violations by national companies: frequently such infringements are exercised by large transnational companies, the headquarters of which could be located anywhere in the world and activity of such companies is naturally global. In that situation it is difficult to define national dimensions of behavior of these companies, to calculate revenues on national markets, to enforce international companies to comply with national competition standards and, in case of making decision of existence of violation, to make such undertakings execute decisions and rulings of Competition Authorities.
3. The issues described make discussion of enhancing international cooperation in investigation of cross-border cases as actual as it has never been before. Effective international cooperation with foreign Competition Authorities and International Organizations is one of the priorities of the Federal Antimonopoly Service of the Russian Federation (the FAS Russia). Recent cases investigated in relation to large transnational companies (e.g. Google, Apple, Microsoft, liner shipping carriers) showed the necessity of an open and effective dialogue among Competition Agencies and also opened up some of the problems connected with investigation of such type of violations. In this regard, regional cooperation remains one of the best ways of tackling cross-border violations.
4. At the regional level, the FAS Russia cooperates actively with other Competition Authorities within the framework of the Eurasian Economic Union and the Commonwealth of Independent States.

1. Eurasian Economic Union

5. One of the key directions of international cooperation of the FAS Russia is cooperation with Competition Authorities of **Eurasian Economic Union (EAEU)** (Republic of Armenia, Republic of Belarus, Republic of Kazakhstan, Kyrgyz Republic and the Russian Federation) and Eurasian Economic Commission (EEC).
6. Since 2006, the Republic of Belarus, Republic of Kazakhstan and Russian Federation initiated the process of integration in all economic spheres, including competition policy. Later Republic of Armenia and Kyrgyz Republic joined the process of integration. During the period of 2006-2014 the legal framework for cooperation between

Competition Authorities of EAEU was established. In 2012, the EAEU Model Law “On Competition” was developed and adopted which is aimed at harmonization of competition legislation of all EAEU countries. At the same time, the most important legal act of EAEU is the Treaty of Eurasian Economic Union (hereinafter – the Treaty) which came into force on January 1, 2015. The main principle of EAEU functioning is fair competition that is stipulated in Preamble and Article 3 of the Treaty.

7. One of the key features of the Treaty regarding competition policy development in EAEU is EAEU Member States transfer a part of their functions to EEC. In accordance with the Treaty EEC is empowered to investigate cases of violation of competition legislation on cross-border markets (within EAEU), make decisions and impose sanctions (remedies). For that purpose, Competition Authorities and EEC could exchange information (including confidential). For protecting it from disclosure the Agreement on the Protection of Confidential Information and Liability for its Disclosure in the Exercise of the European Economic Commission (EEC) its Powers of Monitoring the Compliance of the Common Rules of Competition was developed.

8. In accordance with the Treaty on EAEU the Competition Authorities of the EAEU shall cooperate within the law enforcement activities by sending notifications, requests for information, inquiries and orders to conduct certain procedural activities, exchange of information, coordination of the law enforcement activities of the Member States, as well as implementation of the law enforcement activities at the request of any Member State¹.

9. The Treaty also includes provisions on cooperation between the EEC and the Competition Authorities of the Member States for monitoring compliance with the general rules of competition. EEC and Competition Authorities shall interact when authorised authorities of the Member States submit statements on violations of the general rules of competition with the Commission, when the Commission examines the statements on violations of the general rules of competition in cross-border markets, during the Commission's investigations of such violations, during examination by the Commission of cases of violation of general rules of competition in cross-border markets, as well as in other cases.

10. A decision to refer the statement on a violation of the general rules of competition for examination to the Commission may be taken by the Competition Authority of a Member State at any stage of its examination, conducted with account of the specific features determined by the legislation of the Member State referring the statement. Upon taking such a decision, the Competition Authority of a Member State shall send a respective written application to the Commission².

¹ More information on tools and procedures on cooperation of EAEU Competition Authorities can be found in Protocol 19 to the Treaty on Eurasian Economic Union (URL: http://www.un.org/en/ga/sixth/70/docs/treaty_on_eeu.pdf).

² More information on tools and procedures on cooperation of EEC and EAEU Competition Authorities can be found in Protocol 19 to the Treaty on Eurasian Economic Union (URL: http://www.un.org/en/ga/sixth/70/docs/treaty_on_eeu.pdf).

11. On the basis of clause 2 of Article 74 of Section XVIII “General Principles and Rules of Competition” of the Treaty on the EAEU, Criteria for classifying the market as cross-border (hereinafter referred to as Criteria) were developed³.

12. The Criteria are applied for the purpose of determining the competence of the EEC to curb violations of the general rules of competition by economic entities of the EAEU Member States⁴.

13. For each type of prohibition there is a clear criterion. For example, for unfair competition and anticompetitive agreements, easily definable criteria are provided for, namely:

- in case of unfair competition - the violator and the affected business entity must be registered in the territory of two different Parties;
- in the case of anticompetitive agreements, at least two economic entities of the violating parties are registered in different territories.

14. In the case of abuse of a dominant position, more complex criteria have been established that must be fulfilled together, including the presence of a dominant position in the cross-border market and a share of at least 35% in the territory of each Party affected by the violations. Corresponding criteria in the form of shares are also envisaged for cases of collective dominance - no more than three economic entities - at least 50%, for no more than four - at least 70%. This provision does not apply if the share of at least one business entity is less than 15%. Also for this type of violation there are many qualitative criteria that characterize the market.

15. Violations in markets that are not subject to the Criteria for classifying the market as cross-border⁵ are investigated by the national Antimonopoly Authorities independently or in cooperation with each other.

16. The Treaty on the EAEU provides for the forms of interaction between the Antimonopoly Authorities of the Member States and the Commission in monitoring compliance with the general rules of competition. These forms of interaction are set out in Sections V and VI of Annex No.19 to the Treaty on the EAEU “Protocol on General Principles and Rules of Competition”. At the same time, the Commission interacts with the central offices of the Antimonopoly Authorities of the Member States.

17. After the Eurasian Commission initiates an investigation on the cross-border market, the ruling on the initiation of investigation indicates, in addition to the members of the EEC, employees of the competition authorities of the EEU Member Countries responsible for interacting with the EEC in investigating a cross-border violation⁶.

³ The Criteria are approved by the Decision of the Supreme Eurasian Economic Council dated December 19, 2012 No. 29; amended by the Decision of the Supreme Eurasian Economic Council dated December 26, 2016 No. 26.

⁴ In accordance with paragraph 7 of Article 76 of Section XVIII "General Principles and Rules of Competition" of the Treaty on the EAEU.

⁵ Decision of the Supreme Eurasian Economic Council of December 19, 2012 No. 29 “On approval of Criteria for classifying the market as cross-border”.

⁶ Decision of the Council of the Eurasian Economic Commission dated November 23, 2012 No. 97 “On the Procedure for Considering Applications (Materials) on Violating the General Rules of Competition in Cross-Border Markets”.

18. According to the results of the investigation, if the available information is not sufficient to make a decision on the initiation of the case, the EEC has the right to send to the EAEU Member States a reasoned submission of the following procedural actions:

- interviews with persons under investigation or related case, as well as witnesses;
- reclamation of documents required for the investigation or proceedings;
- inspection of territories, premises, documents and objects of a person in respect of which an investigation is being conducted or a case is being investigated concerning violation of the general rules of competition (with the exception of the apartment of such a person);
- delivery of documents or their copies to the participants of the relevant case;
- examination and other actions⁷.

19. The obligation of Member States to fulfill the provisions of the reasoned submission is also provided for in the Treaty on the EAEU⁸.

20. If, as a result of the investigation, the EEC decides to initiate a case on violation of the general rules of competition in cross-border markets, a special Commission for consideration of the case is formed⁹.

21. The persons participating in the consideration of the case are, inter alia, the Antimonopoly Authorities of the EAEU Member Countries¹⁰. Employees of the FAS Russia on a regular basis participate in the consideration of cross-border cases of violation of the antimonopoly legislation, together with the EEC carry out visits to objects of economic entities - parties to the case, planned and unscheduled inspections in Russia and other EAEU Member Countries.

22. In addition, meetings of the heads of Antimonopoly Authorities of the Member Countries of EAEU and the Member of the Collegium (Minister) for competition and antimonopoly regulation of EEC (the so-called “5+1” format) became traditional. These meetings aim at discussing the most important topics of antimonopoly regulation and cooperation.

23. In 2013, on the basis of EEC the Advisory Board on Competition was created aiming at further coordination and cooperation. At the same time a number of joint working groups were created (for example, joint working group on compliance of prohibition on anti-competitive agreements, joint working group on compliance of prohibition on abuse of dominant position, etc.) The participants of joint working groups are representatives of Competition Authorities of EEA countries and representatives of EEC.

⁷ Paragraph 61 of the Protocol on General Principles and Rules of Competition (hereinafter referred to as Annex No.19 to the EAEU Treaty of May 29, 2014).

⁸ Chapter VI "Interaction of the Commission and authorized bodies of Member States in monitoring compliance with the general rules of competition" of the Treaty on the Eurasian Economic Union on May 29, 2014.

⁹ Decision of the Council of the Eurasian Economic Commission of November 23, 2012 No. 98 “On the Procedure for Investigating Violations of General Rules of Competition in Cross-Border Markets”.

¹⁰ Decision of the Council of the Eurasian Economic Commission dated November 23, 2012 No. 99 “On the Procedure for Considering Cases of Violation of Competition Rules”.

24. In 2015-2016, the first case on violation of competition legislation was considered by EEC along with national Competition Authorities of EAEU. On 29 July 2016, an extended session of Competition and Antimonopoly Regulation Sub-Committee, of the Consultative Committee on Competition, Antimonopoly Regulation and Public Procurement, of the Eurasian Economic Commission (EEC) chaired by a Member of EEC Collegium (Minister) on Competition and Antimonopoly Regulation, considered materials on elements of violating the antimonopoly law by “Caterpillar”. According to “Eurasian group” (Kazakhstan), Caterpillar and its official dealers refused to supply products to the Kazakhstan market. The Committee on regulating natural monopolies and competition protection of the Ministry of national economy of the Republic of Kazakhstan forwarded materials to EEC for consideration.

25. The FAS Russia took part in the investigation. From 24 December 2015 to 22 March FAS inspected distributors of Caterpillar products: “Zeppelin Rusland” Ltd., “Mantrak Vostok” Ltd., “Vostochnaya tekhnika” Ltd., and “Caterpillar Eurasia” Ltd.

26. Dealers and “Caterpillar” reached agreements on fixing equipment sale for “Caterpillar” dealers and distributors by strictly determined territories of Russian market and EAEU common market. Distributors refuse to conclude contracts with companies located in the territories of other distributors. Breaching this rule is punishable by a “fine”.

27. Based on the work with EEC and FAS, “Caterpillar” made changes to the international agreements regulating distribution in EAEU and changed Letters-Certificates on dealers’ catchment areas. So the company voluntarily terminated the violation.

28. Another important area of cooperation between the Antimonopoly Authorities of the EAEU Member States over the past year was the improvement of the legal and regulatory basis for competition policy aimed at eliminating the gaps identified as a result of the practical activities of the EEC.

29. A set of amendments to the Treaty on the Eurasian Economic Union of May 29, 2014, that was approved by the EAEU Member States, is connected with the inclusion of provisions of so-called soft law in it. These changes are aimed at empowering the EEC to prevent violations of general rules of competition, in particular, to issue warnings to stop actions which contain signs of violations of general rules of competition and to warn against inadmissibility of actions that could lead to violation of general rules of competition.

30. The FAS Russia also takes an active part in the work of the Working Group on the Formation of General Approaches to Regulation of Pharmaceuticals Circulation within the framework of the EAEU (hereinafter - the Working Group) established to prepare the legislation regulating the circulation of medicines in the territory of the EAEU.

31. In pursuance of the Agreement on uniform principles and rules for the circulation of medicinal products within the framework of the EAEU dated December 23, 2014, the Working Group developed draft "second level" acts necessary for the launch of the functioning of the general pharmaceutical market of the EAEU. They form a system of interrelated acts regulating the requirements for a medicinal product as a pharmaceutical product - for its safety, quality and efficiency. Simultaneously, the acts regulate the requirements for the medicine and as an object of legal regulation - in terms of its admission to the market, accounting and withdrawal from the market. The drafts of these documents were developed based on Russian experience and approaches of the FAS Russia to regulation of pharmaceuticals circulation, and were approved during the meeting of the EEC Council in 2016.

32. At the same time, the Working Group is currently developing and agreeing on the "third level" acts of the EAEU, envisaged in the drafts of the "second level" acts in the sphere of medicinal products circulation in accordance with the Plan of preparation and approval by the public authorities of the Russian Federation of documents to be developed in accordance with a list of draft EEC documents on regulation of the general market of medicines within the framework of the EAEU for 2016-2018. These acts will provide patients of the EAEU countries with safe medicines of high quality.

2. Commonwealth of Independent States

33. Cooperation within **Commonwealth of Independent States (CIS)** is another example of long-term effective cooperation of Competition Agencies. With regard to competition policy in the framework of CIS the *Interstate Council for Antimonopoly Policy (ICAP)* is functioning. As a part of ICAP activity the *Headquarters for Joint Investigations of the Violations of the Antimonopoly Legislation in the CIS Countries (hereinafter referred to as the Headquarters)* was established.

34. **The ICAP** is the basic platform for interaction of the Antimonopoly Authorities of the CIS Countries. It was established in 1993 aiming at coordinating of formation by the CIS Member Countries of the legal and organizational basis for the purposes of prevention, restriction and suppression of anticompetitive practices and unfair competition within the CIS Economic Area. The legal framework for the activity of the ICAP was established by Treaty on Implementation of the Coordinated Antimonopoly Policy dated December 23, 1993 (renewed in January 25, 2000).

35. The field of the issues discussed by the ICAP cover all spheres of the Competition Authorities' activities of the CIS Countries.

36. Nowadays, the ICAP includes representatives of 10 CIS Member Countries – the Republic of Azerbaijan, the Republic of Armenia, the Republic of Belarus, the Republic of Kazakhstan, the Kyrgyz Republic, the Republic of Moldova, the Russian Federation, the Republic of Tajikistan, the Republic of Uzbekistan* and the Ukraine*¹¹.

37. Sessions of the Council are held regularly – at least twice a year, and, as a rule, in the capitals of the CIS Member Countries by turns.

38. To achieve the effective cooperation which would stimulate even deeper integration of the CIS Member Countries the ICAP Members adopted the Regulation on Cooperation of the States in Suppression of the Monopolistic Activity and the Unfair Competition (hereinafter referred as the Regulation) which forms an integral part of the Treaty.

39. The Regulation provides for mechanisms of cooperation of the CIS Antimonopoly Authorities in investigations of violations of the antimonopoly legislation, of participation in terminating transnational anticompetitive practices and of protection of domestic producers at international and domestic markets.

40. Following the decisions adopted in the course of its sessions, the ICAP performed the analysis of the antimonopoly legislation of the CIS Countries in order to develop the common approaches to its harmonization.

¹¹ * - these countries currently do not actively participate in the meetings of the ICAP, but officially have not withdrawn from the CIS.

41. At the ICAP sessions, the Participants exchange opinions on recent developments in their national antimonopoly legislation and on the overall economic situation with the subsequent information exchange on the most interesting cases currently considered.

42. In the course of its activity, the ICAP has achieved the following results:

- decrease of antimonopoly law infringements on the international markets of the CIS Countries;
- development of competition both in the domestic markets and in external economic activities;
- elimination of barriers in the movement of goods and services within the CIS Economic Area.
- The ICAP prepared the following reports concerning the situation on the CIS markets that were commended at the level of the CIS Heads of Governments:
 - The report “On the state of competition in the market of passenger air traffic of the CIS Member States”, prepared on the basis of a study of the state of competition in the market of passenger air traffic of the CIS Member States, approved by the Council of the CIS Heads of Governments on November 14, 2008 in Chisinau (Republic of Moldova);
 - The report “On the state of competition in the telecommunications markets of the CIS Member States” was approved by the Council of the CIS Heads of Governments on November 19, 2010 in St. Petersburg;
 - The report “On the state of competition in the market for the sale of food products in retail chains in the CIS Member States” was approved at a meeting of the Council of the CIS Heads of Governments on September 28, 2012 in Yalta;
 - The report “On the state of competition and pricing in the markets of oil and petroleum products”, prepared as a result of joint work, in 2014 received a positive assessment of the Council of the CIS Heads of Governments (Ashgabat, November 21, 2014);
 - The report “On the state of competition in the commodity markets of medicinal products of CIS countries” was approved by the Council of the CIS Heads of Governments on October 30, 2015 in Dushanbe (Republic of Tajikistan).

43. To increase the interaction between the Competition Authorities of the CIS Countries, the participants of the ICAP made the decision to conduct joint investigations of anticompetitive practices in the CIS cross-border markets. For this purpose, the **Headquarters for Joint Investigations of the Violations of the Antimonopoly Legislation in the CIS Countries** was established in 2006. In the framework of the Headquarters’ activity, the Member Countries started to conduct on the voluntary basis joint monitoring (investigations) of anticompetitive practice of companies performing on the territories of different CIS Countries.

44. The Headquarters participants’ discuss the market of social importance for their countries and, based on that discussions, choose markets for analysis and further investigation.

45. In the previous years, the Headquarters considered the markets of air transportation, telecommunications, retail, oil and oil products, pharmaceuticals and grain. Nowadays the construction of economy-class housing, production of aggregates and agricultural subsidies are in the purview of the Headquarters.

46. During the years, the Headquarters became an effective platform for interaction of Competition Authorities in investigating specific cases. It is clearly illustrated by the examples of the CIS market inquiry of air transportation sector and joint investigation of the FAS Russia and Competition Authority of Kazakhstan on the market of telecommunications.

47. The market of air transportation within the CIS was selected at an initial stage as an example of a cross-border market. Simultaneous inspections of the airlines by the Competition Authorities of the CIS Countries started in June 2007. As a result of the investigation, the CIS Countries prepared the Report on the State of Competition in the Air Transportation Markets in the CIS Countries (hereinafter referred as the Report). The Headquarters carefully examined and analyzed the international experience on protection of competition in the air transportation markets, particularly the experience of the European Union, the most typical cases on violations of the antimonopoly legislation in the market of air transportation and airport services and the intergovernmental agreements on air communication in the CIS Countries. As a result of the investigation, the Countries elaborated the Recommendations for the competition development at the air transportation market, including the proposals to maintain a non-discriminatory access to the natural monopolies' services and to develop competition in potentially competitive segments of this market related to the market of air transportation. The implementation of such proposals leads to serious development in national legislation and international regulation regarding air transportation market and has been one of the instruments of the development of the air transportation market in the CIS Countries. As a result, in the period 2008-2013 air transportation in the CIS countries increased 2.3 times. The Report was considered and adopted by Council of the Heads of the CIS Countries in May, 2014. In 2014-2016 despite of economic difficulties, there was not serious decline in air transportation in CIS.

48. Another priority market selected for conducting analysis and investigation was the market of telecommunications. In 2008, the Antimonopoly Authorities of the CIS Countries, on the platform of the Headquarters, analyzed the state of competition on the telecommunications market. Based on the analysis, the Headquarters prepared the Report proposing possible measures towards developing competition and conducting antimonopoly investigations of roaming services. The Report was presented to and approved by the Council of the Heads of the Governments of the CIS Countries in 2010. In the first six months of 2010, the Antimonopoly Authorities of the Republic of Kazakhstan and the Russian Federation initiated investigations on the markets of roaming services. The investigations were completed in October 2010; on the basis of the findings the FAS Russia found that three companies abused their market dominance, while the Agency of the Republic of Kazakhstan for Competition Protection arrived to the same conclusions with regard to several Kazakh companies.

49. Following up the outcome of the cases initiated by the FAS Russia and the Agency of the Republic of Kazakhstan for Competition Protection, the operators agreed to reduce the rates in inter-operator agreements between themselves and with other CIS operators. As for the cases investigated by the FAS Russia, the Russian operators reduced their rates in December 2010 by two - four times. In the past three years, the voice call rates reduced by up to 9 times, SMS – by threefold, and data transmission – by 44 times. Reducing the

rates for roaming telecommunications services led to a manifold increase of the overall number of outgoing and incoming calls, SMS, and a growth of data transmission traffic. The share of the CIS in the overall volume of international roaming services went up by 40%. In total, the operators' income increased by 20%.

50. CIS Member Countries exchange information about the facts of opening investigations of violations of competition legislation on the regular basis. This allows to detect potential objects for monitoring by the Headquarters. This activity could result in formulation of recommendations for solving the existing problems and be avoiding making different decisions in CIS jurisdictions at the same case.

51. It is worth noting that over the years of its existence the Headquarters has established itself as an efficient body able to detect and investigate violations of the antimonopoly legislation in the cross-border markets within the CIS. This contributes to a deeper economic integration and to the elimination of barriers of the movement of goods and services in the CIS Economic Area.

52. In 2017, the CIS Countries noted the special need to consolidate efforts to combat international cartels. The Heads of the Governments of the CIS Countries signed the Statement on Consolidation of Efforts of the World Community for Effective Counteraction to International Cartels, which was used as an official document of the 72nd session of the UN General Assembly¹².

53. The Statement firmly condemns international cartels in all forms and manifestations, confirms the need to form a global international mechanism to counter cartels, in particular, by drafting and adopting a relevant international document, which can be the Anti-Cartel Convention.

54. The draft Convention was supported by the CIS Member States and promoting this initiative at international sites will enhance the reputation of the regional CIS association as an association actively involved in shaping the global agenda.

55. It is also worth mentioning that educational events, workshops, lectures, round tables with participation of the FAS representatives are regularly organized at the Center for Education and Methodics in Kazan and in Moscow. This Center is the main platform for training of specialists from the CIS countries. Such events comprise theoretical and practical training courses, aimed at skills upgrade and professional development of competition experts.

¹² The FAS press-release of 09.11.2017 "Statement of the Council of the Heads of the CIS Governments to intensify efforts against international cartels": <http://en.fas.gov.ru/press-center/news/detail.html?id=52437>.