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COMPETITION LAW AND STATE-OWNED ENTERPRISES

Contribution from the Russian Federation

- Session V -

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

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Competition Law and State-Owned Enterprises

- Contribution from the Russian Federation -

1. At the present time, state-monopoly trends in the economy remain in the Russian Federation.
2. The rooting of these tendencies is facilitated, among other things, by the presence of a large number of state-owned enterprises, primarily unitary enterprises¹ operating in competitive commodity markets.
3. In competitive markets, unitary enterprises are present in the following percentage ratio:
 - real estate operations 16.91% of the total number of unitary enterprises operating in competitive markets:
 - wholesale and retail trade - 8.65%;
 - agriculture, forestry, hunting, fishing and fish farming - 7.49%;
 - construction - 4.75%;
 - manufacturing industries - 4.51%;
 - administrative activities and related additional services - 2.93%;
 - hotels and catering activities - 2.85%;
 - activities in the field of culture, sports, leisure and entertainment - 1.17%².
 - The inefficiency of unitary enterprises is as follows.
4. When a significant number of heterogeneous, unrelated objects are under the economic jurisdiction of a number of unitary enterprises, in most cases it can be traced that such enterprises do not carry out any specialized activity, except for leasing of relevant objects.
5. In addition, the Federal Antimonopoly Service of the Russian Federation has identified numerous cases of customer's non-compliance with the provisions of the Federal Law "On the contract system in the field of procurement to meet state and municipal needs" by transferring budget funds in the form of subsidies to departmental unitary enterprises for purchasing goods, works, services for the needs of the customer including competitive markets (for example, construction work, the purchase of medicines and medical devices).

¹ A unitary enterprise is a form of a business in Russia. Unitary enterprises are business entities that have no ownership rights to the assets they use in their operations. This form is only possible for state and municipal enterprises, which operate state or municipal property, respectively. The owners of the property of a unitary enterprise have no responsibility for its operation and vice versa.

² According to data from the Unified Interagency Information and Statistical System (UMISS) (Russian version only): <https://www.fedstat.ru/>

6. The participation of unitary enterprises in economic activity has the negative impact on competition in local markets and leads to their monopolization.
7. Specific features of the legal form and consolidation of property cause inefficiency of unitary enterprises, also due to the lack of effective corporate control (there is no boards of directors with independent directors, risk management systems, etc.), and “guaranteed” demand for products does not contribute to labor productivity, managerial skills and innovative development of such enterprises.
8. According to assessments contained in the conclusion of the Expert Council under the Government of the Russian Federation on the reform of unitary enterprises (2015)³, the labor productivity of workers of unitary enterprises is on average 4.5 times lower than that of employees of organizations of other forms of business ownership.
9. The Expert Council under the Government of the Russian Federation draws attention to the problem of the lack of complete and reliable information about the property of unitary enterprises, their financial and economic activities, especially about municipal unitary enterprises.
10. The main beneficiary – public-law (administrative) entity - lacks effective tools for corporate control of the activities of unitary enterprises, risk management and internal control systems.
11. Administrative control is also ineffective due to the large number of unitary enterprises, the presence of an objective conflict of interests of the main beneficiary of the unitary enterprises - public-law entity (market efficiency against the implementation of state (municipal) functions).
12. “Protected demand” for the company's products, additional opportunities for its capitalization by the owner of the property, impossibility of acquiring inefficient enterprises, lack of market signals for changing ineffective management team and low efficiency of bankruptcy procedures of unitary enterprises, all these factors eliminate the possibility of market control of the enterprise and adversely affect competition.
13. Typical violations involving such enterprises are:
 - providing them with subsidies for reimbursement of costs for the maintenance of municipal property in the presence on the commodity markets of economic entities that have the opportunity to perform the relevant work;
 - sale of municipal property through unitary enterprises by passing Federal Law No. 178-FZ dated December 21, 2001 “On privatization of state and municipal property”;
 - the empowerment of unitary enterprises with the functions of local governments, which creates preferential conditions for other economic entities operating in the same commodity market.

³ Open government. “Reform of unitary enterprises: problems and proposals” (Russian version only): <http://open.gov.ru/events/5514748/>

14. Currently, the FAS Russia has developed a draft federal law on amending the competition law and certain legislative acts of the Russian Federation. This law prohibits the creation of enterprises with state or municipal participation in competitive markets⁴.

15. According to the draft law, the FAS Russia proposes to allow the participation of state-owned enterprises in three cases only:

1. in markets that are in a state of natural monopoly;
2. if the founders are federal executive bodies that carry out functions for the development and implementation of state policy in the field of defense, state administration in the field of security of the Russian Federation, state and public security, the list of which is established by the Government of the Russian Federation, to ensure defense and security of the Russian Federation;
3. if the creation of such an enterprise is provided for by federal law, an act of the President of the Russian Federation, or an act of the Government of the Russian Federation.

16. Positive changes are occurring in the field of procurement. Thus, the Federal Law of July 18, 2011 No. 223-FZ “On the procurement of goods, works, services by certain types of legal entities” provides for special rules governing the procurement of companies with a share of state property. Large-scale amendments to this law, adopted in 2017, created a closed list of ways to conduct the procurement of state-owned companies from small and medium-sized businesses, as well as the procedure for their implementation - their full incorporation into electronic form. Such procurement will be carried out on universal trading platforms operating in accordance with the Federal Law of 05.04.2013 No. 44-FZ “On the contract system in the field of procurement of goods, works, services for state and municipal needs”.

17. It is important to mention that principle of competitive neutrality is established in the fundamental law of the Russian Federation – the Constitution of the Russian Federation. It proclaims that “in the Russian Federation recognition and equal protection shall be given to the private, state, municipal and other forms of ownership”⁵.

18. Establishing of the common rules of competition for economic entities of all forms of ownership is the main principle of the FAS Russia and its goal.

19. The Russian antimonopoly legislation has no limits or exceptions for control over state enterprises actions in any area. Proceedings of proving of violations of antimonopoly legislation are the same in relation to entities of all forms of ownership.

⁴ The Decree of the President of the Russian Federation No. 618 dated December 21, 2017 establishes the National Competition Development Plan for 2018-2020. In order to implement the main directions of state policy on the development of competition, the National Plan envisages amendments to federal laws, including, in particular:

- a) limiting the creation of unitary enterprises in competitive markets;
- b) the prohibition of direct or indirect acquisition by the state and municipalities of shares of business entities operating in commodity markets in a competitive environment.

Available at: <http://en.fas.gov.ru/documents/documentdetails.html?id=15342>

⁵ Part 2 Article 8 of the Constitution of the Russian Federation.

20. For example, in the period 2008-2011 the FAS Russia investigated “three waves of cases” against oil companies of different forms of ownership: JSC “Rosneft” (state enterprise), JSC “Gazprom neft” (partly state-owned company), JSC “Lukoil” (private company), TNK-BP (private company with foreign capital). Cases were investigated on features of abuse of dominance on the same proceedings regardless form of ownership or assets structure. As a result, the total fine amounted more than 470 mln EUR⁶.

⁶ “Three Waves” of antitrust cases against vertically integrated oil companies (VICs) that were accused of abuse of collective dominance in four markets: gasoline, diesel fuel, aviation kerosene, and furnace fuel oil: <http://en.fas.gov.ru/documents/documentdetails.html?id=14678>