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ROUNDTABLE ON COMPETITIVE NEUTRALITY IN COMPETITION ENFORCEMENT

-- Note by the Russian Federation --

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This document reproduces a written contribution from the Russian Federation submitted for Item 9 of the 123rd meeting of the OECD Competition Committee on 16-18 June 2015.

More documents related to this discussion can be found at www.oecd.org/daf/competition/competitive-neutrality-in-competition-enforcement.htm.

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RUSSIAN FEDERATION

1. Introduction

1. Principle of competitive neutrality is established in the fundamental law of the Russian Federation – the Constitution of the Russian Federation – that proclaims, “in the Russian Federation recognition and equal protection shall be given to the private, state, municipal and other forms of ownership”¹. Establishing of the common rules of competition for economic entities of all forms of ownership is the main principle of the Federal antimonopoly service (the FAS Russia) and its goal.

2. The FAS Russia exercises its functions in the different fields. The FAS Russia is empowered to 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 defense and security; control over natural monopolies’ activity (excluding tariff regulation); control over allocation of property, resources, 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; control over compliance with competition rules in the sphere of intellectual property.

3. Principle of competition neutrality is also expressed in assessment by the FAS Russia 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.

4. Unfortunately, nowadays violations of antimonopoly legislation is 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 limitation to economic entities by public authorities as well as in establishment of state enterprises.

2. Tools to address competitive neutrality

5. The FAS Russia has a number of tools for combating anticompetitive practices that have negative influence on 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. It is possible because the accounting and tax standards are similar for all entities on the territory of the Russian Federation.

6. 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. EUR.

¹ Part 2 Article 8 Constitution of the Russian Federation.

7. Besides the Law on Protection of Competition,² the FAS Russia is empowered to control over compliance with Law on Federal Contract System³, Law on Trade⁴, and Law on Electric Power Sector⁵ etc. Compliance with provisions of these laws are tremendously important for competitive neutrality.

8. The FAS Russia 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 public authorities to pass acts and (or) exercise actions lack of action) which lead or can lead to prevention, restriction, elimination of competition. In particular, among others, the following is forbidden: introduction of restrictions concerning creation of economic entities in any sphere of activity, establishing anticompetitive requirements to goods or economic entities, imposition of bans or introduction of restrictions concerning free movement of products, proving priority access to information for an economic entity and other actions.

9. Moreover, public authorities are prohibited to perform as economic entity. The only exception is State Atomic Energy Corporation "Rosatom" which performs as economic entity as a regulator in the sphere of atomic energy. This exception is established in the Federal law dated 1.12.2007 No. 317-FZ "On State Atomic Energy Corporation "Rosatom".

10. Competition-restrictive agreements between public authorities or with economic entities are also prohibited if they lead or can lead to prevention, restriction or elimination of competition, in particular, to increase, decrease or maintaining of prices (tariffs); economically, technologically or in any other way unjustified establishment of different prices (tariffs) for the same commodity; restriction of entry into a goods market (exit from a goods market) or removal of economic entities from it (Article 16 of Law on Protection of Competition).

11. Violation of the mentioned provisions of antimonopoly legislation of the Russian Federation by public officials lead to imposing fines or disqualification for 3 years.

12. The FAS Russia controls the compliance with competitive neutrality principle in the course of public procurement and tenders. The actions that lead can lead to prevention, restriction or elimination of competition in the course of tender 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.

13. Competitive neutrality could be influenced by unreasonable allocation of state aid. Law on Protection of Competition defines proceeding of granting of state and municipal preferences and provides the exhaustive list of the purposes for use of state preferences.

² Federal law dated 26.07.2006 No. 135-FZ "On Protection of Competition"

³ Federal law dated 05.04.2013 No. 44-FZ "On contracting system in the sphere of"

⁴ Federal law dated 28.12.2009 No. 381-FZ "On Principles of State Regulation of Trade Activity in the Russian Federation"

⁵ Federal law dated 26.03.2003 N 35-FZ "On Electric Power Sector"

3. Control over creation of state enterprises

14. Nowadays the FAS Russia has a position aimed at reducing share of state enterprises and their stagewise elimination from competitive markets. This is one of the main directions of activity of the Government of the Russian Federation till 2018.

15. Creation of state enterprises in competitive economic sectors negatively affects competitive neutrality. As FAS Russia's practice shows, state enterprises are the most frequent violators of antimonopoly legislation, because such companies take an advantage of covering their losses from the federal budget. Moreover, there are cases when the state wants to "play along" to its companies in course of bidding.

16. Currently high concentration of state-owned enterprises take place in the banking sector (approximately 50%), gas extraction (75%) and gas transmission (100%).

17. The "forth antimonopoly package" of amendments to antimonopoly legislation of the Russian Federation proposes to bring in the prior approval of creation of such enterprises by competition authority. This control allows creating healthy competition environment and gives a possibility for small and middle companies to enter the markets on the regional and municipal level. The aim of the FAS Russia is to withdraw state enterprises from potentially procompetitive economic sectors.

18. The FAS Russia supposes that state enterprises should perform in the economic sectors where there are no incentives to competition development. It concerns sectors that are important for state defense and secure, i.e. defense industry, space industry, nuclear power and geological study of subsurface.

19. Reduction of shares of state and municipal enterprises in competitive sectors is also fixed in the Strategy of competition development and antimonopoly regulation in the Russian Federation for the period 2013-2024.

20. In addition to control over creation of state enterprises, the FAS Russia is empowered to control over economic concentration. Preferential treatment regimens are not existed in relation to state enterprises. All the mergers are investigated in accordance with rules of antimonopoly legislation. The only exception to this rule is when the merger transaction may be exempted from the antitrust enforcement by appropriate decree of the Government of the Russian Federation or the President of the Russian Federation.

4. Conclusion

21. Despite the extensive functions of the FAS Russia in relation to state actions on the market in order to maintain competitive neutrality, a number of problems in this sphere still exist. In particular, there is a problem of providing administrative pressure on the competition authority in investigation of cases against state enterprises. However, in its practice the FAS Russia has always resolved this problem successfully. We have a problem of 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.

22. Despite these problems, the FAS Russia treats the control over state actions not as a challenge but as an incentive to improve their own activities. In cases against state companies or public authorities, the FAS Russia should conduct a more thorough market analysis, justify conclusions in more detail way, and make a fair legal decision based on a comprehensive deep study of the case.