

The Russian Federation
Discussion on international cooperation: exchange of
information without waivers
June 18, 2013
WP3 Working Party No. 3 on Cooperation and Enforcement
Competition Committee, OECD

1. Legal base

A legal base applied by the FAS Russia to be engaged in international cooperation consists of:

- Federal Law dated 26.07.2006 No.135-FZ “On Protection of Competition” (hereinafter referred as “the Law on Protection of Competition”);
- Regulation of the Government of the Russian Federation of June 30, 2004 No. 331 “On Approval of Statements on the Federal Antimonopoly Service” (with revisions and addendums);
- multilateral competition agreements;
- bilateral competition and non-competition agreements of the FAS Russia;
- free trade agreements.

According to Paragraph 8, Part 2, Article 23 of the Law on Protection of Competition, a scope of reference of the FAS Russia provides for cooperation with international organizations and state bodies of foreign countries, its participation in development and implementation of international treaties of the Russian Federation and activity of intergovernmental or interdepartmental commissions coordinating international cooperation of the Russian Federation, as well as implementation of international programs and projects in regard to protection of competition.

According to Part 2, Article 3 of the Law on Protection of Competition, a sphere of application of the Law on Protection of Competition is applicable to any agreements and deals concluded between the Russian and (or) foreign persons or organizations outside the Russian Federation, as well as to their actions provided such agreements, deals or actions affect considerably competition environment in Russia.

At present, the FAS Russia has concluded around 50 international documents on cooperation with foreign competition authorities, such as intergovernmental and inter-agency agreements, memoranda, joint statements and other documents (with a number of European countries, Brazil, China, Korea, Mexico, the USA, the European Commission etc.).

These types of documents define the general legal framework for cooperation. In addition, a number of agreements, the so-called “the New Type Agreements” which have

been signed recently, contain mechanisms of interaction with competition authorities in investigating cases of violation of the antimonopoly legislation in the trans-boundary markets. At present, new type agreements are signed with antimonopoly authorities of Austria, Hungary, Italy, Mexico, Serbia, Spain and European Commission.

The new type agreements also contain such interaction forms as consultations on individual cases, requests of information, consideration of mutual interests in investigating competition cases, as well as coordination of activities in investigating competition cases.

Thus, it should be noticed that the legal base regulating relations of the FAS Russia with foreign competition authorities doesn't contain provisions that specify an obligation to exchange confidential information in international cooperation.

An exclusion from the mentioned above is the Agreement on Common Principles and Rules of Competition (hereinafter – the Agreement on Competition) that was signed on 9 December, 2010 (came into force on January 1, 2012) it is concluded among the Republic of Belarus, the Republic of Kazakhstan and the Russian Federation within the framework of formation of the Common Economic Area.

The Agreement on Competition specifies such forms of cooperation among antimonopoly bodies of three countries as instructions on carrying out separate procedural actions, enforcement efforts upon a request from one of the Parties. The most widely-used form of cooperation of antimonopoly authorities stipulated by the Agreement is an exchange of information among the antimonopoly authorities of three countries in investigations of specific antimonopoly cases.

Thus, the Agreement on Competition imposes on antimonopoly authorities an obligation to use confidential information received exceptionally for the purposes it was received for, and to transfer it to the third parties only upon consent of the antimonopoly authority that provided the information.

As suppression of violations of antimonopoly legislation within CEA by authorized bodies of three states is foreseen not only in national markets but also in trans-boundary markets of the Eurasian Economic Commission (EEC)¹, the Agreement on Competition also foresees an exchange of information among super national antimonopoly bodies and EEC.

¹ EEC is established in accordance with the Agreement “On Eurasian Economic Commission” of November 18, 2011 with its parties being a single, permanent acting regulating body of the Custom Union and The Common Economic Space and carrying out its activity in the spheres of custom-tariff and non-tariff regulation, custom regulation, set up of trade regimes in relation to the third parties, statistic on foreign commerce and mutual trade, macroeconomic policy and competition policy etc.

It is planning that beginning from September, 2013, EEC will start to execute its powers on suppression of violation of common rules of competition in trans-boundary markets and possibility to exchange confidential information between EEC and antimonopoly bodies of three countries. By this date the Agreement of member-states of the Custom Union and the Common Economic Area “On Procedure of protection of confidential information” within realization of the Agreement on Competition will be adopted.

In the frameworks of the Agreement on Competition, the Agreement “On Procedure of protection of confidential information” is designed to settle relations connected with protection of confidential information in which EEC, state authorities of Russia, Belarus and Kazakhstan, as well as economic entities of three states participate in.

The Agreement specifies that EEC is obliged to take necessary measures for the purpose of protection of confidential information received from state authorities of three countries, including antimonopoly bodies and economic entities. It specifies a list of EEC’ officials that have an access to confidential information as well as defines measures of liability of these officials in case a regime of documents confidentiality is violated.

2. Types of information circulated in the FAS Russia and possibility to exchange information with foreign competition authorities²

Information circulated in the FAS Russia is divided into two groups:

- Confidential information;
- Non-confidential information.

Documents and materials which distribution is foreseen by the legislation of the Russian Federation and the service necessity are related to confidential information.

Non-confidential information is so-called “open information”. Its main purpose is to be transferred to the third persons in order to inform them on a matter. An access to such information may also be provided to indefinite circle of persons, for example by means of telecommunications facilities.

Thus, the legislation of the Russian Federation defines some types of information which can't be classified as confidential and access to which should be provided for an indefinite circle of persons.

For example, the Law on Protection of Competition provides an obligation for the antimonopoly authority to publish on its official web-site in the Internet the decisions and instructions that affect interests of an indefinite circle of people.

² Information given in this document doesn't concern documents that include information containing state secret.

The FAS Russia can freely transferred non-confidential information to foreign competition authorities voluntarily or upon a request.

In turn, confidential information circulating in the FAS Russia can be divided into two groups in dependence on the nature of its nature:

- confidential information received from the third parties;
- own confidential information (service information), created (arising) in connection with office need.

Confidential information received by the FAS Russia from the third parties within the frameworks of antimonopoly investigations and already possessed by the FAS Russia by the moment of receiving of information request from a foreign competition authority, can't be transferred to the foreign competition authority within the frameworks of international cooperation enforcement.

Such information can be used by the antimonopoly authority only for the purpose it was received for, that is for the antimonopoly investigation. Transfer of such information to the third parties entails civil, administrative and criminal liabilities for employees of the antimonopoly authority.

In case of receiving a request from a foreign competition authority on providing of information which the FAS Russia doesn't possess at the moment of receiving such a request, the FAS Russia has the right to forward a request on providing of information to the third parties. Thus, such a request should clearly contain a purpose that is a further transferring of it to a foreign competition authority.

If a person who has received such a request from the FAS Russia considers that it is impossible to transfer the information to a foreign competition authority, then the person, when submitting information to the FAS Russia, should specify that “it is impossible to transfer the information to a foreign competition authority” and put a stamp «Confidential» on documents provided. In this case, the confidential information can't be transferred to a foreign competition authority by the FAS Russia within the frameworks of international cooperation enforcement.

It is necessary to consider separately a situation of exchange of FAS's own confidential information created (arisen) due to a service necessity. Case plot, terms of a legal investigation, sanctions imposed etc. are related to such information. Despite the fact that this information is confidential, the FAS Russia as the owner of this information defines itself the purposes of its use.

A decision on providing of information considerably depends on trust to a foreign partner that has requested information as well as its ability and willingness to keep this information in secret and to use it only for the purposes for which it was requested.

When making a decision on providing of information, the availability of sufficient legislative bases and procedures for preservation of confidentiality of information by a foreign authority is an important factor.

In assessing guarantees of protection of confidentiality used by the foreign competition authority, the FAS Russia refers to its own principles, orders and policy used in trading such information received by the FAS Russia from the foreign competitive authorities.

3. A case with an international implication

One of examples on exchange of information is a case against “BelAZ” Trading House” CJSC (Russia), “BELAZKOMPLEKT PLUS” CJSC (Russia) and “Belorussian Car Plant” OJSC (Belarus) FAS applied the extraterritoriality principle specified in the Law “On Protection of Competition”.

This investigation has become possible due to existence in the Russian competition legislation norms that define an extraterritoriality of their application. Under Part 2 Article 3, the norms of the Law “On Protection of Competition” are applied to the agreements concluded between Russian and (or) foreign persons or organizations outside the Russian Federation and to the actions exercised by them if such agreements or actions affect the state of competition in the Russian Federation.

This investigation was effective due to information received by the FAs Russia within interaction with competition authority of the Belarus Republic in the frameworks of the Agreement on Single Competition Principles and Rules.

The case concerned jurisdiction of both the Russian Federation and the Republic of Belarus. A foreign company - “Belorussian Car Plant” OJSC coordinated participants of the market of dump trucks in the Russian Federation, which resulted in dividing the market under a geographical principle and under the categories of sellers and buyers, and ultimately eliminated competition between dealers.

“Belorussian Car Plant” OJSC was held administratively liable. The company was fined 119.5 million Rubles. “Belorussian Car Plant” OJSC executed a determination issued by FAS and withdrew the letters requiring dealers and buyers to purchase dump trucks from certain dealers.

4. Order of confidential information treatment

The information received is processed in accordance with the Instruction on Processing Information Received from the Government Bodies of Foreign Countries in the Course of

Investigation of Cases of Violation of Competition Antimonopoly Legislation” dated 18.03.2005 No.45 (hereinafter – the Instruction).

The Instruction specifies an order of making a decision on classifying information by the antimonopoly service to be confidential, order of work with incoming and outgoing papers containing confidential information, order of accounting, registration and keeping of such documents in order to restrict access to them.

The Instruction is applied to:

- documents received from foreign government bodies in a foreign language, including those ones received upon request of the FAS Russia;
- documents prepared in response to the request of information received from a foreign authority.

The processing of documents from foreign government bodies in a foreign language, including those received upon request of the FAS Russia, occurs in the following way:

- The Department for International Economic Cooperation (hereinafter – the International Department) receives and registers the incoming documents from government bodies of the foreign states in foreign languages (hereinafter – the foreign language documents).
- An International Department’s official authorized to receive, to view and to register the foreign language documents (hereinafter – the official) is appointed in accordance with the Instruction on Paper Work and the Instruction.
- If the document in a foreign language arrives in the incoming correspondence group, it passes such document to the Official upon signed receipt in accordance with the above mentioned Instructions.
- The Official registers the incoming document in a foreign language in the Register of Documents in a Foreign Language maintained by the International Department and assigns the incoming number to it.
- The incoming number consists of digits “19” and the document number separated by dash. If the incoming document has the mark “confidential”, “strictly confidential” or another mark indicating the confidential character of the document the incoming number will be followed by the index “C”.
- After assigning the incoming number to the document the official will pass it to the Director or Deputy Director of the Headquarters who will further determine the Official acting with regards of the document.
- If the documents relates to the competence of the International Department (on international cooperation and joint investigations) the Official will pass it to the Head or Deputy Head of the Headquarters upon authorization of the Director of the International Department.
- If the document is not related to the competence of the International Department, its further processing is done in accordance with the above mentioned Instructions.

- The Head of the International Department or his Deputy decides on the use of the document by issuing a written resolution registered in accordance with the Instruction on paperwork.
- In accordance with the resolution, the Official will pass it to the structural FAS divisions, if necessary, upon written receipt from responsible official of a structural unit for action to be taken pursuant to the document.
- If the document has a mark “confidential”, “strictly confidential” or other mark indicating on its confidential character the processing of the document in the International Department and structural departments will be made in accordance with the above mentioned Instruction on Processing of the Confidential Documents.
- If the incoming document needs a decision of the Head of the FAS, the Official will pass him the document and a supplementary note.
- The documents in a foreign language are passed to the official of the structural departments who have adequate command of the foreign language.

5. Further steps on development of international cooperation

In connection with the process of formation of the Common Economic Area of Russia, Belarus and Kazakhstan, that is successively growing and is characterised as interpenetration of economies due to the expansion of business entities within the boundaries of three states, there is a real need for development of cooperation of competition authorities of the member-states in CEA’s law enforcement in order to effectively prevent violations of antimonopoly law in each of the jurisdictions committed by business entities of other CEA member-states.

For the development of such cooperation the necessary legal basis has been already established (Agreement on Common Principles and Rules of Competition).

Over the next five years, forms of cooperation with law enforcement will be tested by the competition authorities of the CEA member-states. It is expected that these forms will be widely used. Mechanisms of their application will be improved in case of need.

For the next 5 years the FAS Russia also considers it will be necessary to establish within the CEA of a single database of cases, like the European Competition Network has. The implementation of the base will secure carrying out enforcement by competition authorities more effectively.

In the conditions of integration of Russia into the world economy in the long run, the FAS Russia considers that its international cooperation could be at a new level, which will be facilitated by the process of joining the OECD a lot.

One of the final goals of the FAS Russia is to sign with foreign partners agreements that would be similar to the agreement between the USA and Australia, as well as the agreement between the European Commission and Switzerland that provide for the possibility to exchange confidential information.

Development of international cooperation will also be contributed by drafting of a multilateral agreement on competition in the frameworks of WTO.