

Russian Federation¹
Roundtable on «Access to the case file and protection of confidential information»
Working Party No.3 on Co-operation and Enforcement
OECD Competition Committee
December 3, 2019

Summary

The Federal Antimonopoly Service of the Russian Federation, in carrying out its functions, as part of conducting inspections, handling cases of violation of antimonopoly legislation, monitoring economic concentration, its own requests, receives and uses information, including information that is classified as commercial secret.

According to the Russian legislation, a commercial secret is a mode of confidentiality of information, allowing its owner to increase incomes under existing or possible circumstances, avoid unnecessary costs, maintain a position in the market of goods, works, services or obtain other commercial benefits to which third parties do not have free access on a legal basis and in respect of which commercial secret has been introduced.

The mode of commercial secret is implemented only after the owner of the information constituting a commercial secret takes measures to protect it. At the same time, information containing data that cannot be a commercial secret in accordance with the legislation (for example, information contained in applications, objections, explanations and other materials submitted at the initiative of a person participating in a case of violation of the antimonopoly legislation, written or oral form on issues arising during the consideration of the case of violation of the antimonopoly legislation).

Thus, during consideration of a case, a balance must be ensured between the interests of the persons who provided information constituting a commercial secret to the case materials and those involved in the case of violation of the antimonopoly legislations whose rights and legal interests are affected by the relevant case.

The presence in the case file of information constituting a commercial secret cannot itself constitute a basis for an unreasonable restriction of the rights of persons involved in a case of violation of the antimonopoly legislation in properly preparing and stating their own position.

¹ The document was prepared jointly with the Association of Antimonopoly Experts

The rights of persons involved in a case of violation of the antimonopoly legislation are ensured, among other things, by providing persons who have established a commercial secret mode in relation to the information they have submitted, to agree to familiarize themselves with information containing commercial secret to other persons involved in the case.

In the absence of such consent, the announcement in this meeting of information containing a commercial secret, submitted at the request of the antimonopoly body, is carried out in the absence of persons who do not have the right to familiarize themselves with materials containing a commercial secret.

Access to the case file and protection of confidential information

Russian antimonopoly legislation includes detailed description of cases hearing proceedings. Particularly it regulates: a) parties ability to file confidential information as a part of their legal position which should be analyzed by the regular during antimonopoly investigation; b) authority's request for confidential information during investigation; c) access to file rules, including an access to confidential information.

Additionally, in 2018, the Presidium of the FAS Russia adopted special Guidelines, which included detailed recommendations and rules for protection and giving an access to confidential information during antimonopoly investigations and merger clearance proceedings.

Rules of antimonopoly legislation in this part are based on number of key principles including a necessity to distinguish a confidential and non-confidential information provided by the companies and government authorities during investigation, proper guaranties for confidential information protection by the FAS Russia, an effective regime for parties of access to file included confidential information, excluding situations when a party abuses its rights for confidential information protection to make an unlawful barriers for other party to access and execute its rights for defense.

The criteria how to distinguish confidential information are directly regulated in special Federal law²:

- Such information should be dedicated to business operations, including intellectual property rights (know-how, trade secrets, other trade information);
- Such information should have a real or potential commercial value for the company;

² Federal Law No. 98-FZ of July 29, 2004 "On commercial secrecy"

- The values of such information is based on an absence of any free legal access for it by other entities or individuals;
- The company as an owner of such information uses a confidential regime for it.

According to the Russian antimonopoly legislation, any company, individual or government authority is obliged to provide any relevant confidential information to the FAS Russia upon its request needed for investigation. The FAS Russia imposes administrative fines for those who refuse to provide confidential information.

In accordance with the legislation of the Russian Federation, the FAS Russia is obliged to protect confidential information received, and disciplinary, civil, administrative and criminal liability is established for violating the Law on Commercial Secrecy.

Nevertheless, the Law on Commercial Secrecy includes very important exemption from the confidential status for information that should be provided and free access should be given according to the direct requirements of the federal law. This rule is implemented in Russian antimonopoly legislation.

1) The regime of commercial secret cannot be established on the information contained in applications, objections, explanations and other materials submitted at the initiative of a person participating in a case of violation of the antimonopoly legislation on issues arising during the consideration of the case of violation of the antimonopoly legislation. That means a transparency principle of case hearings and a guarantee of access to case files for the parties.

2) The parties of case hearings should be provided with free access to information about relevant market boundaries, market shares and other relevant information collected by competition authority during economic market analysis and included in its analytical report as well as anonymized consumer survey findings.

As mentioned above, competition authority during its investigation and case hearings can request a confidential information from the parties that could be used as an evidence. For example upon request of the FAS Russia an entity accused in abuse of dominance connected with unfair pricing (monopoly high pricing) or discrimination of customers, can provide financial documents and information, contracts with different customers as an confidential information to be investigated by the regulator. This information is also very important for the applicant to have a right for comments and additional legal and economic position.

In these cases, Russian antimonopoly legislation and Guidelines include a procedure of receiving a written consent from the owner of such information or concluding an NDA agreement between the parties during case hearings.

Such measures together provide a legal guarantee for the parties and make a case hearings really effective.

Treatment of Privileged Information in the EAEU

The Eurasian Economic Commission (EEC) is a supranational body authorized to conduct antimonopoly investigations against companies - residents of the Eurasian Economic Union (EAEU) member states in case if their violations have or may have a negative impact on competition in cross-border markets in territories of the two or more EAEU member states, with the exception of financial markets.

The exchange of confidential information is carried out by the EEC in compliance with the requirements of an international treaty, namely the "Agreement on the procedure for protecting confidential information and responsibility for its disclosure when exercising powers by the Eurasian Economic Commission to monitor compliance with the unified rules of competition", signed in Moscow on November 12, 2014.

Within the framework of the exercise of powers to monitor compliance with the rules of competition, the EEC receives confidential information from legal entities and individuals of the Parties (member states), public authorities of the Parties whose competence includes the implementation of competition policy, and other public authorities of the Parties that can be used solely for the purposes for which such information has been provided.

Commission employees have access to confidential information in the framework of the consideration of applications (materials) on violation of competition rules, the investigation of a violation of competition rules, the consideration of cases on violation of competition rules, as well as the implementation of other procedural actions related to the implementation of monitoring compliance with competition rules.

Disclosure or use of confidential information for purposes not related to the performance of official duties, that has become known in connection with the performance of official duties, is the basis for:

- early termination of powers of the Member of the Board – Minister of the Commission;
- imposition of a disciplinary sanction in the form of the dismissal of an employee of the Commission;
- bringing Commission employees to civil, as well as to administrative or criminal liability.

Waivers of confidentiality when considering global merger control transactions

One of the effective tools of international cooperation of competition authorities in law enforcement, which is widely used in developed countries when considering global transactions of economic concentration, is waivers of confidentiality.

Thus far, the FAS Russia already has a sufficiently large experience of practical cooperation in considering global transactions (Oracle/Sun, Yandex.Taxi/Uber, Bayer/Monsanto, Siemens/Alstom, Taceda/Shire).

Taking into account the long-standing need to systematize work on applying waivers of confidentiality, in 2018 the Presidium of the FAS Russia adopted Guidelines "On applying waivers of confidentiality when considering merger control transactions"³.

One of the main goals of the Recommendations is to ensure a uniform application of waivers of confidentiality mechanism within the FAS Russia when cooperating with competition authorities of other countries and parties to the transactions in question.

Given the importance of using waivers of confidentiality mechanism from a practical point of view, the FAS Russia suggested to rearrange the Recommendations to the CIS format - to develop and adopt Model Recommendations for the competition authorities of the CIS member states within the framework of the ICAP. This proposal found a positive response from the competition authorities of the CIS member states. The Model Recommendations were approved by the Heads of the CIS Competition Authorities at the regular session of the ICAP within the framework of the VI BRICS Competition Conference (September 16-19, 2019, Moscow).

³ Recommendations of Presidium of the FAS Russia "On applying waivers of confidentiality when considering merger control transactions": <http://en.fas.gov.ru/press-center/news/detail.html?id=53894>