

Summary

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).

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 that was notified to WTO 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.

Another agreement that was notified to WTO is the Vietnam - Eurasian Economic Union Free Trade Agreement, which was officially signed in Kazakhstan on May 29, 2015.

The agreement contains the section “Competition”, in the drafting of which the FAS Russia actively participated, and defines the principles according to which the EAEU countries and Vietnam intend to cooperate in the field of competition and competition policy (such as transparency, non-discrimination, fairness, and the priority of consumer interests).

In addition to the Agreement with Vietnam, the Agreement on trade and economic cooperation between the EAEU and the People's Republic of China was signed on May 17, 2018, as well as the Agreement on the Free Trade Area between the EAEU and the Republic of Singapore on October 1, 2019, which also include provisions on competition.

Currently, the FAS Russia is also participating in negotiations on the conclusion of agreements on a free trade zone between the EAEU and such countries, as Israel, India, Egypt.

Competition provisions in trade agreements

Legal regulation of competition in Russia with regard to the WTO

In the Russian Federation, the legal regulation of competition is carried out by the Constitution of the Russian Federation, Federal Law of July 26, 2006 No. 135-ΦЗ “On Protection of Competition” (hereinafter - the Law on Protection of Competition), and the Civil Code of the Russian Federation (in particular, clause 10 of Article 10 establishes the impossibility of using civil rights to limit competition), as well as other federal laws, by-laws and international law.

Competition rules are spread out in various WTO agreements. Such agreements are the General Agreement on Tariffs and Trade (GATT), the General Agreement on Trade in Services (GATS) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).

Article VI of the GATT governs dumping and anti-dumping measures. The article in question establishes that dumping is to be condemned if it causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry.

As an anti-dumping measure, the GATT established the right of a contracting party to levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of such product. (i.e. the difference between domestic and export prices).

A necessary condition for imposing anti-dumping measures is to file a complaint and conduct an investigation, as well as to establish during the investigation a causal link between dumping and causing material damage to domestic industry and reducing its competitiveness.

These provisions of the GATT are reflected in the Federal Law “On Special Protective, Anti-Dumping and Countervailing Measures when Importing Goods”. So, according to Article 3, the investigation is conducted in order to establish the presence of increased imports into the customs territory of the Russian Federation and the resulting serious damage to the Russian economy or the threat of serious damage to the Russian economy, as well as to establish the existence of dumped imports or subsidized imports and the resulting material damage to the branches of the Russian economy, the threat of material damage to the branches of the Russian economy or significant slowdown in creation of a branch of the Russian economy.

Another Agreement - the GATS - in Article VII establishes the legal regime of monopolies and exclusive service providers. The GATS does not contain the concept of an exclusive service provider, however, researchers on this issue note

that this concept coincides with the definition of "exclusive service provider" contained in art. XXVII GATS.

A monopoly service provider is understood to mean any person, public or private, which in the relevant market of the territory of a Member is authorized or established formally or in effect by that Member as the sole supplier of that service. In accordance with this agreement, the state is obliged to ensure compatibility of the actions of the entity that is a monopolist in the delivery of services with the most-favoured-nation treatment, i.e. each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country (Article II of the GATS).

Thus, Federal Law of December 6, 2011 No. 409-FZ "On Amending Certain Legislative Acts of the Russian Federation" amended paragraph 2 of Article 3 of the Law of the Russian Federation "On Customs Tariff", according to which to goods originating from countries, trade and political relations with which have in place the most favored nation regime, the rates of import customs duties of the Common Customs Tariff of the Customs Union within the Eurasian Economic Community are applied. Thus, the WTO member states are placed on an equal footing in these legal relations with the states of the Customs Union.

Competition issues are also addressed in the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). So, Article 40 states that the use of restrictive competition clauses in licensing agreements may adversely affect trade. At the same time, the right of states to independently fix in the national legislation the types of licensing practices that can result in abuse of intellectual property rights and adversely affect competition in the relevant product market is provided for.

Currently, the Law on Protection of Competition stipulates that the requirements of the antimonopoly legislation do not apply directly to actions to exercise exclusive rights to the results of intellectual activity and agreements to grant or alienate rights to use the result of intellectual activity¹.

Actions and agreements on the use of exclusive rights to intellectual property objects, which lead to the prevention, restriction or elimination of competition in commodity markets, cannot be suppressed effectively by existing antimonopoly measures. This can create unjustified advantages to right holders to the detriment of competition in commodity markets.

¹ Part 4 of Article 10 and Part 9 of Article 11 of the Federal Law "On Protection of Competition" dated July 26, 2006 No. 135-FZ

Moreover, the exceptions currently contained in Part 4 of Article 10 and Part 9 of Article 11 of the Law on Protection of Competition regarding the use of the result of intellectual activity or means of individualization can create conditions for the unjustified wide application of such provisions to relations concerning the circulation of goods during production (manufacturing) of which the results of intellectual activity were used.

It should be pointed out, that Part 1 of Article 76 of the Treaty on the Eurasian Economic Union (signed in Astana on 29.05.2014)² prohibits actions (inaction) of dominant economic entity (market entity), the result of which are or may be the prevention, restriction, elimination of competition and (or) infringement of the interests of other persons. At the same time, there are no clauses in the Treaty on the non-application of this prohibition to actions of exercising the exclusive right, as well as the possibility of establishing other rules in national legislation.

To solve abovementioned problems, to increase the effectiveness of antimonopoly regulation, as well as to reduce the level of dependence of the Russian Federation on foreign patent holders, to increase the level of economic security of the Russian Federation, the FAS has developed a draft federal law “On Amending the Federal Law on Protection of Competition”.

The draft federal law provides for the recognition of Part 4 of Article 10 and Part 9 of Article 11 of the Law on Protection of Competition as no longer in force and extends the prohibitions contained in these articles to actions (inaction) and agreements using exclusive rights to the IP.

The adoption of the draft law will make it possible to resolve problematic issues related to the restriction or possible restriction of competition in the exercise of exclusive rights to the IP by the right holders.

Eurasian Economic Union

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).

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

² The UN courtesy translation of the Treaty:
https://www.un.org/en/ga/sixth/70/docs/treaty_on_eeu.pdf

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)³ 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.

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.

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 State⁴.

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.

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

³ Notification under: GATT Art. XXIV & GATS Art. V: <http://rtais.wto.org/UI/PublicShowMemberRTAIDCard.aspx?rtaid=909>

⁴ 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)

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 Commission⁵.

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 developed⁶.

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 States⁷.

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.

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.

Violations in markets that are not subject to the Criteria for classifying the market as cross-border⁸ are investigated by the national Antimonopoly Authorities independently or in cooperation with each other.

The Treaty on the EAEU provides for the forms of interaction between the

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⁶ 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

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

⁸ Decision of the Supreme Eurasian Economic Council of December 19, 2012 No. 29 “On approval of Criteria for classifying the market as cross-border”.

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.

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 violation⁹.

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 actions¹⁰.

The obligation of Member States to fulfill the provisions of the reasoned submission is also provided for in the Treaty on the EAEU¹¹.

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

⁹ 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”

¹⁰ 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)

¹¹ 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

consideration of the case is formed¹².

The persons participating in the consideration of the case are, inter alia, the Antimonopoly Authorities of the EAEU Member Countries¹³. 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.

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.

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.

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.

The FAS Russia took part in the investigation. From 24 December 2015 to 22 March 2016 FAS inspected distributors of Caterpillar products: “Zeppelin Rusland” Ltd., “Mantrak Vostok” Ltd., “Vostochnaya tekhnika” Ltd., and

¹² 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”

¹³ 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”

“Caterpillar Eurasia” Ltd.

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”.

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.

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.

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.

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.

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.

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.

Free Trade Agreement between the Eurasian Economic Union and the Socialist Republic of Vietnam

On May 29, 2015, the Vietnam - Eurasian Economic Union Free Trade Agreement¹⁴ was officially signed in Kazakhstan.

The agreement contains the section "Competition", in the drafting of which the FAS Russia actively participated, and defines the principles according to which the EAEU countries and Vietnam intend to cooperate in the field of competition and competition policy (such as transparency, non-discrimination, fairness, and the priority of consumer interests). The Agreement also establishes the intention of the parties to take all necessary measures to limit the anticompetitive behavior of companies that have a negative impact on trade.

The Agreement spells out types of anti-competitive behavior, for example: abuse by companies of their dominant position in the market, horizontal agreements distorting competition in the market, cartels and bid rigging, various acts of unfair competition. The activities of state monopolies and state enterprises are not subject to the regulation of this section.

The Agreement sets forth specific forms of cooperation in the field of competition: the exchange of non-confidential information by authorized bodies, cooperation in law enforcement, the exchange of experience and legislative innovations. The consultations, the implementation of which is provided for in the section, will serve as a mechanism to effectively and efficiently resolve emerging disputes in the field of competition, as well as facilitating cooperation to remove obstacles to doing business.

Since the anti-competitive behavior of business entities has a significant impact on trade, the inclusion of competition issues in the Agreement reflects the need to build a more progressive partnership system, despite the absence of a basic multilateral agreement on competition and competition policy. It is also in the

¹⁴ Notification under: GATT Art. XXIV & GATS Art. V: <http://rtais.wto.org/UI/PublicShowMemberRTAIDCard.aspx?rtaid=973>

interest of business communities to simplify market access conditions and procedures.

The Agreement includes a mechanism of protection against possible risks in the field of competition, which has become widespread in the world practice of trade liberalization as part of the conclusion of such agreements. This mechanism, the so-called principles of positive cooperation (positive comity principle), allows interested authorized bodies of the EAEU and Vietnam to quickly enter into consultations on resolving issues of cross-border violation of competition law (cross-border mergers and acquisitions committed with violations, cross-border cartels, etc.), as well as on other related issues.

In addition to the Agreement with Vietnam, the Agreement on trade and economic cooperation between the EAEU and the People's Republic of China¹⁵ was signed on May 17, 2018, as well as the Agreement on the Free Trade Area between the EAEU and the Republic of Singapore¹⁶ on October 1, 2019, which also include provisions on competition.

Currently, the FAS Russia is also participating in negotiations on the conclusion of agreements on a free trade zone between the EAEU and such countries, as Israel, India, Egypt.

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