

The Russian Federation
International experiences and best practices in competition law enforcement
against cross-border cartels
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Cartel conduct is known as the most egregious of competition law violations. According to experts, in the Russian Federation the approximate damage from cartels is estimated at 2% of GDP and almost 2 trillion rubles annually. However, its secretive character makes cartels notoriously difficult to detect and prosecute.

The fight against cartels has become one of the priority areas for the FAS Russia. In the Strategy for Economic Security of the Russian Federation for the period until 2030 approved in May 2017 by the President of the Russian Federation, the prevention of cartels was included among the main tasks of the state in the field of ensuring economic security.

In modern conditions of globalization of economic processes and increasing digitalization, cartels often lose their local character and become international. This fact poses even greater threat to the economy of the Russian Federation.

In its practice, the FAS Russia when conducting investigations also has dealt with cartel cases that have a cross-border nature.

The main difficulty of combating such cartels is the fact that they are concluded by major international players outside the territory of the Russian Federation. Such anticompetitive agreements are very difficult, and sometimes almost impossible, to trace.

One of the best examples in cross-border cases is the decision made in 2015 by the FAS Russia regarding the anticompetitive agreement of largest liner shipping companies A.P. Moller-Maersk A/S (Denmark), CMA CGM SA (France), Hyundai Merchant Marine Co. LTD (Korea), Orient Overseas Container Line Limited (Hong Kong), Evergreen Marine Corp. (Taiwan) Ltd (Taiwan)¹.

The FAS Russia found them to have violated the ban on concerted actions², which led to the setting of surcharges to the freight rates in the market of liner container transportation on the Asia-Russian Federation route in 2012-2013. The geographical boundaries of the commodity market covered 12 states.

The FAS Russia established that in 2012-2013, the information on the setting of general rate increases (GRI) was published on the website of one of the carriers, after

¹ <http://en.fas.gov.ru/press-center/news/detail.html?id=44347>

² <http://en.fas.gov.ru/press-center/news/detail.html?id=44353>

which the rest of the market participants set the same markups. After another decrease in freight rates, carriers again set the GRI premium relatively synchronously and uniformly in order to increase or maintain prices.

Such actions led to periodic price increases and had negative effects on consumers. This position was confirmed by a large number of respondents that took part in the poll of the FAS Russia analyzing the negative consequences of anticompetitive behavior of participants of agreement. Due to the publication of information that all key market participants were relatively synchronized and uniformly increased the basic freight rate, the buyer in the course of negotiations had a weaker position than the carrier. The most negative impact of this behavior was for medium and small enterprises, who were forced to agree with the established premium to the freight rate.

The annual container turnover from Asian ports to the Big Port St. Petersburg is about 550 thousand loaded containers. The repeated introduction of surcharges by USD 250-950 per container during the year, even with their partial or temporary application, has a negative impact on the foreign trade of the Russian Federation and on the cost of goods for Russian consumers.

At the same time, one should note that domestic participants in foreign economic activity completely depend on the quality and cost of services of foreign companies, since there is not a single Russian company among the 16 container operators in this market.

According to the antimonopoly legislation of the Russian Federation, such concerted actions are prohibited for legal entities-competitors, the aggregate share of which in the relevant commodity market exceeds 20%, and the share of each of which in the product market exceeds 8%.

Thus, the FAS Russia found listed liner shipping companies having violated the provisions of the Federal Law as of July 14, 2006 No. 135-FZ "On Protection of Competition"³ (Law on Protection of Competition).

On September 7, 2016, the Moscow Arbitration Court upheld the decision of the FAS Russia regarding the anticompetitive agreement of liner shipping companies⁴.

In 2017, a settlement agreement was concluded between the liner shipping companies and the FAS Russia⁵ in the Appeal Court. The participants of agreement

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[http://en.fas.gov.ru/upload/documents/Federal%20Law%20On%20Protection%20of%20Competition%20\(as%20amended%20in%202015\).pdf](http://en.fas.gov.ru/upload/documents/Federal%20Law%20On%20Protection%20of%20Competition%20(as%20amended%20in%202015).pdf)

⁴ <http://en.fas.gov.ru/press-center/news/detail.html?id=47097>

⁵ <http://en.fas.gov.ru/press-center/news/detail.html?id=49003>

stopped the violation and undertook obligations aimed at providing fair conditions for consumers of container shipping services.

Besides, within the Eurasian Economic Union (EAEU), the member of which is the Russian Federation, the FAS Russia has experience in participating in investigations conducted by the Eurasian Economic Commission (EEC) that, in accordance with the Treaty on the EAEU, has the power to start an investigation in case there are possible signs of violation of the general rules of competition in cross-border markets.

One of the recent examples of such interaction was a cartel case investigated in 2018-2020 in the cross-border market for production of cochlear implant systems.

In 2018, the EEC received a complaint from the Ministry of National Economy of the Republic of Kazakhstan, which reported on the possible allocation of the market along national borders between the suppliers of cochlear implant systems of Belarus, Kazakhstan and Russia.

The FAS Russia took an active part in the investigation and consideration of this case, in particular, during the execution of a reasoned submission of the EEC on the inspection and participation in meetings to consider the case.

Reasoned submission is an effective mechanism of the EEC to obtain the necessary information during investigations and consideration of cases, provided for by the Treaty on the EAEU (Paragraph 61 of the Annex 19 to the Treaty on the EAEU). It is a "request" sent to the antimonopoly authorities of the EAEU member-states on the commission of procedural actions in accordance with national legislation (for example, requesting the necessary information, inspecting territories, premises, documents of persons, conducting surveys, examinations and other actions).

As part of the execution of a reasoned submission, the FAS Russia carried out a dawn raid of Euromax⁶, its territories, premises, documents and items, as well as requested the necessary information.

During the inspection, carried out with the participation of EEC employees, a number of documents and information were copied from the employees' working computers, including e-mails, which were included in the sufficient evidence base of the case.

As a result of case consideration, in July 2020 it was found that between January 2016 and September 2018, supplies of implant systems produced by Cochlear were limited to the assigned territories: in Belarus – by Assomedica and Belvivad; in Kazakhstan – by PharmExpress and SPP VEK; in Russia – by Euromax.

⁶ The legal entity that supplies speech processors manufactured by Cochlear in the Russian Federation

Taking into account the provided evidence, the EEC Board found the above-mentioned companies to have violated the competition legislation of the EAEU. Such a violation entailed the situation when consumers were deprived of the opportunity to choose a product at a more favorable price, as well as obtain warranty and post-warranty service from a wider range of Cochlear products.

Jointly with the decision the EEC obliged the defendants to pay fines and terminate violations, including:

- terminate and not execute arrangements that may result in the division of the commodity market, and to exclude such provisions from previously concluded distribution agreements;
- stop giving preferential treatment to individuals;
- place publicly available information for consumers to contact any of the EAEU suppliers regarding the purchase and service of Cochlear's speech processors.

At present the economic entities and officials of the Republic of Belarus and the Russian Federation have duly paid the fines to the budgets of the respective states.

The case of Cochlear, considered by the EEC and the antimonopoly authorities of Russia, Belarus and Kazakhstan, is a vivid example of effective regional cooperation, the success of which has been determined by the existence of the legal framework and effective cooperation mechanisms provided for by the Treaty on the EAEU.

The Treaty on the EAEU demonstrates the relevance of the existence of documented mechanisms for cooperation required to investigate cross-border cartels and exchange experiences between countries.

The importance of such cooperation was emphasized by the heads of governments of the CIS member-states in the "Statement on consolidating efforts of the world community to efficiently counter international cartels", which strongly condemns the activities of cross-border cartels and supports the preparation of an international corresponding document. Later, the Statement was adopted as an official document of the 72nd session of the UN General Assembly on the agenda "Macroeconomic Policy: International Trade and Development" and was published on the UN official website on January 10, 2018.

One shall note that, as a rule, cartels operate where it is economically profitable, and pay little attention to any administrative or state boundaries. If it is profitable economically, such barriers will unlikely stop the participants of cartel agreements. From this point of view, international cooperation aimed at effectively and operatively combating cross border cartels is extremely necessary.

In order to effectively combat cross-border cartels, the FAS Russia uses all possible channels of communication with other foreign competition authorities both in a bilateral and in multilateral formats.

The FAS Russia actively uses bilateral relations based on provisions of Memoranda, agreements, working plans in order to consult foreign competition authorities within the investigation process taking into account that the antimonopoly legislation of the Russian Federation provides for the prosecution of anticompetitive agreements reached outside the Russian Federation if they affect the state of competition in our country.

For instance, a similar investigation against liner shipping companies described above was also conducted, including but not limited to, by the European Commission and competition authorities of the USA, People's Republic of China, Japan. Thus, the FAS Russia used the mechanisms provided for in bilateral cooperation documents to carry out consultations with foreign counterparts from European Commission and the People's Republic of China aimed at experience and practices exchanging.

The FAS Russia also has established strong ties with its BRICS counterparts in the format of BRICS Working Group on Cartels created in 2019, the goals of which are to discuss specific cases for conducting joint investigations in the BRICS space, as well as improving existing and developing new mechanisms to identify anti-competitive agreements.

The Working Group carries out its work by holding face-to-face meetings, so-called "missions", at the level of leaders and experts of the international and anti-cartel divisions of the BRICS competition authorities with the involvement of developers of special programs and algorithms for identifying digital cartels.

To date, two "missions" of the Working Group took place in November 2019 in Moscow and in March 2020 in Brasilia. The Working Group is a good example of cooperation when foreign competition authorities that use different tools and mechanisms to work out the consolidated efforts to most effectively combat cartels.

However, despite positive achievements, the experience of the FAS Russia in detecting and preventing cross-border cartels showed there are still serious gaps in the international legal regulation on combating cross-border cartels.

While vigorous efforts in facilitation international cooperation when conducting investigations against anticompetitive practices of large TNCs have already been made, findings of studies carried out in recent years by a number of leading

international organizations such as OECD⁷ and ICN⁸, as well as the BRICS International Competition Law and Policy Center⁹, revealed that majority of competition authorities from less developed countries and newly established agencies find it almost impossible to build contacts with counterparts in cross-border cartels investigations due to shortage of resources and lack of trust.

The findings also showed that the very small number of competition authorities, especially from developed countries, cooperated on any cartel investigation while almost all agencies sought cooperation on all cases where it would be feasible and necessary¹⁰.

Being aware of existing obstacles, leading international organizations have elaborated the number of important corresponding documents, such as ICN Guidance on Enhancing Cross-Border Leniency Cooperation, various chapters in ICN Anti-Cartel Enforcement Manual, OECD Recommendation concerning Effective Action against Hard Core Cartels, etc.

It is worth noting that the abovementioned documents are generally oriented on the developed countries or countries-members of these organizations with already established contacts with each other, while agencies that do not have the terminology related to cartels and therefore any cartel enforcement experience, as well as countries where competition authorities are relatively small or young, can not fully apply them in practice.

Competition regimes are emerging in developing countries that are not yet ready to tackle cross-border anticompetitive practices, and even if their laws are sufficient, most of these countries lack the capacity to enforce such regulations, given the political pressure from home countries of cartel participants.

Besides, taking into account the fact that today information necessary for cross-border cartel investigation is scattered in different places, it requires an agency to look through a wide number of documents, losing the valuable time and spending huge amount of resources.

Thus, nowadays there is a need of development of modern international mechanisms for combating cross-border cartels, taking into account the interests of all countries regardless of their socio-economic development that will consolidate the previously

⁷ Jenny, Frédéric (2003). 'International Cooperation on Competition: Myth, Reality and Perspective,' The Antitrust Bulletin, vol. XLVIII

⁸ <https://www.internationalcompetitionnetwork.org/portfolio/international-cooperation/>,
<https://www.internationalcompetitionnetwork.org/portfolio/oecd-icn-report-on-international-co-operation-in-competition-enforcement-2021/>

⁹ <http://www.bricscompetition.org/cross-border-cartels/>

¹⁰ <https://www.oecd.org/competition/InternEnforcementCooperation2013.pdf>

achieved efforts into one document and will serve as a step to converge procedures for combating cross-border cartels around the world.

UNCTAD, uniting 195 countries around the globe, seems to be the most appropriate platform for creation of such mechanisms and development of common principles.

Such a document may become one of the main achievements of the activities of UNCTAD Working Group on Cross-Border Cartels created by the Resolution of the 8th UN Competition Conference in October 2020 defining the general tools for detecting cartels and consolidating the mechanisms of interaction between competition authorities in the investigation of cross-border cartels that will benefit the competition authorities by saving national time and staff resources, encouraging capacity building and strengthening anti-cartel systems around the globe.