***Russian Federation*[1]**
Extraterritorial Reach of Competition Remedies
OECD Competition Committee
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The principle of extraterritoriality in Russian competition legislation

By operation of Part 2, Article 3 of RF Federal Law № 135-FZ dated 26.07.2006 "On the Protection of Competition" (hereinafter – the Competition Law), the provisions of the Federal Law in question apply to agreements reached beyond the territory of the Russian Federation between Russian and (or) foreign entities or organizations, as well as to the actions taken thereby, if such agreements or actions have an impact on the status of competition within the territory of the Russian Federation.

This provision establishes the possibility of the extraterritorial application of the Competition Law. The term "extraterritoriality" is widely used in international agreements, the rulings of international courts, and in the legal literature.

Proceeding from a literal interpretation of the norm currently under discussion, the Competition Law could formally be applied to any anticompetitive agreements (actions) reached (taken) beyond the territory of the Russian Federation, if such agreements (actions) have an impact on the status of competition within the territory of the Russian Federation, which presupposes a rather wide swath of potential situations (such as transactions involving economic concentration, cartel-forming and other anticompetitive agreements, instances of unfair competition, etc.).

In practice, the Competition Law has thus far been applied extraterritorially first and foremost to transactions involving economic concentration, inter alia, in due consideration of the provisions of Article 26[1] of the Competition Law, which reveal that "it is precisely (and only) with respect to this institution that impact on the status of competition in Russia is signified."[2]

Adoption of the current version of the provision under consideration has engendered certain hopes for an intensification of the work of the antimonopoly authorities in the pursuit of international cartels.

At the same time, in the practice of the FAS Russia and the courts, uniform approaches to the application of norms of extraterritoriality in cartel cases have not yet been formed. In particular, there is no sufficient basis for judicial decisions that

[1] The contribution was prepared by the FAS Russia with participation of the Association of Antimonopoly Experts

[2] Commentary on the "third antimonopoly package" (V. Dianov, A. Yegorushkin, E. Khokhlov) ("Statute," 2012)

will help determine which circumstances in the activities of foreign defendants should testify to the negative impact on the state of competition in the Russian Federation.

The objective complexities in the identification of cartels formed beyond the territory of the Russian Federation (just as any other anticompetitive agreements and (or) actions), handling of the respective investigation, and collection and consolidation of evidence, just as the difficulties associated with enforcing the Competition Law, continue to present a serious obstacle to the broad-based extraterritorial application of the Competition Law.

Prosecution

The violation of antimonopoly legislation within Russia entails both administrative and criminal responsibility. This responsibility extends, inter alia, to foreign citizens, stateless persons and foreign legal entities committing offences within the territory of the Russian Federation.[3]

Regarding the procedure for the processing and delivery of procedural documents to foreign defendants in the course of considering cases of violation of the antimonopoly legislation and administrative offences, the current version of the Code of Administrative Offenses of the Russian Federation provides that in case of necessity to perform procedural actions, the official sends a request for legal assistance to the relevant official of a foreign state in accordance with the international treaty, concluded by Russia, or on the basis of reciprocity[4].

Provided below are examples wherein the actions of a foreign company, registered outside of Russia, have violated the provisions of Russian antimonopoly legislation, which in turn has resulted in the prosecution of said parties in connection with the fact that such actions have an impact on the status of competition within the territory of the Russian Federation.

FAS Russia cases featuring application of the principle of the extraterritorial operation of antimonopoly legislation:

- *The Microsoft case*

The case was opened on the heels of a complaint by Kaspersky Lab. According to the complainant, Microsoft had significantly cut – from 2 months to 6 calendar days – the timeframe allowed for adapting the antivirus software of outside developers to the Windows 10 operating system. These actions would have resulted in certain unfair advantages for Microsoft on the software market. In the course of the investigation, it was established that Microsoft was introducing restrictions with

[3] Art. 2.6 of the RF Code of Administrative Offences and Art. 11 of the RF Criminal Code, respectively

[4] Part 1 Art. 29.1.1 of the RF Code of Administrative Offences

respect to the form and timeframe for providing alerts to the users of antivirus software made by outside producers, and was padding its requirements on antivirus software with a section which, if not complied with, served as grounds for the blocking and refused transfer of the respective software to updated versions of the operating system. The company was also blocking the antivirus software of outside producers and had activated the antivirus software Windows Defender without properly notifying the respective users and obtaining their express consent. FAS Russia issued Microsoft a warning to cease its actions containing indicia of the violation of applicable antimonopoly legislation. Microsoft Corporation heeded the warning in full.

- *The two Apple cases*

In 2016, FAS Russia opened two cases against Apple:

1. Price fixing on the part of Apple

In 2016, a case was opened against Apple Group pursuant to indicia of the violation of Part 5, Art. 11 ("coordination of the economic activity of business entities") of the Competition Law. The case was initiated in connection with a citizen's complaint filed in October 2015 claiming the setting by the 16 main resellers of identical prices for the new smartphone models Apple iPhone 6s and iPhone 6s Plus.

The investigation conducted by FAS Russia, using the information obtained from the resellers, showed that from the launch of official Russian sales of the Apple iPhone 5s, iPhone 5c, iPhone 6, iPhone 6 Plus, iPhone 6s and iPhone 6s Plus, most of the resellers had set and maintained identical prices for them for approximately three months. That said, the established prices coincided with the prices from press releases and price-lists published and distributed by Apple employees from email addresses associated with the apple.com domain.

Apple had been monitoring the retail prices for Apple iPhones set by resellers in online stores and at retail outlets and, in the event of their setting of "unsuitable" prices, Apple would send emails to the resellers asking for them to be changed. The resellers' observance of the recommended retail prices could also have been predicated on certain provisions of the respective agreements between Apple and the resellers, which were open to termination by Apple at any time without showing cause.

FAS Russia found the company guilty of coordinating economic activity among the resellers of Apple iPhones. The company has taken the necessary steps towards eliminating the violations of applicable law and is pursuing a policy designed to prevent the recurrence of such infractions moving forward: the company is currently in the process of formulating comprehensive antimonopoly compliance and training its workers on the rules of Russian antimonopoly law.

2. The parts-supply case

According to the complaint received by FAS Russia, in 2016, service centers had refused to provide the concerned individual with a replacement for their damaged Apple iPhone 6 Plus display in connection with a lack of supplies of the required parts to Russia, offering the smartphone-owner to get a replacement phone for pre-payment instead.

FAS Russia established that the actions of Apple, as the sole supplier of Apple Inc products to Russia, contained indicia of the violation of Part 1, Article 10 of the Competition Law (abuse of dominant position) through the company's failure to ensure the effective use of Apple Inc products (iPhone 6, iPhone 6 Plus, iPhone 6s, iPhone 6s Plus) throughout their respective service life. The company had not been supplying to the territory of the Russian Federation the components necessary for repairs (screen modules and motherboards), as a result of which the interests of consumers had been infringed.

Based on these grounds, FAS Russia issued a warning to Apple. The company was required to ensure the rendering of services involving the repair (replacement) of screen modules of Apple smartphone models sold within the territory of the Russian Federation.

The company heeded the FAS Russia warning. At present, consumers are able to receive screen-replacement services, which is twice as cheap as replacing the entire phone for a new one.

- *The Google case*

Google had abused its dominance on the market for pre-installed Android-app stores. Google's violations were expressed in their provision to counterparties of the Google Play app store for pre-installation on Android mobile devices destined for circulation within the territory of the Russian Federation – provided compulsory pre-installation of the Google applications and search engine, including their placement at prominent positions on the homepage of the respective devices. The actions of Google had resulted in a prohibition against the pre-installation of the applications of other developers. Google was issued an instruction to eliminate the respective infractions, and was also given a fine in the amount of RUB 438 mln.

Google attempted to contest in court the decision, the instruction and the fine, and later – the fine imposed for its failure to follow the initial instruction. The entire case encompassed a total of 39 court sessions.

In March 2017, Google and FAS Russia reached a settlement agreement. Google acknowledged its guilt and paid the fine in full.

According to the terms of the settlement, Google waived its insistence on the exclusivity of its apps on Android-based devices in Russia, undertook to refrain from restricting the pre-installation of any competing search services and (or) applications (including on the default homepage), abandoned the prompted pre-installation of Google search as the sole general-search engine, waived its further application of contractual clauses contravening the terms of the settlement, and has undertaken to honor the rights of third parties to add their preferred search engines to the selection window.

As concerns those devices already in circulation within the territory of the Russian Federation, Google has developed an active "selection window" for the Chrome browser which, upon regular updating, gives the user the opportunity to select their preferred "default" search engine.

Over the next few months, for devices just coming to market, Google developed a new Chrome widget to replace the standard Google-search widget displayed on the homepage. This made it possible for the end-users of Android-based devices containing a GMS package to see, upon the first launch of the new widget, a "selection window" allowing for the default-search installation of the preferred search engine of those developers who had concluded a commercial agreement with Google on its inclusion in the selection window.

For 60 days following the court's approval of the settlement agreement, the interested Russian search engines had the opportunity to reach out to Google to discuss the possible terms of their inclusion in the selection window next year.

Thus, within the territory of the Russian Federation, the channel for the pre-installation of apps on mobile devices is open for app developers, who have in turn received equal rights and opportunities to access the respective devices.

Aside from the restoration of competitive conditions on the mobile-app market, implementation of the settlement agreement has allowed consumers to purchase devices whose software best meets their expectations.

The user can, at any time, change their settings and select the "default" search engine that they prefer.

That said, Google will refrain from restricting or preventing the pre-installation of other developers' apps on user devices.

- *The case against international container shippers*

The largest international container shippers were setting and maintaining high prices for freightage. FAS Russia concluded its investigation into companies from Denmark, France, South Korea, Hong Kong and Taiwan on the market for container-line cargo shipments along the Far East/Southeast Asia – Russian Federation route:

the companies had been taking prohibited coordinated actions that had resulted in surcharges (markups) over the regular freightage rates.

Information on the setting of freightage surcharges (General Rate Increase, GRI) had been published on the website of one of the shippers, after which the remaining market participants had introduced the exact same markups.

In 2017, FAS Russia concluded a settlement agreement with the container shippers, within whose scope the shippers ceased committing the violation and undertook certain obligations whose performance would ensure compliance with the requirements of the Competition Law and the establishment of fair conditions for the consumers of container-shipping services.

Furthermore, FAS Russia joined the market participants in drafting a clarification[5] containing certain rules governing maritime container shipments which, when observed, would minimize the likelihood of the violation of applicable antimonopoly legislation.

According to the document, in making decisions on price changes, shippers should be guided by market factors, a reasonable assessment of the potential utilization of vessel carrying capacity, the scope of necessary expenditures to make the shipments and other economic indicators of their own commercial operations, as well as by any circumstances that could have an impact on all market participants. Notice to consumers of a price change is recommended to be made privately.

Interrelationship between Russian national antimonopoly regulation and the regulation of relations under the protection of competition within the scope of the Eurasian Economic Union

Part 3, Article 3 of the Competition Law[6] excepts from the law's scope of operation relations arising on cross-border markets whose compliance control is referred to the competence of the Eurasian Economic Commission (EEC), and which fall under the respective international regulation.[7]

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[5] See Clarification № 9 of the FAS Russia Presidium dated 14.06.2017 "On the Procedure for the Publication by International Maritime Container Shippers of the Cost of Freightage": https://en.fas.gov.ru/documents/documentdetails.html?id=15298

[6] Part 3, Art. 3 of the Competition Law: "The provisions of this Federal Law shall not extend to relations regulated by the uniform rules of competition on cross-border markets, control over whose observance is referred to the competence of the Eurasian Economic Commission pursuant to the international agreements of the Russian Federation. The criteria for classifying a particular market as cross-border shall be established by the respective international agreement of the Russian Federation."

[7] For more details, please refer to Clause 1 of FAS Russia letter № IA/74666/15 dated 24.12.2015 "On Application of the Fourth Antimonopoly Package."

With the adoption of the "fourth antimonopoly package,"[8] Article 3 of the Competition Law was supplemented with a norm envisioning that the provisions of the federal law in question do not extend to relations regulated by the uniform rules of competition on cross-border markets, control over whose observance is referred to the competence of the Eurasian Economic Commission pursuant to the respective international agreement.

The limits of EEC control over antimonopoly rules are set forth by the Treaty on the Eurasian Economic Union (EAEU), signed on May 29, 2014 in the City of Astana.

The criteria for classifying a particular market as cross-border are set forth by Resolution № 29 of the Supreme Eurasian Economic Council dated 19.12.2012.

Thus, a market is classified as cross-border where the geographical boundaries of the respective commodity market encompass the territories of two or more EAEU member nations (Russia, Belarus, Kazakhstan, Armenia and Kirgizia).

That said, depending on the type of antimonopoly prohibition, the criteria for determining the cross-border-nature of commodity markets are clarified by the aforementioned resolution.

Interdicting unfair competition should be undertaken by the EEC – provided that the business entity whose actions constitute unfair competition, and the competing business entity that has sustained, our could sustain, damage or whose business reputation has been harmed, or could be harmed, as a result of the commission of such actions are registered within the territory of different EAEU member nations.

Interdicting anticompetitive agreements should be undertaken by the EEC – provided that at least two of the market players participating in the respective anticompetitive agreement are registered within the territory of different EAEU member nations.

Interdicting the abuse of dominant position should be undertaken by the EEC in cases where the totality of the following conditions are satisfied:

- the volume share of sales or purchases by a business entity occupying a dominant position on a commodity market encompassing the territory of at least two EAEU member nations, and whose actions lead to an abuse of dominant position, of the total volume of the respective good circulating within the territory of each of the member nations of the Eurasian Economic Community (EurAsEC) affected by the violation, totals not less than 35%;

[8] The "fourth antimonopoly package" consists of RF Federal Law № 275-FZ dated 05.10.2015 "On Amending the Federal Law on the Protection of Competition and Certain Legislative Acts of the Russian Federation," which entered into force on 05.01.2016.

- the abuse of dominant position leads, or could lead, to the exclusion, restriction or elimination of competition on a commodity market encompassing the territory of at least two EAEU member nations, or to the infringement of the interests of other parties within the aforementioned territory.

In addition, interdicting the abuse of dominant position will also be undertaken by the EEC under the detection of collective dominance. In this case, a commodity market may be classified as cross-border under the satisfaction of the following conditions in their totality:

- the total volume share of sales or purchases by a number of business entities, each of which occupies a dominant position on a commodity market encompassing the territory of at least two EAEU member nations, and whose actions constitute an abuse of dominant position, of the volume of the respective good circulating within the territory of each of the EurAsEC member nations affected by the violation, totals for not more than three market participants – not less than 50%, or for not more than four market participants – not less than 70% (this Regulation is not applicable if the share of even one of the aforementioned business entities totals less than 15% within the territory of each EurAsEC member nation;
- over an extended period of time (for at least one year, or if the period totals less than one year – since the inception of the respective commodity market), the relative shares of participating business entities remains unchanged or insignificantly changed, and access for new competitors to the respective commodity market is problematic;
- the good being sold or purchased by the participating business entities cannot be substituted with another good under consumption (including under consumption for production purposes), growth in the price of the good is not associated with the expected decline in demand for the good, information on price, on the terms of sale or purchase of the good on the respective commodity market is available to an unspecified number of parties;
- violation of the prohibition leads or could lead to the exclusion, restriction or elimination of competition on a commodity market encompassing the territory of not less than two EAEU member nations, or to the infringement of the interests of other parties within the aforementioned territory.

These criteria for classifying a market as cross-border are applicable to natural-monopoly holders, in due consideration of the particular features established in the respective agreements between EurAsEC member nations concerning natural monopolies, including sectoral (industry-specific) agreements.

Despite the fact that enforcement practice of the Eurasian Economic Commission has not yet become widespread, it has nevertheless already made it possible to identify some legal problems that need to be addressed.

As it was mentioned earlier, the competence of the EEC is currently limited to the geographical boundaries of the commodity market of the EAEU. At the same time, there were circumstances in practice where the actions of foreign companies registered outside the EAEU could have had negative consequences for the EAEU market. Obviously, in such cases, the EEC should have been empowered to investigate and prosecute foreign defendants registered outside the EAEU. To solve this problem, it is necessary to introduce changes to the supranational competition law of the EAEU, in particular, in both - the Treaty on the EAEU and in the Criteria for classifying a particular market as cross-border, set forth by Resolution № 29 of the Supreme Eurasian Economic Council dated 19.12.2012.

International cooperation and joint investigations

For FAS Russia, a critical direction for the advancement of international cooperation lies in determining the specific mechanisms that would allow the concerned parties to interact swiftly and efficiently under the consideration of specific instances of the violation of applicable legislation.

One of the thrusts of such interaction involves cooperation among the competition authorities of CIS countries within the scope of the Intergovernmental Council on Antimonopoly Policy (ICAP) and, as part of ICAP activities – within the scope of the Headquarters for Joint Investigations into Violations of Antimonopoly Legislation in CIS Member Nations (hereinafter – the Headquarters).

Within the scope of the Headquarters, antimonopoly bodies conduct joint market analyses and investigations into the anticompetitive practices of companies operating on interstate markets within the framework of the CIS.

In different years, the subjects of the Headquarters' investigations have included the air-carriage, telecommunications, electric-power, retail-trade, oil and petroleum-product markets. Today, the work of the Headquarters is focused on investigating the markets for the production of construction aggregates, economy-class housing and medical equipment.

At the initial stage, the air-carriage market was chosen as an example of a cross-border market. Simultaneous audits of airlines were conducted by the antimonopoly bodies of CIS member nations in 2007. As a result of the investigation, a Report was prepared on the status of competition on the air-carriage market in CIS countries. At Headquarters, the effort was made to comprehensively study and analyze international experience in the protection of competition on the air-carriage market – specifically, the experience of the European Union, typical cases of the violation of antimonopoly legislation on the air-carriage and airport-service market, and intergovernmental agreements on air transport in CIS countries. Based on the outcome of the investigation, the countries formulated recommendations on the fostering of competition on air-carriage markets, including proposals on maintaining

non-discriminatory access to the services of natural-monopoly holders and the promotion of competition in the potentially-competitive segments of such markets. The implementation of these proposals was one of the instruments for the development of competition on air-carriage markets in CIS countries. As a result, in 2008-2013, the volume of aviation operations in the CIS increased by 2.3-fold.

Another priority market chosen for study was the telecommunications market. In 2008, the competition authorities of CIS countries, within the scope of the Headquarters, analyzed the status of competition on the telecommunications market. Based on the findings of the analysis, the Headquarters prepared a Report outlining possible measures for the promotion of competition and conducting an antimonopoly investigation on the roaming market.

In the course of analyzing the situation on the market, signs of the violation of antimonopoly legislation were identified under the formation of tariffs for communications services in roaming. The antimonopoly authorities of the Russian Federation and Republic of Kazakhstan, within the scope of their respective national legislation, conducted the corresponding investigations and opened cases into their dominant operators, which concluded in October 2010.

On October 22, 2010, FAS Russia issued a finding on the abuse of dominant position with respect to the setting and maintenance of monopolistically-high prices for communications services in roaming within the territory of the Russian Federation, and on the imposition of unfavorable contractual terms stemming from the failure to notify subscribers of the possible modification of the service-payment arrangements established by the respective agreement.

In the course of investigation into the case, the Russian operators made proposals on the reduction of tariffs. The “Big Three” mobile operators were issued an instruction to set tariffs for communications services in roaming at the proposed level, to ensure the SMS notification of subscribers, and to make the required changes to their public offers. The total fines imposed ran in excess of RUB 38 mln.

As the investigation unfolded, the Russian operators announced a reduction in tariffs for mobile-radiotelephony communications services in roaming within the territory of the CIS – across all services, there was an average 2-4-fold reduction, and in national roaming – an average 3-3.5-fold reduction.

The Russian “Big Three” also announced the taking of actions aimed at formation of the necessary conditions for reducing subscriber tariffs: all CIS operators were sent offers on a significant (1.5-3-fold) reduction in the level of inter-operator settlements. The majority of CIS operators accepted the terms being offered.

Aside from cooperation within the scope of regional associations (APEC, BRICS, CIS, EAEU), FAS Russia also boasts a rather rich and diverse “bilateral agreement

portfolio." Since the agency's inception, it has signed and is in the process of successfully implementing a number of intergovernmental (with Brazil, Bulgaria, Poland, the PRC) and interdepartmental agreements (memoranda, joint statements, etc.) (with CIS member nations, European Commission, France, Hungary, Mexico, Romania, Slovakia, South Korea, USA, Venezuela etc.) on cooperation in the area of competition policy. These documents set forth the agency's strategic directions and forms of cooperation with the respective bodies in foreign countries with the aim of formulating coordinated positions on crucial issues of economic development, sharing experience in the area of lawmaking and practical activities, providing methodological assistance in the performance of expert appraisals and consultations, and organizing internships, training exercises and seminars.

Recognizing the need for the international coordination of competition-related law enforcement in an environment of deepening globalization and increasing instances of anticompetitive behavior beyond the country's national borders, FAS Russia has taken a pragmatic view of the prospects for bilateral cooperation with foreign competition agencies and is endeavoring to elevate it to a new level. However, the mechanisms for cooperation presented in the standard memoranda on mutual understanding often fail to include provisions on the corresponding measures to be taken against the anticompetitive practices of transnational corporations, on non-discrimination, on the procedural guarantees of due process and fair treatment, or on cooperation in the area of competition-related law enforcement and transparency, etc.

Thus, instead of the standard memorandum, FAS Russia is exploring the possible signing with its foreign colleagues of so-called "agreements on new level cooperation." The provisions of such agreements expand on the clauses found in the standard memoranda of understanding and include, inter alia, clauses on the competitive behavior of the parties in the event of the conducting of investigations, on experience sharing, and on the organization of consultations for the purposes of interdicting violations of antimonopoly legislation within the territory of the parties to the agreement. Such agreements constitute international acts, and as such, require additional, more extensive domestic reconciliation. FAS Russia has already signed a new level agreement with antimonopoly bodies of Belarus, Austria, China, and an agreement between FAS Russia and the Norwegian Competition Authority is currently in the final stages of approval.

Agreements on cooperation of a new level should provide, in particular:

• principles and mechanisms for the interaction of the antimonopoly authorities of the parties that concluded them within the framework of investigations;

• the possibility of exchanging confidential information at all stages of the investigation.

In order to solve the above problems, it is also necessary to sign an international document specifying cases of bringing foreign defendants to administrative responsibility, as well as bilateral agreements with different countries on legal assistance in cases of violation of the antimonopoly legislation and administrative cases that would provide for:

• the scope of legal assistance;

• appointment of competent state bodies, through which such requests will be sent;

• the procedure for delivery of documents when providing legal assistance;

• requirements for processing documents when providing legal assistance;

• the order of execution of requests for legal assistance;

• procedure for issuing orders for the production of certain procedural actions;

• the procedure for the recognition and enforcement of judgments that have entered into legal force on antimonopoly and administrative cases.

In addition to the signing of these international documents, there will undoubtedly be a need to make additions and changes to Russian legislation (including the Law on the Protection of Competition, government rules and regulations) that establish specific mechanisms for implementing the provisions of these international acts.