***Russian Federation***
***Roundtable on "Licensing of IP Rights and Competition Law"***
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Currently, the issue of application of the antimonopoly legislation to actions and agreements related to the use of exclusive rights to the results of intellectual activity (hereinafter referred to as IPR) is highly relevant.

Nowadays, the misused intellectual property rights allows to monopolize markets, which can lead to unreasonable overpricing of goods by manufacturers. This, in turn, leads to a threat to the defense and security of the state and price discrimination of citizens in socially significant issues.

Many modern market economies build a system of their regulation of intellectual property based on the priority of protecting public interests (protecting competition) over private interests of right holders.

Such regulation is based on the provisions of Article 40 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)[1], which stipulates that the members agree that some licensing practices or conditions pertaining to intellectual property rights which restrain competition may have adverse effects on trade and may impede the transfer and dissemination of technology.

**Application of the antimonopoly legislation to licensing agreements**

In order to develop these provisions of international law, many states have determined the procedure for application of the antimonopoly legislation to actions and agreements on the use of exclusive rights to the results of intellectual activity[2].

In the Russian Federation the situation is different.

The antimonopoly policy in the area of the circulation of IPR should provide a balance of two tasks: stimulating the creation of new objects of intellectual property, in particular, new technologies, and providing access to previously developed objects.

Within the framework of the first task, the IPR copyright holder should be provided with the freedom to implement the developed IPR and reasonable remuneration in the form of profit. As part of the second task, end-users, as well as manufacturers, who use

[1] https://www.wto.org/english/docs_e/legal_e/27-trips_04d_e.htm#8

[2] Antimonopoly clarifications on intellectual property licensing prepared by the Federal Trade Commission and the US Department of Justice in 1995; Provision of the European Commission of 21.03.2014 No. 316/2014 "On the application of Article 101 (3) of the Agreement on the functioning of the European Union in relation to categories of agreements on technology transfer"; Explanations on the use of intellectual property in accordance with the Anti-Monopoly Act prepared by the Japan Fair Trade Commission in 2007, etc.

this IPR at the next stages of the value chain, should be provided with non-discriminatory access to the IPR on economically justified conditions.

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 activity[3].

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.

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.

Recently, the FAS has increasingly begun to investigate cases in which defendants attempt to justify the legality of their anticompetitive actions by referring to exceptions related to the exercise of exclusive rights to intellectual property.

For example, in the case brought on the grounds of a violation of Clause 5 of Part 1 of Article 10 of the Law on Protection of Competition[4] by Teva Pharmaceutical Industries Ltd. related to evasion (refusal) of the delivery of the medicine Copaxone, the company referred to the fact that it could not be subject to antimonopoly laws in view of the possession of a trademark on this medicine. It should be noted that the position of the FAS[5] in this case was not supported by the court of first instance and was confirmed only in acts of appeal, cassation and supervisory instances[6].

There was the similar situation in the case against Google Inc., which was considered on the grounds of the abuse by the company of its dominant position.

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[3] 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

[4] The FAS Ruling No. AK/43672/13 on the hearing of the case No. 1-10-279/00-18-13 of 05.11.2013: https://br.fas.gov.ru/ca/upravlenie-kontrolya-sotsialnoy-sfery-i-torgovli/c7136938-edab-48fb-8486-5a7607e26440/

[5] The FAS Warning No. АЦ/39563/13 of 10.10.2013: https://br.fas.gov.ru/ca/upravlenie-kontrolya-sotsialnoy-sfery-i-torgovli/f2a861b1-c37f-4d68-896c-864eb5cae500/

[6] Resolution of the Presidium of the Russian Supreme Court No. 305-КГ15-7123 on the case No. A40-42997/2014

Google Inc. in the course of legal proceedings also appealed to the fact that the provisions of the antimonopoly legislation do not apply to the company's pre-installation of software on mobile devices and smartphones due to the exclusive rights to the Android operating system and software. Appeal of Google was not supported by Courts[7].

In the case against Angstrom OJSC and Smartronic projects PTE LTD regarding the supply of microcontrollers, instituted on the grounds of violation of Parts 1 and 2 of Article 11 of the Law on Protection of Competition, the suppliers of integrated circuits also tried to prove the impossibility of applying the antimonopoly legislation to anticompetitive cartel agreement due to their exclusive rights to the intellectual property[8].

In addition to the above mentioned examples, it can be stated that in practice there may be other situations when actions and (or) agreements on the exercise of exclusive rights to intellectual property may lead to violations of antimonopoly laws.

For example, a dominant entity which possesses exclusive rights can establish in a licensing agreement the requirements for the purchase of goods, works, services, including those which results from intellectual activities or created using them that are not related to the subject of the licensing agreement (the so-called “binding practice”); can establish restrictions in the license agreement on the supply of goods created using the IPR; can prohibit the counterparty to enter other agreements with competitors of the right holder (the so-called "provisions on non-compete agreements"); can create discriminatory conditions or establish monopoly-high price for goods produced using the IPR; can establish in the license agreement restrictions on the independent determination of prices for products; can refuse (evade) the conclusion of a license agreement, due to the separate agreement with a third party and so on.

In 2018 and earlier, several cases of appeals (complaints) of business entities to the FAS on issues related to the legal relations of the parties under a license agreement were recorded. The establishment and formation by a certain economic entity of the price and value of the sold goods (work, services) is considered in the provisions of the Law on the Protection of Competition, which is used in cases when the economic entity that occupies a dominant position establishes a monopoly-high and monopoly-low price.

Thus, in some cases based on exclusion of Part 4 Article 10 of the Law on Protection of Competition, the FAS is forced to refuse the applicants to consider such complaints.

[7] Resolution of the Ninth Arbitration Court of Appeal on the case No. A40-240628/2015

[8] Resolution of the Presidium of the Supreme Arbitration Court of the Russian Federation of November 29, 2011 No. 6577/11 on the case No. A40-3954/10

For example, the FAS received a complaint about the same prices for the software from all independent partners of 1C-Bitrix LLC. Among the conditions of partner licensing, which was enclosed with the complaint, LLC "1C-Bitrix" is the licensor, that means the owner of the exclusive right to the IPR, and therefore has the right to set pricing policy. Due to this fact, the applicant was recommended to apply for the protection of his rights to the judicial authorities.

There was also a consideration of the application regarding the actions of the copyright holder in the implementation of the TechExpert reference system. Since, according to the information from the application sent to the FAS, as well as information from the company's website, the exclusive rights to the reference system (its individual parts) of TechExpert belong to Codex JSC. In this connection, the right holder may, at his discretion, allow or prohibit other persons to use the result of intellectual activity or means of individualization. The absence of a ban is not considered consent (permission). The applicant was recommended to apply for the protection of his rights to the judicial authorities.

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)[9] 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.

It should be noted that, for instance, in the expert review "Competition Law and Policy of Kazakhstan, 2016"[10], the Organization for Economic Cooperation and Development indicates that all actions, including cartel agreements relating to the exercise of rights to intellectual property, are currently not covered by the Law on Competition of the Republic of Kazakhstan. Nevertheless, in the opinion of the Organization for Economic Cooperation and Development, since some of these agreements may harm competition, there are no obvious reasons for excluding them as categories from the scope of the Law on Competition. Any benefits and anticompetitive effects can be properly balanced on a case-by-case basis in a system that allows exceptions for agreements that benefit consumers, for example, by stimulating innovation, and do not unduly restrict competition, as provided for in general rules on exclusion.

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

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

[10] http://www.oecd.org/competition/competitionlawandpolicyinkazakhstan2016.htm

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.

The draft law has been submitted for consideration to the Government of the Russian Federation in 2017[11].

**Possibility of compulsory licensing**

The right holder's misuse of his dominant position can lead to the refusal to manufacture or supply socially important goods (medicines, medical devices, etc.) to the market of the Russian Federation. Of course, such actions may lead to a threat to the life and health of citizens, and also create an unfavorable environment for the development of competition. However, the Russian legislation does not provide for effective mechanisms of state influence on such violations.

Nevertheless, the possibility of the state forcing unscrupulous right holders is provided for by international acts.

There were several examples of such practices.

Due to the technological inability of Bayer company to manufacture a sufficient amount of the medicine Cipro (INN: Ciprofloxacin) and the threat to Canada's national security when it is necessary to protect the population from possible terrorist attacks using biological weapons, in particular, the anthrax pathogen, in October 2001 the Canadian Government issued a permit for Apotex company to produce 1 million tablets-copies of Bayer's Cipro and sell it at a price of almost two times below the price of the original medicine.

In 2017, the Federal Patent Court of Germany (Bundespatentgericht) decided to grant Merck company a compulsory distribution license for raltegravir (its trade name is Isentress). A compulsory license during the hearings on interim measures was issued for the first time in the 55-year history of the court.

[11] Over the past five years, the antimonopoly body has developed several draft laws concerning the IPR

Similar international practice also exists in other countries (Brazil, India, Indonesia, South Africa, etc.).

In the Russian Federation the situation is different.

According to clause 49 of the National Security Strategy of the Russian Federation until 2020, approved by Resolution of the President of the Russian Federation of 31.12.2015 No. 683[12], one of the main areas of ensuring national security in the medium term is determined to ensure the provision of high-quality and affordable medicines to the population.

In the conditions of maintaining state regulation of prices for vital and essential medicines, there is a potential threat of foreign manufacturers' refusal to supply medicines due to the possible unprofitability of their business in the Russian Federation. Since such a refusal is economically feasible, the application of measures provided for by the antimonopoly legislation is not possible.

Under such circumstances, the economic dependence of the Russian Federation on medicine manufacturers with no substitutes, including those associated with unstable exchange rates, constant price increases, and other economic and political restrictions (sanctions) do not meet the requirements of the national security of the Russian Federation.

Production of patented medicines without the permission of patent holders is the most common measure aimed at achieving a balance between the interests of rights holders and retaining human rights, as well as a tool that allows governments of WTO member states to ensure national security, respond to the emergence of problems associated with citizens' provision with pharmaceuticals, fight with epidemics and budget savings.

This possibility is provided for in Article 31 of the TRIPS Agreement. The powers of the WTO member states in the field of health are specified in the Declaration on the TRIPS Agreement and Public Health adopted on November 14, 2001 in Doha.

At the same time, the Global Strategy of the World Health Organization and the action plan on health security, innovation and intellectual property adopted in 2008 urges all countries to promote access to medicines for all citizens.

According to Article 31 of the TRIPS Agreement, the use of the patent object without the permission of the right holder is possible if the national legislation of a member of the World Trade Organization allows such use.

In accordance with Article 1360 (Use of an invention, utility model or industrial design in the interests of national security) of the Civil Code of the Russian Federation

[12] http://kremlin.ru/acts/bank/40391

(hereinafter referred to as the Civil Code)[13], the Government of the Russian Federation has the right, in the interests of defense and security, to allow the use of an invention, utility model or industrial design without the consent of the patent owner, notifying him of this in the shortest possible time and paying him commensurate compensation.

In order to guarantee the supply of affordable medicines to the citizens, it seems appropriate to use the mechanism for introducing goods into circulation without the consent of the patent owners, provided for in Article 1360 of the Civil Code, including the case of economically or technologically justified reduction or cessation of production (supply) of a medicine. Permission to use an invention, utility model or industrial design without the consent of the patent owner may be drawn up by acts of the Government of the Russian Federation, in which intellectual property, as well as the amount and procedure for paying remuneration to the right holder are listed.

The absence of an effective mechanism for compulsory licensing poses a threat to national security, as well as to the life and health of citizens.

The FAS drafted a federal law "On Amendments to Article 1360 of the Civil Code of the Russian Federation", which introduces a new version of Article 1360 of the Civil Code, which provides for clarification of the grounds for issuing permission to use an invention, utility model or industrial design without the consent of the patentee by the Government of the Russian Federation in the interests of protecting the life and health of citizens.

In addition, the draft federal law proposes that the procedure for making the decision provided for by the proposed article, as well as the procedure for paying compensation, should be determined by the Government of the Russian Federation.

In addition, in order to ensure that the Government of the Russian Federation implements the provisions of Article 1360 of the Civil Code to reduce the price of expensive medicines protected by a patent, necessary to combat epidemics that threaten national security, paragraph 4 of point 5 of section I of the action plan ("roadmap") "Development of competition in healthcare" (approved by the Government of the Russian Federation dated January 12, 2017 No. 9-p[14], as part of measures to improve the regulatory framework in the field of intellectual property protection) provides for the development of drafts of normative legal acts which establish the procedure for issuance by the Government of the Russian Federation of the permission to use the invention, useful model or industrial sample medicine without patentee permission.

[13] https://www.zakonrf.info/gk/
[14] http://government.ru/docs/31081/

The adoption of the draft law will reduce the level of dependence of the Russian Federation on foreign patent holders, which, in turn, will increase the level of economic security of the Russian Federation.

**The problem of "parallel import"**

One of the serious problems in the development of competition at the present time is the conflict between the interests of foreign right holders and Russian importers, offering options for "parallel" supply of goods, including both products of everyday demand and goods vital for health and social security.

More than 10 years ago, in the Russian legislation in the field of IPR, in fact, the absolute protection of the exclusive right to IPR was enacted. In 2008, Article 1487 of the Civil Code incorporated the national principle of exhaustion of exclusive rights. For example, in accordance with this Article, the goods purchased for resale crossing the Russian border without the permission of a foreign right holder shall be confiscated by customs, and the entrepreneur shall be punished.

The introduction of the national principle of exhaustion was aimed at supporting investment in the Russian economy in the context of growing domestic demand and insufficient competitiveness of the Russian jurisdiction to localize the production of goods traded on international markets. In fact, the current legal regulation is used in order to limit competition between suppliers of branded goods, maintain an exceptional position in the market of rights holders and their authorized dealers, and maintain a single price level. This should allow right holders who are placing industrial capacity in Russia to receive higher returns and compensate for other shortcomings in the investment climate. At the same time, the situation in some cases increases the costs and risks of Russian consumers and entrepreneurs.

For example, the Constitutional Court of the Russian Federation examined the case on the verification of the constitutionality of the provisions of clause 4 of Article 1252, Article 1487, Clauses 1, 2 and 4 of Article 1515 of the Civil Code of the Russian Federation in connection with the complaint of PAG LLC.

It considered a situation when one of the suppliers (under a state contract for the supply the medical institution with a special paper lot of the Sony brand for an ultrasound machine) purchased this product from a third-party Polish company and imported it into Russia. Cargo had no time to pass customs clearance, as the goods were arrested by the decision of the Arbitration Court of the Kaliningrad region. By its decision, the court granted the claim for the protection of exclusive rights to the SONY trademark of Sony Corporation. The Russian company was prohibited from importing, selling or otherwise introducing into civilian circulation on the territory of Russia, as well as storing the specified SONY goods for this purpose. Also, by a court decision, the Russian company

had to pay compensation, the goods were confiscated. These decisions were supported by the appellate and cassation judicial instances.

According to the Decree of the Constitutional Court of February 13, 2018[15] in this case, the Constitutional Court recognized that the national principle of exhaustion of exclusive rights enacted in the Russian Federation, imposing a ban on the import of goods with trademarks placed on them without the permission of the copyright holders into Russia , does not contradict the Constitution, but the copyright holder may unfairly use the exclusive right to a trademark and restrict the import to the domestic market of Russia of specific goods or sales to create a pricing policy consisting in overpricing on the Russian market. Such actions may acquire particular danger in connection with the use of sanctions against the Russian Federation by other states. Therefore, based on the objectives of protecting the rights of citizens and other public interests, the Constitutional court gave a constitutional and legal interpretation of the challenged provisions of the Civil Code. The Decree also noted that in cases of unfair conduct of a trademark holder, civil law institutions should be used to counteract overuse of rights. The court may deny the claim of the right holder in whole or in part, if the fulfillment of its requirements may pose a threat to constitutionally significant values.

Deciding on the size of the importer's liability, the courts must take into account the factual circumstances of the case. It is not allowed to apply the same civil liability to an importer who imports original products without the permission of the right holder, and to an importer who imports counterfeit products (except for cases when losses from the importation of such goods are comparable to losses from the importation of counterfeit product). The federal legislator has the right to differentiate the amount of responsibility depending on the nature of the violation of the holder's right. In addition, it is possible to destroy goods imported into the territory of Russia as parallel imports only if they are of poor quality or in order to ensure safety, protect human life and health, and protect nature and cultural values.

Thus, the effectiveness of the current legal regime in terms of attracting investments does not find unequivocal empirical confirmation, and the desirability of further supporting especially favorable conditions for certain groups of investors raises serious doubts. An entrepreneurial climate should be developed through a general improvement in the quality of the institutional environment for all market participants.

Legalization of parallel imports and the abolition of the national principle of exhaustion have obvious advantages in terms of developing equal and free competition, but in order to prevent socio-economic shocks for individual markets and backbone enterprises, this process should be carried out in stages, within individual product groups' framework and on the basis of preliminary analysis of costs and benefits.

[15] https://rg.ru/2018/02/22/postanovlenie-ks-dok.html

The FAS initiated the process of legalizing parallel import (introducing the international principle of exhaustion of rights, which allow the import of original goods put into the territory of any country, without the additional consent of the copyright holder) at the level of the Eurasian Economic Union (EAEU). The motive for promoting the initiative is that foreign right holders continue to infringe the interests of Russian importers, offering options for "parallel" delivery of goods, including those vital for the health and social welfare of the Russian population. In addition, there were identified several cases of customs restriction of import into the customs territory of the EAEU of goods in postal items for individuals from foreign online stores, which violates the rights of consumers and puts various online stores in an unequal position (in violation of the provisions of the EAEU legislation). Thus, the current regulatory framework is used in order to limit competition between suppliers of branded goods, maintain an exclusive position in the market for themselves and their authorized dealers, and maintain a single price level.

In addition, there are cases of a ban by foreign right holders on the sale of goods delivered to the territory of the Russian Federation on the territory of another EAEU member state without additional permission from the right holder, it means that concerning the goods of foreign right holders imported into the territory of the EAEU national principle of exhaustion of rights is applied.

In the process of work on the issue of the legalization of parallel import at the level of the Eurasian Intergovernmental Council, in accordance with the order of 6 April 2016 No. 6, the EEC developed a draft Protocol on Amendments to the Treaty on the Eurasian Economic Union of May 29, 2014 (hereinafter - the draft protocol). This draft protocol provided for provisions on granting the Eurasian Intergovernmental Council the authority to establish exceptions to the use of the principle of exhaustion of the exclusive right to a trademark for certain types of goods. Currently, this project is in the process of domestic approval in the member states of the EAEU.