

## *Summary*

As competition in the markets becomes dynamic, the analysis of potential competition becomes more and more important in the analysis of the state of competition.

Today, the concept of potential competition is being actively developed and even applied by some competition authorities, including the FAS Russia.

When analyzing the state of competition in the commodity markets, the FAS Russia mainly assesses the *factual* competition.

In addition to factual competition, the FAS Russia also evaluates what has been called *actual* potential competition in the literature. This concept takes into account the competitive pressure that already exists from persons outside of business entities community operating in the considered product market. For example, such competitive pressure is accounted for in bid rigging cases.

Within the framework of this report, an overview will be given of those cases when the FAS Russia takes potential competition into account in its analysis.

Further, the report presents the position of the FAS Russia on the issues of accounting for potential competition in the framework of certain types of anti-competitive practices: agreements on joint activities between competitors, transactions of economic concentration, anti-competitive behavior.

## *Potential competition*

As competition in the markets becomes dynamic, the analysis of potential competition becomes more and more important in the analysis of the state of competition. Today, the concept of potential competition is being actively developed and even applied by some competition authorities, including the FAS Russia. Within the framework of this report, an overview will be given of those cases when the FAS Russia takes potential competition into account in its analysis.

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<sup>1</sup> The contribution was prepared by the Association of Antimonopoly Experts

When analyzing the state of competition in the commodity markets, the FAS Russia mainly assesses the *factual* competition. For example, the concept of a cartel is such that an agreement between real competitors, leading to certain consequences, is recognized as a violation. An anti-competitive agreement between potential competitors, such as restricting market access, would be considered a "different" anti-competitive agreement.

In addition to factual competition, the FAS Russia also evaluates what has been called *actual* potential competition in the literature<sup>2</sup>. This concept takes into account the competitive pressure that already exists from persons outside of business entities community operating in the considered product market. For example, such competitive pressure is accounted for in bid rigging cases. In such cases, the FAS Russia takes into account the behavior of those entities that are already operating on the market, however, due to illegal actions carried out by other players, they cannot take part in bidding.

It is important to take into account that such *actual* potential competition is more *factual* competition than potential competition.

With regard to *really* potential competition, the FAS Russia generally holds the position that competitive pressure on existing players created by potential market participants plays an important role in terms of limiting the opportunities for the latter to maintain or increase market power. Accordingly, the restriction of potential competition may have negative consequences similar in their negative effects to the restriction of actual competition.

In this regard, the FAS Russia analyzes the consequences of anti-competitive practices not only in terms of how they will affect actual competitors, but also how they will affect potential competitors.

Further, the report presents the position of the FAS Russia on the issues of accounting for potential competition in the framework of certain types of anti-competitive practices: agreements on joint activities between competitors, transactions of economic concentration, anti-competitive behavior.

### **Agreements on joint activities between competitors**

According to the Guidelines of the Presidium of the FAS Russia on the procedure and methodology for analyzing joint activity agreements<sup>3</sup> (hereinafter referred to as the Guidelines), when analyzing joint activity agreements between competitors, the FAS Russia conducts an analysis in which, in addition to assessing the level of real competition in the relevant market, the presence of potential competition is also

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<sup>2</sup> Werden & Limarzi (2010), Forward-Looking Merger Analysis and the Superfluous Potential Competition Doctrine: <https://www.jstor.org/stable/23075590>

<sup>3</sup> <https://fas.gov.ru/documents/575737> (Russian version only)

taken into account. The absence of potential competition is an additional reason for not approving a joint activities agreement or issuing a remedy to the parties.

Thus, when analyzing agreements on joint activities, the FAS Russia considers potential competition as a factor holding back the market power of companies after the conclusion of the transaction.

Thus, the Paragraph 2 of the Part II of the Guidelines states that in addition to the high economic concentration of the market and a significant aggregate share of companies participating in the transaction (more than 50%), the criteria that must be met to recognize the agreement in question as restricting competition are:

- the affected product market is characterized by high barriers to entry;
- there are significant restrictions on the import of goods affected by the agreement on considered joint activities.

In order to determine the presence and the possibility to overcome barriers to entry into the commodity market affected by the agreement, the FAS Russia considers it relevant to survey not only actual, but also potential market participants (Paragraph 3.3 of the Guidelines).

When analyzing import restrictions, the FAS Russia assesses the value of import duties and transport costs in relation to the price of goods, import quotas or any other restrictions on the volume of imported goods (Paragraph 3.4 of the Guidelines). The presence of such restrictions weakens the deterrent effect of potential competition from importers on existing market participants.

### **Transactions of economic concentration**

Closing a transaction of economic concentration can also negatively affect potential competition. It's negative impact is possible when it results in acquisition by companies of their potential competitors, the termination or slowdown of the production of goods and/or services by the latter, which could later enter the market and exert competitive pressure. Thus, the potential competitive pressure on the business entities present in the market will be reduced.

In addition, mergers and acquisitions may create or strengthen a vertically integrated company, whose influence on suppliers and/or distributors can partly limit potential competition.

The practice of considering transactions of economic concentration by the FAS Russia is structured in such a way that the analysis of potential competition is carried out both in terms of assessing the current level of competition in the market and in terms of the impact of the agreement on the possibility for new participants to enter the market.

For example, as part of the FAS Russia analysis of the global deal between Bayer and Monsanto in 2016, the impact on potential competition was considered as one of the main results of the deal, which led to the FAS decision to approve the deal with the issuance of *remedies*<sup>4</sup>. The remedies included requirements to create non-discriminatory access for Russian companies to platform solutions of the merged company<sup>5</sup>. One of the main objectives of the requirements put forward to companies was to create conditions for the development of potential competition. To ensure the implementation of the remedies, a technology transfer mechanism was created on the basis of a Russian research university in 2018.

The analysis carried out by the FAS Russia when considering this transaction showed that its result, among other things, could be, firstly, the emergence (strengthening) of existing entry barriers. The FAS Russia considered that the emergence (strengthening) of entry barriers could occur because the creation of a digital platform that integrates the supply of key agricultural production means would make it virtually impossible for independent producers of agrochemicals or seeds, as well as individual agronomic digital services that not integrated into such a platform to enter the market.

Secondly, the deal between Bayer and Monsanto could lead to the formation of an oligopolistic market structure with three large players who own the entire spectrum of modern agricultural technologies and create their own integrated platforms through which they could sell key inputs to agricultural producers. These players would be bound by mutual partnership agreements, which could increase the risks of possible anticompetitive agreements or concerted actions, lead to a significant deterioration in the position of consumers in the market, as well as to suppress potential competitors by excluding them from access to certain key technologies or data.

### **Anti-competitive behavior**

Potential competition is also taken into account in the competition analysis with regard to investigations related to abuse of dominance, anticompetitive agreements and concerted actions. Here, potential competition is also assessed in terms of overcoming barriers to entry, and companies that have the ability to enter the considered market quickly and without significant costs can be taken into account in the composition of business entities operating in the market.

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<sup>4</sup> <http://en.fas.gov.ru/documents/documentdetails.html?id=15347>

<sup>5</sup> FAS Decision to extend the period for consideration of the application of November 15, 2017: <https://br.fas.gov.ru/ca/upravlenie-kontrolya-agropromyshlennogo-kompleksa/-c084b115-a929-42e7-a5a9-a8362a96e6c4/> (Russian version only)

At the same time, the FAS Russia pays special attention to the possibilities of companies operating in adjacent markets to become participants in the considered commodity market.

Also, the FAS Russia pays special attention to potential competition when analyzing anti-competitive practices in digital markets. This is because this concept is inextricably linked with the concepts of "digital markets" and "multi-sided platforms", which are becoming increasingly common today.

As part of its practice, the FAS Russia already takes into account the impact that the digitalization of the economy has on the markets. Thus, the FAS Russia considers network effects as one of the main barriers that can limit potential competition in these markets. For example, due to the presence of network effects, entry barriers were found to be difficult to overcome in the market of services for ensuring information interaction between applicants for a job, employers and recruitment agencies on the Internet in the case against HeadHunter<sup>6</sup> and in the market of services for aggregators of information about hotels in the case against Booking.com<sup>7</sup>.

At the same time, the FAS Russia does not limit itself to analyzing potential competition within the framework of only anti-competitive behavior. The FAS Russia has also developed a methodology for assessing and further recovering losses of potential competitors as a result of anti-competitive practices of existing players in the market<sup>8</sup>. According to the Paragraph 4.3 of the FAS Methodology, as grounds for compensation for losses to potential competitors, it is necessary to prove that their entry to the market was not only planned, but was also possible in the absence of a violation.

To assess the losses of potential competitors, similar methods are used as for assessing the losses of operating companies in the market. However, since comparison with the periods before and after the violation is not possible when calculating the losses of potential competitors, the main methods are comparative analysis of adjacent markets, as well as financial or economic modeling. The main tool in financial and economic modeling is the analysis of the financial plan of a potential competitor, prepared before the violation. At the same time, if it is

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<sup>6</sup> Decision of the FAS Russia No. AG/4087/20 of 01/23/2020: <https://br.fas.gov.ru/ca/upravlenie-regulirovaniya-svyazi-i-informatsionnyh-tehnologiy/8e4961ce-3f9c-4b37-9f4b-b2804deec88/> (Russian version only)

<sup>7</sup> Decision of the FAS Russia No. AD/115711-DSP/20 of 12/29/2020: <https://br.fas.gov.ru/ca/upravlenie-regulirovaniya-svyazi-i-informatsionnyh-tehnologiy/cdf15018-ef29-40e8-acbd-d39edc8aee39/?query=>

<sup>8</sup> The report of the FAS of Russia with the guidance on compliance with mandatory requirements, which explains what behavior is lawful (2018): <https://fas.gov.ru/documents/612182> (Russian version only)

impossible to carry out appropriate assessments (for example, due to lack of data), losses can be recovered only in terms of real damage associated with preparing the company for entering the market.