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**HOW ENFORCEMENT AGAINST PRIVATE ANTICOMPETITIVE CONDUCT
HAS CONTRIBUTED TO ECONOMIC DEVELOPMENT**

CONTRIBUTION FROM THE RUSSIAN FEDERATION

-- Session IV --

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HOW ENFORCEMENT AGAINST PRIVATE ANTICOMPETITIVE CONDUCT HAS CONTRIBUTED TO ECONOMIC DEVELOPMENT

1. One of the most important activities of the Ministry of the Russian Federation for Antimonopoly Policy and Support of Entrepreneurship (MAP Russia) aimed at development of competition on the financial services market. They are concentrated at resolving of a range of top priority tasks: creation of equal competitive conditions for the financial structures; provision of citizens and legal entities with quality financial services on the whole territory of the Russian Federation; assurance of equal competitive conditions for national and foreign companies in connection with the proposed entry of the Russian Federation into the WTO.

2. Herewith we present summary of the decision of Commission of the Ministry of Russian Federation for Antimonopoly Policy and Support to Entrepreneurship (Commission), concerning the case № 2 06/121-03 on infringement of Russian antimonopoly legislation, initiated in respect to the limited liability company “Non-bank credit organization “Western Union DP East” (LLC “Western Union”) by the joint-commercial bank “Ruslavbank”.

Decision case No. 2 06/121-03 on infringement of the antimonopoly legislation

September 10, 2003

Moscow

The Commission of the Ministry of Russian Federation for antimonopoly policy and support to entrepreneurship (MAP Russia)

ASCERTAINED:

The Joint-stock commercial bank (JSCB) “Ruslavbank” has appealed to the MAP Russia with a declaration of infringement of the antimonopoly legislation. According to the declarant’s opinion, making Contracts between the LLC “Western Union” and Russian banks on services providing to the individuals of sending and payment of money without opening bank accounts present an infringement. The Contracts that Russian banks and the LLC “Western Union” are making contain standard clause 4.2.8., according this clause it’s prohibited to the bank while the Contract with the LLC “Western Union” is in force to interact with other organizations offering services of immediate money transfers in forms similar to those used in the LLC “Western Union” system.

The declarant has created and is developing the correspondent net “CONTACT” on individual’s money transfers without opening bank accounts through the system of banks’ correspondent accounts. According to the JSCB “Ruslavbank” declaration 40 Russian and foreign banks had joined the created net.

At the same time the declarant has submitted documents testifying Russian banks' refusal to proceed the fulfilment or to make contracts with the JSCB "Russlavbank" on individual's money transfers without opening bank accounts by using the net "CONTACT", because of existence of the Contracts made earlier with the LLC "Western Union" that contain standard clause 4.2.8., according this clause it's prohibited to the bank while the Contract with the LLC "Western Union" is in force to interact with other organizations offering services of immediate money transfers in forms similar to those used in the LLC "Western Union" system.

The declarant believes, that pointed terms of the Contracts made between Russian banks and the LLC "Western Union" limit the access of other financial organizations to the market of services of individual's money transfers without opening bank accounts, in particular the declarant's, and that is an infringement of article 6 of the Federal law of 23.06.99 № 117-FL "On Protection of Competition on the Financial Services Market" (Law on Protection of Competition). The declarant also believes, that inclusion by the LLC "Western Union" of standard clause to the Contracts with Russian banks, prohibiting banks, while the Contract is in force, to interact with other organizations offering services of immediate money transfers in forms similar to those used in the LLC "Western Union" is an unfair competition, prohibited by the article 15 of the Law on defence of competition.

The LLC "Western Union" objected to the position declared by the JSCB "Russlavbank" and believes, that the Contracts made between the LLC "Western Union" and Russian banks are not contrary to the antimonopoly legislation.

The Commission examined arguments declared by the parties, analyzed submitted materials and determined the following.

The LLC "Western Union" offers on the Russian market the system "Western Union" – system of individual's money transfers without opening bank accounts. The system "Western Union" is an international system, it has been created by Western Union Financial Services, Inc. – company, established according to the law of Delaver (Diamond) State, USA. Western Union Financial Services, Inc. and the LLC "Western Union" made a Contract on cooperation of 01.01.99, determining rights and obligations of the parties in using the system of money transfers Western Union.

In order to provide to individuals services of money transfers without opening bank accounts, the LLC "Western Union" and Russian banks are making bilateral Contracts on cooperation between the corresponding Russian bank and the LLC "Western Union" directed to providing designated services to individuals that are on the territory of Russian Federation (clause 1 of the model contract).

To co-attain purposes of cooperation that is the subject of the Contract the corresponding bank provides necessary premises, facilities and staff to work at the client services' office in the system "Western Union" (clause 4.2.1 of the model contract). The LLC "Western Union", in its turn, provides advertising and directive materials, necessary to serve individuals, using the system "Western Union", sends specialists to install the software and train bank's staff to work with the system "Western Union", provides bank with advisory support in technical and organizational questions, arising during the usage of this system (clauses 4.1.1– 4.1.3 of the standard contract).

Terms of the Contracts, that the LLC "Western Union" makes with Russian banks, according to which while, the Contract is in force, bank has no rights to act as an agent or representative of other companies, offering services of immediate money transfers in forms similar to those used in the LLC "Western Union" system, are standard, so say identical to all Russian banks.

The LLC “Western Union” itself qualifies the Contracts it makes with Russian banks, using standard terms, as “model”¹ (page 3 of the LLC “Western Union” declaration to the Commission of MAP Russia).

Analysis of the model contract including its subject - cooperation between the LLC “Western Union” and bank on co-providing services to individuals of money transfers without opening bank accounts, as well as basic rights and obligations of the parties, according to which bank and the LLC “Western Union” can offer to the individuals pointed services only together, do not allow the Commission to agree with the LLC “Western Union” in the part that it is a commission contract, according to which, one side (commissioner) under the commission of another side (committent) undertakes to perform for fee one or several deals on its behalf, but at the expense of committent (article 990 of the Civil Code of Russian Federation (CC RF)).

Also the Commission cannot agree with the LLC “Western Union” interpretation of article 1007 of the CC RF as a rule that permits to divide market by sellers, buyers, territories and etcetera. Indeed, clause 2 of article 1007 of the CC RF stipulates the opportunity to enclose in the agency contract agent’s obligation not to make with other principals similar agency contracts, that have to be fulfilled on the territory, fully or partly coinciding with the territory, pointed out in the contract. However it has to be in mind that contracts, made by banks with other organizers of systems of payment (also contracts with JSCB “Russlavbank” to use its system CONTACT), are not considered neither by the parties to the Contract, nor by the Commission of MAP Russia as agency or commission contracts.

Also, according to the clause 2 of article 1 of the CC RF, civil rights can be limited by federal law. In particular, article 6 of the Law on defence of competition, which prohibits the conclusion of agreements, limiting competition on the finance services’ market, is such a limitation and exception. At the same time this article does not contain any exception for agency or commission contracts.

As for the terms of the Contract: the model contract between Russian bank and the LLC “Western Union” contains along with other terms standard clause 4.2.8, according to which while the Contract is in force the bank has no right to act as an agent or representative of other companies, offering services of immediate money transfers in forms similar to those using in the system Western Union.

Presence of this term in the contract does not permit the bank, which made the Contract with the LLC “Western Union”, to make contracts with other organizations, representing another systems of payment. At the same time it cannot be admitted that banks are free to choose a contractor – creator and owner of the money transfers’ system. The width of the territory, covered by the system, served as a criterion to the banks in the process of choosing the contractor for providing services to individuals of money transfers. The international payment system “Western Union”, before entering Russian market, has been establishing and functioning in different countries for a considerable period of time and now covers more than 195 countries; as for Russian Federation – the LLC “Western Union” carries out its activities in 82 out of 89 regions of Russian Federation (pages 2 and 3 of the explanations to the case of the LLC “Western Union” dated 28.08.2003).

Russian companies, having intention to work on this market, will be able to reach such covering only after a considerable period of time and financial expenditure on establishment and development of a payment system.

Presence of the clause 4.2.8 of the model contract, that banks making with the LLC “Western Union”, taking into consideration competitive advantages of this company before new payment systems and companies ready to render services on this very market, restrains competition on the services’ market of individual’s money transfers without opening bank accounts, as it doesn’t permit banks to make

¹ The law-term “model agreement” is used in the text of decision from the viewpoint of LLC “Western Union”.

individual's money transfers' agreements with other organizations, that, taking into consideration the difference between the LLC "Western Union" and its potential competitors in territory covering, forces banks to decline a mutually beneficial cooperation with other organizations in favour of the LLC "Western Union".

It's also necessary to mention, that the LLC "Western Union" itself indicates ensuring bank's interest to promote only one company and its payment system and desire to eliminate competition of other companies, having more flexible inter-payments with banks (the LLC "Western Union" gives the example of the conditions of work in the CONTACT system; page 4 of the LLC "Western Union" declaration to the Commission of the MAP Russia) - as one of the reasons for including the clause 4.2.8 to the model contract.

Mentioned circumstances and examined materials give grounds to the Commission to qualify clause 4.2.8 of the model contract, that the LLC "Western Union" makes with Russian banks, as the term of contract, directed to restriction of access to the market of services of individual's money transfers without opening bank accounts to other financial organizations and development of new payment systems and, as a consequence, restriction of competition.

The Commission stated that it's conclusions on the infringement of articles 6 & 15 of the Law on Protection of Competition by the LLC "Western Union" were made taking in account the following circumstances:

- for credit organizations - participants of the systems of payment the great importance in competition has the possibility to provide clients the maximum range of services. Making contracts with different systems of payment of individuals' money transfers allows to credit organization to wide up the list of services providing and to attract more clients with different demands and finance abilities;
- the analyses and the comparison by the Commission of the different systems of payment and in particular Western Union and CONTACT enable to make a conclusion that those systems are not similar and have number of technological, organizational and other differences;
- clause 4.2.8 of the model contract doesn't permit banks while the Contract is in force to be an agent or representative of other companies on immediate money transfers. However the LLC "Western Union" sends notices to banks of annulment of the Contracts in every case of using by banks other systems of payment than Western Union. At the same time banks on receipt of such notices were sending to the LLC "Western Union" explanations that the relations between them and the other payment system organizer are neither representation nor agency as well as explications that the systems CONTACT and "Anelik" are related to the operations through correspondent accounts of the banks - participants and so they can't be classified as similar to Western Union. Nevertheless the reasons stated by the banks the LLC "Western Union" were annulling the Contracts with banks if they were uphold to their position without further negotiations and explanations on clause 4.2.8.

Taking into consideration all stated in the decision reasons and consequences after the analyses of the materials submitted and hearing of the both parties the Commission of the MAP Russia following the articles 22; 23; 30 of the Federal Law "On Protection of Competition on the Financial Services Market",

DECIDED:

1. To recognize that the provisions of clause 4.2.8 of the model contract between that the LLC "Western Union" and the Russian banks are making according to which bank, while the Contract is in force, don't have a to act as an agent or representative of other companies that

are providing services of immediate money transfers in forms similar to those used in the system Western Union, don't correspond to article 6 of the Federal Law of 23.06.99 № 117-FL "On Protection of Competition on the Financial Services Market", prohibiting to make agreements that have as a result or may have as a result limitation of competition on the finance services market including the limitation of access to the finance services market of other finance organizations.

2. To qualify the actions of the LLC "Western Union" to include clause 4.2.8 to the model contract and the demand to stop relations between banks and other organizers of the systems of individuals' money transfers without opening bank accounts together with the threat to annul the Contract between the bank and the LLC "Western Union" due to the infringement of clause 4.2.8 of the Contract as unfair competition prohibited by article 15 of the Federal Law of 23.06.99 № 117-FL "On Protection of Competition on the Financial Services Market".
3. To issue to the LLC "Western Union" the prescription to stop the infringement of the antimonopoly legislation before 10.11.2003 and to inform the MAP Russia on measures which were carried out before 15.11.2003.

This decision can be considered as an illustration how enforcement against private anticompetitive conduct has safeguarded the development of the money transfer systems in Russian Federation, which serves not only the promotion of competition on the financial services market but contributes to the economic progress as well.