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IMPROVING INTERNATIONAL CO-OPERATION IN CARTEL INVESTIGATIONS

Contribution from the Russian Federation

-- Session II --

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IMPROVING INTERNATIONAL CO-OPERATION IN CARTEL INVESTIGATIONS

-- Russian Federation --

1. Introduction

1. Development of the international cooperation plays an important role in the process of advocacy and competition protection as it promotes creation of the favorable legal, institutional and information environment for realization of a competitive policy, and in particular in joint cartel investigation.

2. Realization of the international cooperation in cartel investigations allows to provide improvements of the national legislation and practice of its application on the basis of the advanced international experience, and also gives the chance to stop more effectively violations having the international (trans-boundary) character increase of cooperation between competition authorities of foreign countries.

3. Realization of these issues isn't possible without active interaction between the leading international organizations in the field of competition policy as well as competition authorities of different countries.

4. The FAS Russia instituted special Department to fight against cartels¹ that already investigated some prominent cases is created. In regards to participants of cartels, some criminal cases have already been initiated by law enforcement authorities. The FAS Russia actively fights cartel². Unfortunately practically in all sectors of the Russian economy there are cartels and some of them have trans-boundary character. In this regard the importance of the international cooperation during cartel investigation is difficult to overestimate.

2. Existing tools and Mechanisms for realization of the international cooperation

2.1 *Formal mechanisms of cooperation*

5. FAS Russia cooperates with competition authorities of other countries within the frameworks of 44 agreements on cooperation.

6. The basic forms of interaction in the field of a competition policy in such agreements are:

¹ In 2010-2011 the FAS Russia in cooperation with RF Ministry of Internal Affairs discovered large cartels in the market of chlorine, of power-generating coal, in the insurance market, at a bid rigging on pharmaceuticals etc.

² In Russia there is a per se prohibition on cartels. Recently, serious sanctions for participants of a cartel were implemented, that is a large "turnover fine" and criminal liability up to 7 years of prison. A leniency program for the participation in a cartel for the first person who voluntarily discloses a cartel and its participants to the FAS Russia is provided for.

- exchange of non-confidential information on perfection of the legislation and business management;
- organization of educational visits and training of experts;
- participation in conferences, symposiums, seminars and other activities organized by the Parties;
- meetings of experts or consultation between experts of the Parties by e-mail which provide prompt communication for an exchange of non-confidential information on issues of mutual interest;
- organization of meetings (visits) for discussion of perspectives and directions of the further bilateral cooperation;
- exchange of documents, results of researches and other publications of the Parties.

7. The need and urgency of cooperation of competition departments during investigation of particular cases of infringement of competition legislation with trans-boundary character, defined the necessity for the FAS Russia to conclude absolutely **new type of bilateral agreements** on cooperation in which mechanisms of information interchange are accurately registered during investigations and control over economic concentration, allowing to proceed to qualitatively new forms of co-operation.

8. At present the following “new type” agreements of are signed:

- The agreement between the Federal antimonopoly service (Russian Federation) and the Federal commission on a competition of the Mexican United States about cooperation in the field of a competitive policy Paris, 06.15.2010;
- Cooperation Agreement in the field of competition policy between the Federal Antimonopoly Service (the Russian Federation) and the Hungarian Competition Authority Moscow, 28.09.2010;
- Cooperation Agreement in the field of competition policy between the Federal Antimonopoly Service of the Russian Federation and the Austrian Federal Competition Authority, Moscow, 19.05.2011;
- Memorandum of Understanding on Competition between the FAS Russia and DG Competition of the European Commission, Brussels, 10.04.2010;
- Memorandum of Understanding in the field of competition policy between the Federal Antimonopoly Service and Spain’s National Competition Commission, Madrid, 11.12.2011 r.

9. The FAS Russia has a number of tools and mechanisms, both formal, and informal during the process of cooperation with its international partners.

10. Within the limits of bilateral agreements of new type the following mechanisms of cooperation of the Parties are prescribed:

- carrying out of consultations on particular case with rendering of the fullest assistance.
- requests for information.
- the mutual account of interests during investigation of particular cases, having trans-boundary character.
- coordination of activities during investigations of particular cases of competition legislation violation.

11. It is necessary to mention that the given agreements assume exchange possibility only non-confidential information.

2.2 *Tools for interaction*

2.2.1 *Working Group on Oil Products with Austria*

12. Working group on research of the issues of pricing in the markets of oil and oil products and methods of their functioning was created on the initiative of the FAS Russia the Austrian Federal Competition Authority. In January 2012 in Moscow the first meeting of this Working group was held, in which heads and specialists of the Competition Agencies of Austria, Bulgaria, Germany, Kazakhstan, Latvia, Portugal, Russia, Romania and the Ukraine took part.

13. The basic directions of activity of the Group are information exchange, carrying out of consultations, joint investigations of infringements of the antimonopoly law made in the trans-boundary markets.

14. Participants of the meeting exchanged views and experience of monitoring the markets of oil and petroleum products, as well as experience of preventing violations of the competition legislation in these markets in their countries, discussed the proposals on the further joint work of the group, assign certain Competition Authorities - members of the Working group to coordinate certain areas of work to make it more productive, as well as each Competition Authority to appoint a contact person for operational interaction within the Working group, as well as on the development of harmonized methodologies for the prevention of violations of the competition legislation in the markets of oil and oil products. As the results of the meeting further activities of the Working group were agreed.

2.2.2 *Interaction with the European Commission*

15. Currently the FAS Russia is actively cooperating with the Directorate General for Competition of the European Commission in the framework of the Memorandum of understanding in the sphere of cooperation between the Federal Antimonopoly Service of the Russian Federation and the Directorate-General for Competition of the European Commission (Brussels, 10.03.2011), and the Plan of Interaction for 2011-2012 is annexed to the Memorandum. The Plan identifies economic sectors with high priority in terms of interaction, and the format and methods of implementation of such interaction.

16. It is necessary to mention that in 2009 the FAS Russia interact with the European Commission on the merits of consideration of the transaction on acquisition of Sun Microsystems by the company Oracle Corporation. Application for carrying out of this transaction was submitted to Competition Authorities of many countries in the world, including Russia, as well as the European Commission. Taking into account the world experience in the field of cooperation of foreign competition authorities when considering transactions, execution of which may have an impact on competition in the markets of several countries, the FAS Russia organized the mentioned consultations, which in case of necessity were to be continued in 2010.

17. According to the rules of the European Commission basic condition for holding of such consultations is receiving from the company-subject of the consultations the official letter of refusal of confidentially (waiver), in which the company confirms its agreement to hold consultations between the European Commission and Competition Authorities of other countries on transaction with possibility of exchange of confidential data (submitted by this company to the relevant Competition Authorities). In the frame works of consultations of the FAS Russia with the European Commission the latter carried out the procedure for obtaining a "waiver".

18. It should be noted that the FAS Russia for the first time became a participant in the process of application of this mechanism, which should become the most acceptable form of settlement of issues arising from impossibility of confidential information exchange according to the national legislation of the parties during investigation of specific cases of violations of the competition legislation and control over transactions involving economic entities of Russia and the EU.

2.2.3 *Operating Headquarters on interaction with foreign competitive departments*

19. With a view of maintenance of practical interaction with foreign competition authorities within the limits of existing agreements, the FAS Russia in 2011 the Plan of the organization of work on interaction FAS of Russia with foreign competitive departments has been confirmed during investigation of cases of antimonopoly law violation in several directions:

- cartels;
- abusing dominant position;
- transactions (activities) within the limits of economic concentration.

20. Moreover with a view of realization of the aforementioned Plan in 2011 in FAS Russia the Operating Headquarters on interaction with foreign competition authorities has been created for investigation of cases of competition law violations that includes as members employees the FAS of Russia responsible for interaction with foreign competition authorities.

21. In particular, in conformity with specified Plan FAS of Russia develops under the reference with the information with state structures of the foreign states at investigation of cases of infringement of the antimonopoly law in development of available Instruction FAS of Russia about the reference with the confidential information.

2.3 **Regional Cooperation**

22. International and regional integration is gaining more momentum; transnational corporations are spreading their influence worldwide that increase of number of M&A transactions and violations of competition legislation by economic entities striving to maximize their profits that are not within national jurisdictions. Such a phenomenon rises before all the antimonopoly authorities of the world, and Russia *inter alia*, the issue of necessity to strengthen interaction between competition authorities and to continue elaboration of harmonized approaches towards implementation of competition policy.

23. Thus, international cooperation in protection of competition is playing more important role that under current circumstances is assessed as an important factor of protection of competition in the internal market of the Russian Federation, as well as creation of conditions for broadening trading and economic relations with foreign partners, creation of favorable investment climate and support of Russian exporters and investors to get access to external markets.

24. The basic platform for interaction of antimonopoly bodies of the CIS countries is the Interstate Council on Antimonopoly Policy (ICAP), which has been created in 1993 according to the Agreement on carrying out of the coordinated antimonopoly policy from 12/23/1993 (new edition of the Agreement from 1/25/2000) (further – the Agreement) for the purpose of coordination of activity of the states-participants CIS on creation of legal and organizational basis for the prevention, restriction and suppression of monopolistic activities and an unfair competition in the Common Economic Space of the CIS.

25. The structure of ICAP includes Heads of Antimonopoly authorities of the CIS countries. Moreover there are observers present in ICAP – representatives of competition authorities of Hungary, Romania and Mongolia.
26. Practical interaction of competition authorities of the CIS countries which result is strengthening of economic interaction and deepening of economic integration of the CIS countries is carried out according to Provision on cooperation of the CIS states on suppression of monopolistic activities and unfair competition which is an integral part of the Agreement.
27. The Provision contains the mechanisms, allowing competition authorities of the CIS countries to cooperate during consideration particular cases of competition law violation; to participate in crossing of transnational anticompetitive actions and to play an active role in the course of protection of domestic commodity producers in the international and internal markets.
28. With a view of development of practical cooperation of competition authorities of the CIS countries, ICAP members took the decision on carrying out of joint investigations of anticompetitive practices of the companies operating in the joint markets within the CIS.
29. For this purpose the ICAP creates the Headquarters on joint investigations of competition law violations in the CIS countries (further – the Headquarters), thus objects of the analysis are those markets which successful functioning provides creation of the infrastructure that serve as the basis of formation of the Common Economic Space within the limits of the CIS, and also directly impact well-being of citizens of the CIS states.
30. The markets of passenger air service, telecommunications, grains, combustive-lubricating materials, retail trade, and the pharmaceutical markets are the markets in question. Improvement of methods of cartel fighting became one of the priorities of work of the Headquarters. But so far there were no joint investigations of cartels.
31. One of lines of activity of the Headquarters in where positive results were reached is the investigation of international telecommunication market of the CIS states.
32. In the course of the investigation conducted by two Antimonopoly Authorities of Kazakhstan and Russia the signs of violation of the antimonopoly legislation were revealed on formation of roaming tariffs for telecommunication services. In the framework of national legislation and implementation of coordination of actions of national competition authorities of Russia and Kazakhstan relevant investigations were conducted and proceedings were instituted in respect of the dominant operators of Russia and Kazakhstan.
33. In particular during the investigations regular consultations between representatives of the Antimonopoly Authorities of Russia and Kazakhstan were carried out. During these consultations the algorithm of joint actions was elaborated and the FAS Russia conducted the same verification activities that were carried out by the Kazakhstan authority.
34. At the end of October 2010 the Antimonopoly Authorities of both countries have completed consideration of these cases and court proceeding were initiated simultaneously. During the investigation of the case the Russian mobile operators announced reduction of rates on telecommunication services in international roaming in certain areas (lowered 1, 5 to 4 times). Kazakhstan operators also announced a sharp reduction of rates.

2.3.1 *Customs Union and Single Economic Area*

35. At present within the framework of formation of the Common Economic Space of the Republic of Belarus, the Republic of Kazakhstan and the Russian Federation, the Agreement on Common Principles and Rules of Competition was signed on 9 December 2010 (came into force 1 January 2012) , which provides tools of cooperation between the Parties of the Agreement by sending requests of information, requests and orders for carrying out of separate procedural actions, exchange of information, coordination of enforcement activities of the Parties, as well as law enforcement at the request of one of the Parties.

36. According to this Agreement, the Parties give each other any information on anticompetitive actions which they have if such information is relevant to the case or can form the basis for law enforcement activities of the other Parties. Though there were no precedents as yet, there exists the legal basis of the given format of the international cooperation allows to exchange the confidential information.

37. It is necessary to notice that that information and the documents given within the frameworks of cooperation which have confidential character, can be used exclusively with a purpose defined in the given Agreement, thus use and transfer to the third parties of the information for other purposes are possible only with the written approval of the authorized body of the Party which has provided information. Moreover each Party provides protection of the information, documents and other data, including the personal data given by authorized body of other Party.

38. At present the standard legal acts regulating such type of interaction are drafted.

3. Constraints for efficient information exchange

39. International cooperation in cartel investigation is not possible without exchange of information, in particular, confidential information requested in the course of investigation from economic entities of another state, between Competition Authorities of different jurisdictions, which is often a big problem not only for the Russian Antimonopoly Authorities, but also for competition authorities of a number of jurisdictions.

40. Restrictions on granting the information to competition authorities of other countries are stipulated by the FAS of Russia's duty of observance of requirements of the legislation of the Russian Federation on information protection.

4. Improvement of information exchange mechanism

41. At the present moment the FAS Russia participates in the several projects (the Project on information exchange within the frameworks of APEC Forum and the project on information exchange within the frameworks of the ICN Cartel Working Group, which purpose is to work out mechanisms of information exchange among competition authorities, including exchange of confidential information.

4.1 APEC

42. Within the frameworks of APEC the FAS Russia has developed the mechanism of information exchange and, in the long term, securing of closer cooperation of competition authorities of the APEC countries during investigation of the antimonopoly law infringements. For elaborating of the mechanism of information exchange the comparative analysis of legislative, technical and administrative possibilities of the APEC countries economies on information exchange during the application of the antimonopoly law was carried out.

43. This analysis was carried out by means of elaborating and sending to APEC economies of the questionnaire and by analyzing of the received answers. Further it is planned to make classification of the APEC countries economies in accordance with their potential readiness and exchange possibilities on exchanging of certain types of information, including on affairs of the antimonopoly law infringements.

44. The given classification will allow to generate the information interchange mechanism between relative APEC economies with closer characteristics.

4.2 ICN

45. Within the frameworks of the ICN Cartel Working Group the best practices are elaborated by the best experts, in particular, concerning hard cartels. Here also are elaborated methodical materials and the analysis of carried investigations is fulfilled.

46. All of this is much of use both by experienced antimonopoly authorities, and by rather young antimonopoly authorities of different countries.

5. Conclusion

47. Competitive authorities of many countries face necessity of expansion of the international interaction in investigation of infringements of the antimonopoly law, in particular in cartel investigations. According to the FAS Russia the following basic conditions is necessary to for competition authorities to expand practical interaction with foreign competitive departments presence to have:

- trust from competitive departments-partners;
- authority of department among the international competitive community, confirmed with practical activities;
- presence of corresponding legal base;
- maintenance of due degree of protection of confidentiality of the information given within the limits of interaction.