THE EXTRATERRITORIAL APPLICATION OF EUROPEAN COMPETITION LAW

A contribution to the study of EU Law in Russia

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A contribution to the study of EU Law in Russia

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Τούτῳ γάρ μοι δοκεῖ διαφέρειν ἀνὴρ φιλότιμος ἀνδρὸς φιλοκερδοῦς, τῷ ἐθέλειν ἐπαίνου καὶ τιμῆς ἕνεκα καὶ πονεῖν ὅπου δεῖ καὶ κινδυνεύειν καὶ αἰσχρῶν κερδῶν ἀπέχεσθαι.

XENOPHON, *Economics*

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Preface

Demetrius A. Floudas

I. OUTLINE

The need for a competition policy in a free market economy is to regulate the invisible hand of Adam Smith so as to promote the public good. If a monopoly has arisen because of efficiency and it is the lowest cost provider of the good or service then its continued existence may be justified on grounds of a rule of reason although per se a monopoly may be declared undesirable. If however a monopoly restricts entry and is inefficient then we need a competition policy and authority to restraint the monopoly to avoid the deadweight loss to society of the monopolist's continued activity in the economy.

The Russian Federation is one of the largest economies in the world, and it is therefore vitally important to ensure that competition persists in the Russian market. In theory, competition expels inefficient players from the market, helps remaining enterprises increase their efficiency and competitiveness, and, as a result, contributes to achieving economic growth. In practice, industries facing vigorous opposition on the domestic level are more successful than those protected by regulations.

But in today's world, with large multinational companies and increasingly internationalised actors, the notion that free competition can be protected simply by the application of the antimonopoly regulations of individual nations has become progressively more problematic. There exists no International Law regulating competition –legislating on the subject has long remained the privilege of states, although the European Community was the first to introduce a significant body of rules which applies on an international level. Hence, the issue of the *Extraterritorial Application of European Competition Law* becomes increasingly topical. And in a country like Russia, whose remarkable economic recovery has taken the world by surprise, and which is in the process of spawning enormous enterprises that will undoubtedly dominate the global economic arena in the coming decades, the study of *extraterritoriality* in applying antimonopoly rules is more relevant than ever.

As a consequence, the volume in your hand is divided into six chapters, each written by an individual contributor. A. Andrianopoulos undertakes the introductory part, which sets the scene by describing the most pertinent economic and political undercurrents which may influence Competition policy in the Russian federation. Chapter 2 introduces the basic tenets of applying antimonopoly regulations in foreign countries, as a theoretical grounding for the premise of extraterritoriality. The problem of applicable jurisdiction in particular, and the way that it has been tackled through the case-law of the European Court of Justice, is elaborated in the following, third, chapter. The specific problems concerning extraterritorial application of antimonopoly law in the case of export cartels and in the control of mergers are examined in two successive chapters by S. Ryan and V. Scordamaglia in the subsequent part of the book. The volume concludes with A. Sushkevich's comparative examination of the application of Competition Law on foreign companies from a particularly Russian perspective. The new Federal Law on Competition of the Russian Federation has been included in an Appendix, both for ease of reference to its English

translation by our Russian readers, as well as an attempt to make this essential text more widely familiar to the international scholar.

II. ACKNOWLEDGEMENTS

Many thanks to Dr Igor Artemyev, Head of FAS, for accepting to compose the Foreword to this compilation. His kind commentary is a solicitous accolade for the work of our team –not only in this published tome but throughout the whole project; and at the same time it serves as an eminently discernible testimony that the cooperation between the Competition Project and its Russian counterparts remained cordial, fruitful and rewarding throughout.

The Team, moreover, wish to express their appreciation to the Delegation of the European Commission in Moscow for their active backing of the Competition Project.

The preliminary concept of this collection is based on a working paper by Prof. Vincenzo Scordamaglia**.** We have all benefited from his considerate judgement and remain in admiration of his generous and gentlemanly demeanour. Special recognition is likewise due to Mrs. Galina Tsyganova for keeping us well looked-after, well-organised and sane through thick and thin.

This endeavour has benefited from the involvement of the Rev. Peter Prabhu, Vice-President, HHGLS, with his steadfast dedication to the common cause, and Prof. A. Karatza with Bogy, who hold the fort valiantly. In addition, the editor is grateful for comments received at various stages of the process from Dr Uwe Schönherr, of the German Foreign Ministry, Tatiana Khovrenko, FBDICMA, A. Teplitsky of PWC, Prof. M. Dent & Prof. V. Lissniak of ABLE, Moscow, and S. Solomakha, of the Russian Securities Institute; whereas Miss P. Kimbel of Queens' College, Cambridge, cross-checked certain translation matters and Mrs T. Svinarchuk, European Profiles, was invariably quick off the mark.

I gladly acknowledge the excellent relationship we maintained with Alexey Sushkevich of FAS, without whose benign authority, scholarly disposition and conspicuous integrity this project would have been so much more strenuous.

I remain heavily indebted to Stefanos Ioakeimides for his unwavering confidence in my person and his thoughtful and compassionate way of dealing with every eventuality. His commitment and diligence helped us ensure very successful results. I should also personally thank Andreas Andrianopoulos and Tasos Mantelis for their unfailing encouragement and for generously sharing with me their vast experience.

Finally, all credit is due to the individual contributors of this book, who believed in what we were doing and amiably committed their efforts.

Red Square, Autumnal Equinox 2007

List of contributors

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Since the early 90-s, Mr Artemyev took an active part in the politics of Leningrad, later on St. Petersburg. He has been elected member of the Leningrad Council and the Legislative Assembly numerous times.
In December 1999, he was elected Representative of the RF State Duma of the third convocation. During this convocation he acted as Vice Chairman in the «YABLOKO» fraction, and was Vice Chairman of the Committee for Credit Organizations and Financial Markets.

Demetrius A. Floudas is the Team Leader of the Moscow-based Approximation of Competition Rules Project. He has read law in Greece, Germany and Britain and has practiced as an Attorney in Athens. In addition, he has completed a broad scope of international consulting assignments in the private and public sectors, including projects in Eastern Europe, N. America, and Southeast Asia. In Russia, he previously worked as the Senior Legal Expert of Insurance Advisory Services II and as Team Leader of the Russian WTO Accession Project.
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Alexey Sushkevich is the Head of the Analytical Dept of Russian Federal antimonopoly service since 2004. He was educated at the Economic department of Moscow State University. For a long time he served as a research fellow of the Institute of the USA and Canada of Russian Academy of Sciences, there he defended his dissertation on problem issues of US – EC technological transfer. He participated in the elaboration of the number of Russian federal laws, the last drafts were "On the protection of competition" (federal law since 2006) and "Amendments to the Russian code of administrative punishments, setting fines for the violation of antimonopoly legislation" (federal law since 2007). Alexey Sushkevich is a visiting Professor at the State University – High School of Economics (Moscow), he regularly publishes articles on a broad range of issues, relating to competition policy.

Foreword

THE POLITICAL AND SOCIAL DIMENSIONS OF COMPETITION IN RUSSIA AND EUROPE

Igor Artemyev

We live in a world of change. To excel in this new and challenging environment we need to be able to compete. But one nation can never compete internationally if it is not able to establish firm rules of free competition within its own economy. Even companies that are established in one nation's market need to be able to compete within the rules of other markets when they operate internationally. Within the context of globalisation that fosters in free market environments companies must learn to compete freely and openly even if in their own countries operate in protected and more interventionist conditions. The jurisdiction of the competition authorities of foreign markets can now reach out and penalise companies even if they are established in countries where their monopolistic behaviour is tolerated.

It has been noted that state monopoly, state-owned enterprises and conglomerates tend to become inefficient because of irresponsible management and the lack of competition. No one takes risks if he can avoid it. Why should monopoly state enterprise managers innovate and experiment if they know that their business is sheltered by the state? Why should they take a risk and fail?

One might argue that domestic situations of each economy be taken into account in discussing whether they should be retained. It has been widely recognised, in particular, that state-owned enterprises are vital to build infrastructure such as transportation and communication network and public utility. In Russia, the State has traditionally played a leading role in building infrastructure because of its specific nature and the vast economic scales that are needed. However, due to the recent technological innovation and economic globalisation, it has become feasible, even imperative, to introduce competition in those areas as well.

It is also claimed that competition policy could lead to increased unemployment and endanger incumbent industries and enterprises, including regional small and medium-sized ones and that political and social context generated by competition policy cannot be ignored. Since competition policy expels inefficient enterprises from the market, bankruptcy and unemployment would most likely occur. Such costs of competition policy cannot be ignored in a political and social context. This is true not only in developing economies but also in developed economies. However, it should also be noted that anti-competitive practices, if overlooked, would raise prices, thereby impose excessive burdens on consumers and user industries and ultimately hamper the growth of national economic welfare.

A desirable approach to tackle undesirable social effects of competition policy would be to increase national economic welfare by actively implementing competition policy on the one hand and to

minimise its negative impact on the other, by creating new industries, promoting job mobility and providing relief measures for the unemployed as well as taking income reallocation policies to the extent permitted by social consensus. In doing so, the government should explain to the business circles and the general public to deepen their understanding on that competition policy would produce more economic advantage than disadvantage in the long run, and that the short-run costs of competition policy could be compensated by taking appropriate counter-measures without suspending competition policy.

The relationship also between competition policy and trade liberalisation is important. There is no doubt that an increasing number of players brought about by trade liberalisation reduce the room for anti-competitive practices in the market. In this sense, trade liberalisation complements competition policy. However, because successive trade liberalisation has diminished tariffs and other border measures, anti-competitive activities across national borders are increasing, and activities in foreign economies sometimes affect one's own market. Furthermore, it should be noted that non-tradable goods or tradable goods with high transportation costs would face no real competition with imports. And even the competition of tradable goods could be affected by existing government measures such as regulations, standards and license requirements. For these reasons, it is obviously not true the assertion that trade liberalisation can justify the moratorium on competition policy.

Russia has completed the transformation of a large number of basic economic and legal institutions, replacing many of them with completely new structures. The creation of a competition-based market economy has been articulated as a central goal of the restructuring process, with support for competition strongly expressed in the new Russian Constitution and Civil Code, as well as in the early creation of a competition law and competition authority.

In practice, the Russian Federal Antimonopoly Service (FAS) has faced a shifting policy environment that has not always supported the immediate creation of competition or the direct enforcement of competition law above other policy goals such as rapid privatisation, crisis recovery and the creation of internationally competitive structures. Despite this, it has made significant contributions to the creation of a competitive market environment both through enforcement and through participation in policy formation and legislative drafting efforts. These include the substantial reduction of direct barriers to the movement of goods and services within the country and a leading role in the creation of the basic legislative frameworks for consumer protection, advertising regulation and other tasks necessary to allow markets to function in a civilised manner.

The Russian competition authority has also played a central role in regulatory reform efforts directed at natural monopoly sectors. It has led the drafting effort for the initial law on natural monopolies, creating a narrow definition of natural monopoly and separating tariff regulation in those sectors from other, potentially competitive areas of activity. As current regulatory reforms move forward, FAS continues to play an active role in the process – proposing models for the restructured industries and supervising the conduct of their newly formed components to ensure non-discriminatory access for competitors.

In conclusion, it is clear that to achieve development, free competition is indispensable. For free competition to succeed companies must realise that the rules should be blind. And that they may extend beyond national borders. Extraterritoriality, as far as the implementation of competition rules is concerned, is now with us. And it has come to stay. Every Russian company competing in

the markets of the wide world must take into consideration not only the laws of the Russian Federation, but also the diverse regulations of our partners throughout the world. To promote the understanding and the increased familiarity of our lawmakers, experts, business leaders and opinion-makers with the regulations instituted by our European Partners, our colleagues from the 'Approximation of Competition Rules' project have published this book, which is now in your hands. It represents an excellent rendition of its subject-matter by some very respected and knowledgeable experts in the field, as well as a tangible result of the increasing trend of Russia's collaboration with our counterparts in Europe and throughout the world. We value and attach great importance to this partnership and we look forward to its fruitful continuation in the future.

Finally, it is not by accident that this book is subtitled "A Contribution to the Study of EU Law in Russia". As a timely intervention, this endeavour provides a much needed assessment by eminent researchers of how far we are moving towards the goal of internationally compatible competition legislation. This book has brought back into the limelight the strengthening ties of FAS as an integral aspect to its success. I believe it will be valued by both Russian and International scholars alike.

Chapter 1

COMPETITION, GROWTH AND THE PROSPECTS OF THE RUSSIAN ECONOMY

Andreas Andrianopoulos

I. INTRODUCTORY REMARKS

It is essential for any ambitious policy of economic growth to establish firm rules of free and unhindered competition in the workings of its markets. The full development of market forces and the realisation of all possible benefits of an open economy rely to a substantial extent upon the application of free competition practices. It is beyond ideological inflexibility and preconceived socio-economic dogma to assert that the benefit of consumers and the fulfilment of a viable and stable socioeconomic order can most certainly be achieved through the implementation of policies that encompass a really open and free competition regime.

The ultimate objective of all economic policies is the welfare of a country's citizens. And this can be realised only by means of guaranteeing popular satisfaction with the condition of the economy, with the transparency of the state' s (and, consequently, the taxpayers') finance, with hopeful prospects and expectations for a prosperous future.

Within the context of a modern economy, obliged to compete in an environment of an essentially globalised worldwide open market, there are several options to be followed for success to be ultimately attained. The economy has to be open. So that investment can flow in, new technologies attained, modern projects initiated and the market forces achieve a balanced level of activities. The private sector of the economy has to be enlarged thorough privatisation and the reduction of state monopolies. This policy enhances the possibilities of more vigorous economic action, expands the state' s finances by means of extending the available tax basis and opens more possibilities for new initiatives, innovation and modern entrepreneurial practices which add dynamism and tremendous potentiality to the furthering of growth and economic development. Productivity levels finally have to be raised, so that the country should be able to compete efficiently on the international economic arena at almost every level of financial endeavour. High productivity is the measure on the basis of which countries achieve satisfactory levels of growth and attain rapid rhythms of development.

To attain however high productivity levels it is more than essential for an economic regime to establish free and open competition practices. Any disruption of competition rules and any violation of its root concepts and characteristics undermine the smooth working of the market and diminish the prospects of high productivity results. It is therefore imperative that competition rules should be clear, all encompassing, universally within the context of a national economy of course - applicable and with as few as possible exceptions tolerated. And by means of exceptions an overtly open and sincere competition concept should consider all state policies that undermine

free marker procedures, offer protection to specific segments of the economy, allows for unwarranted state intrusions to the functions of the market and hinder unobstructed competition policies.

Henceforth, it is not surprising that the European Union has established rules that extend the application of competition obligations to companies that operate within the Union's market confines but have their ownership established on foreign soil. US enterprises for example are obliged to adhere to EU competition rules during their operations there. And face the economic consequences of any violation that they have exercised. Heavy fines may be imposed and the companies are obliged to pay if they wish to continue doing business within the Union's economic space.

Likewise, Russian companies are bound by European Union guidelines if they establish entrepreneurial operations there. The rules that apply to indigenous EU companies will inevitably be exercised to all foreign enterprises, irrespective of the established norms at their country of origin. Vertical integration of business activities will not easily be tolerated while monopolizing the supply of goods and dominating distribution markets will be heavily penalised. This is the way that the EU aims to expand the dynamism of its economy and adhere to a really free competition regime. It is widely believed that any obstacle to real competition may hinder the region's efforts for sustained economic growth.[1]

II. PRACTICES OF COMPETITION DISTORTION IN RUSSIA

Within the above described context there are many government activities in the Russian economy that directly or indirectly impede the full application of an absolutely free competition environment. And thus contribute to the development of economic dysfunctions, growth impediments and difficulties for really antagonistic trade and business practices to emerge and flourish. As a result the final pursuit of rapid growth, not boosted by high oil prices[2], remains illusive and unattainable and the society's ills and miseries are not banished nor radically curtailed.

It is customary under similar circumstances, i.e. when a limited share of economic activity is left to the market and there are serious obstacles to the application of genuine and free competition practices, the blame of the unsatisfactory end results to be attributes to the, so called, open economy. While it is exactly the obstacles imposed upon its functions by overt or covert state intervention procedures that contribute to the unwelcome outcome.

[1] Beck & Schularick, "Russia 2010: It's a Russian Bear, Not a Bull", *Deutsche Bank Research*, International Topics, March 2003.

[2] It is indicative that even First Deputy Prime Minister Dmitry Medvedev, in an interview published in *Moskovsky Komsomolets* in September 2006, suggested that oil prices, which are fuelling economic growth, would not always remain high. According to his remarks, it is also the view of expert economists that this growth can only be sustained through considerable investment in industry and infrastructure; which of course, under conditions of competition distortion, are not forthcoming.

To formulate therefore an efficient competition policy concept we should at first attempt to specify existing market dysfunctions that today hinder the process of growth and are holding the economy back from a rapid expansion. Then we should address a number of policy initiatives that impose problems upon a really free competition regime. And finally, we will proceed to recommend a number of policy initiatives that will most probably encourage the full and unobtrusive application of real competition rules in the economy.

Without getting into specific details there can be acute observations that locate problems and deficiencies that badly influence free competition. In the case of the Russian Federation many decades of strict central control of the economy and a heavy legacy of state planning and non-existent free market mechanisms had left a heavy burden of competition distortion practices. Overlooking the problems imposed by such realities renders it almost impossible for a truly free competition regime to be installed. The main areas where such distortions of competition are observed are almost all of them related to the functioning of the state. Taxation avoidance or granted exceptions , direct or indirect subsidisation, bureaucratic hustle, illegal imports, toleration of fake products, unfair procurement allocations and purposeful harassment by various state agencies are some of the most important cases that lead to serious competition distortion.

When the Kremlin decides to subsidise some public, semi-private and private firms and not their competitors, then it intervenes in the workings of the market and hampers competition. This usually happens on the justification of alleviating social problems which would endure if an enterprise – usually gigantic and dominating the economy of a region or a local community – is threatened with bankruptcy and closure. The spectre of local or regional unemployment forces government agencies to intervene and discover ways to salvage the firm. Smaller healthy firms however cannot under similar circumstances efficiently compete and survive under pure market terms.

This process of subsidisation can take various forms. It is not always necessary for public money to directly fill the coffers of the troubled enterprise. Not paying taxes without the consequences of direct state sanctions can be an indirect way of state financial support.[3]

Another means of assistance is the provision of electrical power by the local or regional electrical company – usually controlled by the Local Government body. And bartering (for purchase of raw materials or settling electrical, water and gas bills) by means of unjustifiably overvalued goods produced by the local firm, still in some (rare) cases comprises a way of keeping an essentially bankrupt enterprise in business. In a similar way competition is distorted when – usually – local and regional governments offer contracts to some enterprises and not to others. Competitors are driven out of the market and prices are formed in an unnatural way when costs are soaring and the state appears to believe that direct control of drilling and distributive activities will provide higher

[3] The case of the confrontation between Rosneft and Nenets governor Alexei Barinov, over the state-owned oil major's outright refusal to pay a 900 million ruble tax debt, is indicative of situations such as this. A similar instance is the abrupt reduction of Yuganskneftegaz's tax bill by a Moscow court in April 2006. Yuganskneftegaz is a production unit acquired by state owned Rosneft from troubled Yukos. The back taxes this company owed while belonging to Yukos were reaching 4.7 billion USD. This tax bill was reduced, according to a statement from Rosneft, by the Russian court to about $700,000 !

returns for the Russian economy than the ones envisaged from foreign investors now involved in the aforementioned projects (in Sakhalin-1 and Skahalin-2, predominantly). [4]

Likewise, it is to the detriment of free competition when bureaucratic hurdles are raised to prohibit firms from achieving their goals while making life easier for their competitors. There is an unfair advantage for businesses that are facilitated in their way around red tape while their competitors are struck down by bureaucratic inefficiency or purposeful feet dragging. There can never be a regime of genuine competition unless the rules of the game are the same for all entrants, corruption is cut to a minimum and regulations (inspections, permits, certificates) are limited to a level where bureaucratic involvement is minimal.

A serious issue of competition violation is the toleration of lots of various legal or semi-legal commercial outlets. By avoiding the taxman and by sometimes providing customers with counterfeit, fake or unlicensed products these semi-clandestine operators undermine the ability of well-organised and legitimate competitors to survive profitably in the market. It is impossible, for example, for a serious food chain to compete in a market where hundreds of street or borough vendors operate outside the tax collecting system, without product quality control or health provisions and free of import duty obligations. The same is true in cases of publication copyright infringements or intellectual property violations when legitimate competitors have to function under conditions of strict adherence to the law. In all these circumstances competition is violently disregarded undermining overall productivity and creating an inefficient and demand then few resources are able to move to the private sector while bottlenecks and shortages are created in the public sector. Moving half way from a centrally controlled command economy – through partial and hesitant reform – to a proper market economy usually produces economic dysfunctions and sometimes leads to the collapse of output dysfunctional market.

III. DE-POLITICISATION OF THE RUSSIAN ECONOMY

It is quite clear that all the above competition distortions are not related directly to the content and jurisdiction of the existing or under review competition legislation. They are merely by-products or end results of existing political and social conditions. It is inevitable however that one must take these conditions under consideration when discussing competition issues in the Russian Federation. Politics is an essential ingredient for the functioning of all legislative regimes as well as for the character shown by national markets. Politicisation of the Russian economy[5], for example, is a common feature in situations in which competition is distorted and markets operate under conditions of unfairness and burdensome state involvement. It is inevitable, i.e., that when public agencies set prices for the services rendered or products provided by state monopolies (or official prices between state firms) with little respect to market forces and consumer preferences few

[4] However, the Russian mastermind of the PSA concept, Mikhail Subbotin, who is currently the director of the CRP-Ekspertiza consulting company in Moscow, reiterated that similar arguments are at least absurd and contribute, in the final analysis, to "an unscrupulous approach to competition"; *Vedomosti* (reproduced in *The Moscow Times*, 25 Oct 2006).

[5] For a further analysis of the de-politicisation concept, see A. Shleifer, ***A Normal Country: Russia After Communism***, New York: Harvard University Press, 2005

resources move to the private sector. And when they do bottlenecks are created and shortages appear in the public sector. When the transition from a centrally controlled command economy to open markets is hesitant and half hearted the final result is usually dysfunction and collapse of output.

The essential problem is to devise ways in which politicians can no longer influence the economy and are able to impose practices that favour their constituencies over the health of the economy as a whole. One step to this direction is rapid and widespread privatisation. Limiting the role of the state in the owning of economic assets and playing a role in market behaviour makes it much more expensive for politicians to influence firms. Privatisation reduces the amount of inefficiency that firms accept to satisfy political desires but, nevertheless, it does not make by itself firms fully efficient.

By creating product market competition corporate governance is improved and political control is almost entirely diminished. When, for example, private firms continue to receive subsidies in exchange for sustaining employment they are pursuing political and not profit enhancing objectives. With product market competition de-politicisation evolves rapidly. When firms face efficient rivals they either have to become efficient themselves or face the prospect of bankruptcy. Because, to keep an inefficient private firm afloat by means of state subsidies is much more expensive than sustaining by means of state aids an inefficient monopoly that can waste large monopoly rents and assets before it begins to lose money heavily.

However, political notables realise that product market competition raises the cost of exerting influence in the economy and they directly or indirectly intervene to restrict competition by political action. The most common way of political intervention to restrict competition is through the justification of protecting national, and long established, firms from domestic and foreign competition. This extends frequently to bankruptcy procedures which become politicised leading to the "rehabilitation" of incompetent enterprises rather than being allowed to "go under".

Great strides towards the complete de-politicisation of the economy can be achieved by means of opening up the market to a genuine competition regime. This can be achieved by encouraging domestic competition at every level of economic activity and by opening up the economy to the winds of international trade.

IV. EXCESSIVE CONCENTRATION OF ECONOMIC STRENGTH UNDER THE STATE

Within the context of serious distortions to the competition policy pivotal role is played of course by any steps taken to enlarge the involvement of the state in controlling significant segments of the economy. De-politicisation cannot really be effected nor can state intervention in the market be minimised when huge business concerns fall back in the hands of the Kremlin. The state instead of being rolled back from getting involved in the economy there are signs that extends its implication in the market place. There are of course defensible political justifications for such political

initiatives: the restoration of the power of a crumbling state machine, the strengthening of a weakened public image and the re-concentration in the hands of the public sector of the control of the most important national resources.

Nevertheless, from the view point of enhancing productivity and achieving rapid rates of economic growth such policies do not contribute to the desired final goal. The exclusion of foreign involvement in segments of the Russian market, the maintenance of semi-private or public monopolies in vital sectors of the economy and the designing of entrepreneurial schemes that lead to the concentration under the control of the state of crucial heavy industries in the fields of energy, gas and metallurgy have serious negative effects. Such policies have the undesirable result to stifle competition, impair the flow of foreign investment and to undermine the future competitive efficiency of the concerned firms.

A. Gas

There are many cases that prove the above point. The giant monopoly gas company Gazprom has been suggested that may face serious shortages in its production output in the not so far future. According to the views of the executive director of the International Energy Agency, Gazprom may be unable to meet its supply commitments by the end of the decade because of a lack of investment. Based on the IEA data its leadership maintains that "in the coming years Gazprom will not have enough gas to supply even their existing customers and existing contracts". And this is because, "Gazprom is not investing enough".[6] Even Gazprom's own think tank NIIGazekonomika[7] has recently warned, in a study concluded at the end of 2005, that in a few years the volumes of gas consumed by Russia itself will so much multiply that deposits available for export will be minimal[8]. Gazprom's European clients will thus be forced to look to other energy sources, namely in Central Asia. For Russia, the study insists, the main problem will be a huge loss of needed foreign currency reserves. It is therefore imperative, the NIIgazekonomika study recommends, to encourage the exploration of new gas fields so that production will not stall.[9]

It is indicative that EU energy officials have urged the Russian government to break up Gazprom's gas export monopoly and to ratify the Energy Charter. If this happens, third party access to Russian gas export routes will be allowed and thus new investment will flow into the country while genuine competition will pertain in this field of business activity. However, the prospects for

[6] Former Russian deputy energy minister Vladimir Milov has also insisted that there exists inefficiency in the company which would lead Russia to be short of about 100 billion cubic meters of gas by 2010. The problem for Russia is that new projects such as the Shtokman field in the Arctic has been repeatedly delayed, Milov said, and Gazprom's policy to lock in extra supplies from Central Asia is impossible to cover the emerging gap. As a result, the maintenance of strict state monopoly over gas leads to reduced investment, inefficient productivity performance and, finally, to serious production drawbacks.

[7] Research Institute for the Economics of the Gas Industry.

8 Even at cabinet level there was a debate about Gazprom's ability to supply gas after 2011. See "Cabinet Disagrees on Gas Production", *The Moscow Times*, 5 Mar 2007.

[9] Equally disturbing is the fact that government officials admit that in the near future gas prices will increase without however any previous steps to be taken to prepare consumers for the emerging new reality. In October 2006 Industry and Energy Minister V. Khristenko said that natural gas prices in Russia will reach for industrial consumers European levels by 2015.

something like this happening are very dim.[10] Energy interests close to Russian President Vladimir Putin were pressing for the creation of a single, state-owned pipeline company, which would include both oil and gas pipelines and which would be under their control.[11] To add further validity to the above speculation, The Federal Energy Agency has proposed[12] an increase in state control over the Chevron-led oil pipeline from Kazakhstan to the Black Sea (CPC)[13] so that the state can get revenues from the project sooner.[14]

As a result of this climate of opinion it came as no surprise that the Russian President Vladimir Putin signed, a day almost after the 2006 meeting of the G8 in St. Petersburg where voices urging Russia to end Gazprom' monopoly over gas pipelines were raised, a law voted by the State Duma safeguarding the giant gas company's monopoly rights. It appears however that even Russian companies,[15] and not only competition practices[16] and sound economics, face problems with this latest stipulation.

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[10] Gazprom CEO Aleksei Miller told the World Gas Congress in Amsterdam that his company has no intention of ending its monopoly over Russia's pipeline system, as the EU has demanded; *Kommersant* 7 June 2007.

[11] . Analysts have suggested that the immediate goal could be the merger of Transneft with Transnefteprodukt, the state-owned oil-products pipeline company, and SG-Trans, the state-owned Liquid Natural Gas transport company, along with a 24 percent stake in the Caspian Pipeline Consortium, a private pipeline that transports oil from Kazakhstan to the Black Sea. The result would be a single state-owned pipeline company.

[12] Reported in *Kommersant* 19 Oct 2006.

[13] It is no coincidence that the Moscow prosecutor general has hitherto brought charges against CPC, for the purpose of revoking its license, while officials claim the pipeline should be a state monopoly. Cf. "Agency Suggests Making CPC a Monopoly", *The Moscow Times*, 20 Oct 2006 and "Prosecution as a Weapon against Foreign-Controlled Energy Projects", *Stratfor Report*, Dec 2006.

[14] Such a move would mean that the fees it charges oil firms using the pipeline would be set by the Federal Tariffs Service. Up to now the fees have been set by private shareholders, which also include BP, Royal Dutch Shell, LUKoil and Rosneft. Kommersant said if Russia were to declare the pipeline a monopoly, long litigation would follow, as CPC believes its agreement with Russia precludes such a move. Officials argue the agreement was never ratified by the parliament. So it appears that further difficulties loom in the future for another privately run energy project.

[15] Thus, in August 2007[t] it became known that energy majors (even state-owned ones!) petitioned in writing the Prime Minister to revoke the law and exempt from Gazprom's transport monopoly the gas produced in oil fields and is carried to markets in condensed form. It was quite a welcome surprise that among the companies addressing the PM (Lukoil, Rosneft, Surgutneftegas, TNK-BP, Russneft and Tatneft) was Gazprom's own oil subsidiary Gazprom Neft! The fact that the formal heads of all these companies signed the letter appears to signify that a change in the approved bill is quite likely.

[16] This particular event however brought into the forefront another issue of competition possible distortion. When Gazprom acquired oil conglomerate Sibneft the Russian Federal Anti-monopoly Authority (FAS) approved immediately, without any thorough investigation, the transaction -on the basis that it did not relate to the same market sector. However, it is well known that oil fields produce gas as well. It is questionable therefore to what extent, and if, Sibneft's acquisition by Gazprom had a considerable, and obviously overlooked, market effect.

B. Oil

Similar initiatives can be observed as far as oil is concerned. Despite its huge reserves and giant companies there have been serious disturbances in the Russian oil market.[17] Substantial mergers and acquisitions have taken place with the end result that the private sector has lost a substantial share of the market. Until 1996 the by-and-large state–owned oil corporations had halved Russia's oil output. This was due mainly to mismanagement, lack of market competition and aversity to risky investment initiatives. Shortly after important oil majors Lukoil and Surgut were privatised followed shortly with the transfer to private concerns of most other oil companies. In all, by 1999, 90% of the companies dealing with oil were in private hands. Production rose rapidly averaging to about 8.5 percent annually for the next five years while new technologies were introduced and foreign experts were employed to work on old oilfields and help exploit the new difficult plateaus.

After 2003 however the state started to expand its presence[18] and controlling interests in the energy sector.[19] The end result of such initiatives has been a fall in the overall production of oil. It was not only Yukos' output that naturally plummeted but also Sibneft had a drop in its production levels (some attribute this to the prolonged period of its sale procedures) while Rosneft failed to proceed with new investment in its main line of work, i.e. production of oil, because it spent major amounts of money in the acquisition of other companies. Similar concerns have surfaced about recent developments in the Sakhalin region.[20]

The prospects however of the - to a large extent state controlled - oil industry does not appear particularly rosy. It appears that the still private conglomerates, like Lukoil, Surgut and TNK-BP,[21]

[17] Rautava, "The role of oil prices and the real exchange rate in Russia's economy: a cointegration approach", *Journal of Comparative Economics*, Vol. 32, No. 2, pp. 315-327.

[18] . State owned oil company Rosneft, after initially acquiring the small oil company Severnaya Neft for the exorbitant sum of $600 million (it had been privatised for only $7 million a few years earlier), has acquired a 20% share of Gazprom's total ownership while it added to its portfolio the former Yukos crown jewel Yuganskneftegaz.

[19] Building upon its government connections Rosneft proceeded to acquire in the summer of 2006 operational control of TNK-BP's Udmurtneft subsidiary. The key to this deal is that Udmurtneft was purchased by the Chinese state oil firm Sinopec Corp. which then transferred control to Rosneft which has now its hands (even indirectly) on another 115,000 barrels per day of output. Likewise, Gazprom bought, with the acquiescence of the anti-monopoly authorities, as we described above, another large Siberian oil conglomerate, Sibneft. The sum it paid to Sibneft's major shareholder Roman Abramovich was $13 billion for his controlling stake.

[20] The Ministry of National Resources decided to restrict foreign access to the energy projects in the area, in the Sakhalin – 1 and Sakhalin – 2 energy consortia.

[21] Already in mid-2005 BP announced its first production decline at its key Russian oil and gas fields since its merger with Russia's TNK. Although BP blamed the harsh weather there were wider concerns about slowing growth in the Russian energy sector. Capacity in Russian pipelines is restricted and winter conditions necessarily limit tanker movements. Possible depletion of reserves was held responsible by experts for the year's production decline. To acquire more assets however TNK-BP has to overcome the government's reluctance to allow foreign companies to participate in auctions for acquisition of new acreage.

within this climate of insecurity opted to reduce production levels as well by lowering their investment in introducing new technologies and exploring new fields.[22] In short, with the withering away of oil major Yukos, the state controls now a significant chunk of Russia's oil production (there is also talk of state owned Rosneft to plan the purchase of still private oil company Surgut) while, through Gazprom, the can exercise full monopoly over the production and export of gas. And it is well recorder that both business fields face serious long term problems in their production capabilities and business efficiency.[23]

The lack of direct investment is the main cause. There are many unexplored oil deposits in the country. But they remain out of reach for producers and explorers. But there is inadequate investment in the geological exploration of new deposits. And it is quite evident that this is due to the limitations imposed upon the entry to the oil market of international investors as foreign oil companies and drilling firms. It is thus obvious that limits on competition have negative effects upon production and overall market efficiency.

C. Electricity

In the field of electricity a similar story unfolds. The fact that Russia has lots of generation plants does not mean that all this capacity is available to meet demand. Most Russian plants were built in the 1950s and 1960s. Many are worn out and, therefore, frequently out of service for repair or maintenance. On average, 10 percent of installed capacity is out of service at any one time. In some months, the figure can be much higher.

The existing park of generation plants was constructed in Soviet times to meet Soviet demand. Following the collapse of the Soviet Union, the shape of the Russian economy and the shape of Russian society have changed. Electricity demand patterns have changed -- but the location of the generation plants has not. The result is that there are now regions of capacity scarcity and regions of capacity excess, but the transmission infrastructure to correct these mismatches does not exist.

Because of the inability to stockpile electricity, it is not average demand that dictates how much generation capacity is needed, but peak demand. While average national demand in Russia has not yet recovered to the highs of Soviet times, peak demand has spiralled. While the government's most optimistic economic growth scenario produced a "high-growth" peak electricity demand

[22] . According to an analysis by the senior fellow at the Institute for International Economics Anders Aslund, "in 2005, the increase in oil output growth dropped to 2.7 %, with all of the growth coming from the three big private companies. This year, after four months output has risen by an annual rate of only 1.7%, and stagnation appears to be approaching".

[23] Igor Bashmakov, the executive director of the Russian Center for Energy Efficiency, was quite outspoken. He maintained that unless energy efficiency is increased Russia will stop exporting energy sources because the domestic market will absorb them all. The vice president of the Russian Gas Society, Oleg Zhilin, believes that only price liberalisation (i.e. competing market conditions for the formation of prices) will lead to a considerable decrease in gas consumption in Russia. Upon the same line of argument, the head of the Russian Union of Oil and Gas Producers, Yuri Shafranik, said that Russia by the end of last year had reached its maximum level of production. He insisted that Russia's oil production and subsequent exports will be inevitably limited by 2009. Oil production in Russia, said Shafranik, will continue to grow for another two to three years, then the volumes of production will stabilise at a certain level, and then will begin to fall.

figure of 150 gigawatts for 2009, peak demand had already climbed to over 150 gigawatts by January 2006…

With electric pumps used for traditional district heating systems and consumers buying more and more plug-in electric heaters as a backup, cold weather produces additional loads in electricity grids that were never foreseen by Soviet planners. The main culprit is below-cost electricity tariffs.[24] Successive governments have used their tariff-setting powers to provide cheap electricity to the national economy. The hidden subsidies have been funded by power sector companies, and it is no surprise that investment by these companies is negligible. *Since the business of electricity supply is loss-making, there is no cash to invest and -- at least from the long-suffering shareholders' point of view -- no reason to invest.*

There has been persistent opposition to any initiatives for sector reform. [25] Siberian smelters, for example, seemed to be under threat from the prospect that power sector reform would bring to an end the special arrangements under which the smelters paid some of the world's lowest prices for their electricity. This reaction, however, was overcome when Unified Energy Systems (UES) agreed that selected energy-intensive industries will be protected from the realities of market pricing by locking in cheap power with long-term power purchase agreements.

D. Metals and Raw Materials

The business landscape in the raw materials and natural resources sector of the Russian economy appears to touch upon a heavier state involvement and direct or indirect control. The government does not hide its intentions to bring under Moscow control most of the activities expressed in the exploration, discovery, manufacturing and trading of raw materials found in the Russian mining terrain. [26] No matter how grandiose the political considerations of such deals can be, from a purely economic efficiency point of view they appear rather disappointing.[27]

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[24] Government ministers have acknowledged by speaking frankly that holding down tariffs in the cause of containing inflation could actually damage economic growth by killing investment in an essential infrastructure sector. Addressing the Soviet legacy of mispriced energy now, said Finance Minister Alexei Kudrin, could Russia avoid a repetition of the 1998 financial crisis. Privatisation, however, and markets have not as yet taken hold in the electricity sector. Competition is not working and efficiency remains doubtful…

[25] Very recently the government appeared ready to proceed with reforms in the electricity sector. Regulated tariffs would be replaced by market pricing. UES would be broken up and replaced by a series of competitive companies whose running would be left entirely to private shareholders. Electricity prices would be freed, investors would get fair returns, and Russian consumers would get secure supplies of heat and light. Even on that level however there have already been some drawbacks. It has been decided that the government will increase its share in the grid company and the dispatching units to 75% plus one share. But instead of swapping assets with private investors in UES as it was initially suggested, the state is posed to buy additional shares in the grid and dispatching units which would lead to a massive subsidy for the electricity sector. And maintenance of government control, of course.

[26] On the one hand the government encourages the merger of pivotal Russian companies like steel giant Severstal with the Luxembourg based Arcelor. With the prospect within five years the Russian owners of the new company to be in total control of the combined metal mega enterprise the state aspires to indirectly influence one of the biggest steel manufacturers in the world. Almost simultaneously regional governor and business tycoon Roman Abramovich became known that he was prepared to purchase a controlling stake in the massive and largest Russian

Similar, however, as the above negative phenomena are observed in other areas[28] of natural resources business management.[29]

Positive signs, nevertheless, do still exist: as an example, the merger of RusAl and SUAL, to create the world's largest aluminium producer, would not be completed without scrutiny by the anti-monopoly authorities.[30] To the benefit of the Russian economy and the average consumer, of course.

E. Other Business Sectors

1) In *banking* there have also been substantial changes that ended up in strengthening also the role of the state. Essentially, a small number of state controlled banks, five in all, are appropriating most of their private sector antagonists. One can notice that apart of pure business tactics for the state – owned institutions to achieve their ends there have been smear campaigns, bank runs and accusations of money laundering. As a consequence, the banking sector is still by and large under

steel maker Evraz. A possible future aim of this deal would be the formation of a new Russian steel champion. This can happen if Evraz, strengthened by the capital induced by the Abramovich purchase, will proceed to merge with Magnitogorosk and Novolipetsk. These are the other two strong Russian steel companies. If this deal is concluded there will be a consolidation of the steel sector and Evraz, along with the combined powers of Arcelor and Severstal, will create a tremendous force in the steel industry with world wide implications. The Arcelor and Severstal deal finally was not concluded. Due mainly to shareholders reaction on the part of the Luxembourg .company. This of course does not nullify the intentions expressed and the long term strategies unfolded.

[27] Especially if speculation concerning the ultimate objective of the Evraz deal – to be sold, like Sibneft, along with the new mergers to the state – come to materialise. Competition considerations will obviously be overlooked while productivity and business efficiency will most probably decline.

[28] E.g. in uranium extraction nuclear fuel monopoly TVEL plans to issue new shares of the country's largest uranium miner, Priargunsk, and the Chepetsk uranium enrichment plant.

[29] The latest event observed in the natural resources sector of the economy is the decision by the head of the aluminium giant RusAl, Oleg Deripaska, to purchase a controlling stake and thus merge with the second Russian aluminium behemoth SUAL. In forming a new company in which RusAl, SUAL and the Swiss alumina commodity trader Glencore (which will also be acquired) will all participate with 64.5%, 21.5% and 14% respectively, then there will emerge a $30billion company. This will be, in the words of media reports, “the worlds’ leading caster of aluminium and the world’s second largest producer of alumina, the raw material from which the metal is made”. The deal, which was unofficially announced in 2007, warrants obviously close inspection by the anti-monopoly authorities. The kind of inspection however that aims to uphold competition principles and not to fall prey to visions of creating world national business champions.

[30] . "The process will not be a fast one," Igor Artemyev, Head of the Federal Anti-Monopoly Service, told reporters in late 2006. "An application will be examined in accordance with the new law." The new law on the protection of competition, which extends the watchdog's powers and sets tougher anti-monopoly regulation rules, became effective on October 20, 2006. And it appears that the anti-monopoly authority’s leadership is determined to apply its provisions at every direction.

the state's control[31] with the uninspiring result that "the ratio of the broad money supply to GDP is about 10 percentage points lower than in less-developed Ukraine, where private banks dominate and flourish".[32]

2) *Heavy machinery* companies, especially Uralmash, have done quite well, albeit the government intervened in this sector as well.[33]

3) The automotive sector in Russia could have been the most successful business field in the country. Higher incomes warrant more or less the purchase of new private vehicles. Unfortunately, in Russia this is not happening. Mainly, because there has not been any new major investment in the filed and no foreign companies have been encouraged to enter the market either independently or in cohort with Russian enterprises. There have been publicised intentions but it appears that all plans have been thwarted either by common bureaucratic hurdles or because the presence of powerful private companies in this business sector was not welcome. On the contrary, Rosoboronexport, a state-owned major arms manufacturer and trader, took control last year of AvtoVAZ, the country's largest carmaker (the car LADA).[34] Again the state expands in business sectors best left in private hands if competition, efficiency and high economic returns are anticipated.

4) The Russian *aircraft industry* is also a field in relative trouble. There have been up to now a number of small private enterprises managing to survive under difficult odds and an all suspecting and doubtful about their intentions state bureaucracy. Finally, the state decided to make its move. A big merger will take place placing all independent private companies (in Ulyanovsk, Voronezh, Samara, Komsomolsk-on-Amur, Kazan) under the auspices – and ownership of course – of the main and immense state–owned AiRUnion corporation (to be called United Aircraft Building Company). The fate of all the hitherto private companies remains doubtful since the state bureaucracy will flood the field with public funds (the initial estimation of starting funds reaches $1 billion) to support the ailing and by and large inefficient smaller public corporations.

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[31] Tompson, "Banking Reform in Russia: Problems and Prospects", *OECD Economics Department Working Papers*, No. 410, 2004. But *contra*, Prabhu & Floudas, *The Russian Banking Sector*, ICC: Ottawa, 2004.

[32] Lane (ed.), ***R**ussian Banking: Evolution, Problems and Prospects*, Cheltenham: Elgar, 2002.

[33] In 2006 and without any explanation that pertains to reasons related to economics, Uralmash's mother company, OMZ, was sold to Gazprom. And a relatively efficient not state – owned private company, Siloviye Mashiny, was similarly sold to government controlled Unified Energy Systems. Without having the slightest relations with the latter's main business activities and objectives.

[34] For this endeavour to have any chance of success the government will have to infuse large amounts of subsidies to the auto making company. Although during the August 2006 Auto show in Moscow the Avto VAZ head Vladimir Artyakov retraced his previous statements, about the need of heavy public subsidies, and stressed that there will be now no need for state help, he did not explain where the "absolutely needed help" will come from. These movements that involve the flow of state funds to the industry undoubtedly create problems. Because they imperil competition and prohibit this business sector from any chance of healthy, and independent from the state, economic growth. Rosoboronexport is allegedly negotiating the acquisition now of a majority stake in VSMPO-Avisma, the world's largest titanium maker, and St. Petersburg's two military shipyards

It is quite apparent that all these initiatives do not aim at the strengthening of the economy. They are rather related to efforts of central control of major sectors of the economy. They impede however heavily competition practices and undermine efforts to raise productivity in the economy as a whole. It is not therefore a matter of legalistic adherence to the wording of certain documents. The issue is primarily related to actual political initiatives and the pursuit of objectives that have as their target the overall functioning of the economy. A competition policy project cannot overlook these realities. They constitute the essence of the functioning of the market. And they characterise the future prospects of the economy of the Russian Federation.

V. CONCLUDING REFLECTIONS

It goes without saying that the Russian government aims to control a major chunk of the natural resources business sector. And by means of the power thus acquired it may spread the state's influence to other sectors of the economy as well.[35] The three main categories of strategic industries that the government has shown a strong interest to participate in and, if possible, to control are high-profit natural resources; key infrastructure such as banks, pipelines, and electricity generation; and sectors of perceived strategic advantage, such as nuclear power, technology and aviation.

The state's increasingly assertive control over the perceived most important 'strategic sectors' -- the natural resources sector foremost among them, but also metals, automotive, aviation and other industries -- has rattled foreign investors and unsettled the prospect of an open free market regime. Many observers insist that state control brings inefficiency and corruption. It is beyond doubt that enhances difficulties in product output, bureaucratic and risk aversion management and fundamentally undermines competition.

One can observe that the planned industrial policy of the government relates directly to the exploitation of energy funds to putting together strategic industries. The overall aim is to put together financial and administrative resources to support economic growth.[36] It seems that the government is persuaded that effectiveness or strategy is set by the state and efficiency is up to private companies and the market to figure out. The stable development of the Russian economy in the coming years it is thus presumed that needs to be based on the planned growth of its component parts, including above all mineral resources. But events do not unfold usually in this optimistically perceived way. The objective allegedly pursued by the state is without doubt righteous. The final result however is almost never positive.

[35] Gazprom portrays the hazards of such a perspective. As it stands now, the giant gas company -including its subsidiaries- has 38 % of its assets outside the energy sector, including holdings in construction, banking, media, agriculture and other sectors. In the media field only Gazprom has $700 million worth of assets. Even the recent sale of the successful economic newspaper Kommersant to tycoon Alisher Usmanov, who is a senior manager of Gazprom and works closely on various serious projects with the company, some observers believe that it will end up in the gas giant's embrace.

[36] Beck *et al*, *Long-Term Growth Prospects in the Russian Economy*, Frankfurt a. M.: European Central Bank, 2007.

The pursuit and final implementation of a fairly functioning competition regime is a basic means for achieving business efficiency, high competitiveness for the economy and rapid rates of growth. This objective however is seriously burdened by the policies that were above exhibited. A competition policy concept therefore, above and beyond the legislative framework of the government apparatus, should take seriously under consideration the promotion of alternatives that remedy the existing dysfunctions. The removal of competition distortion practices, the promotion of policies that de-politicise the economy and finally a sincere effort to cut back in the state' s attempts to control major shares of the natural resources business sector are primarily the objectives for the establishment of a really free competition economic environment.

In brief, one can observe the following: Russia is a large and proud country. Russia is also on the road of becoming an imposing actor in the world economy. Its huge supply of raw materials and its enormous energy deposits offers Russia a pivotal role in international economics and financial markets. Its rate of growth is already one of the fastest in the world. Its economic potential is widely recognised but it nevertheless carries with it some serious drawbacks. Russia dominates some of the most crucial global commodity markets. But it fails to impress the world's consuming public. Because Russia's products cannot yet be found in supermarket shelves. Neither do they dominate the most popular electronics markets and the entertainment and communications industries.

Russia is rich in natural resources. And she relies in gigantic mergers of raw material industries or behemoth natural monopolies to control its national market and direct – target its exports. The impact the country's economy has upon the international scene is thus undisputed. The long term effects however of such an unhindered by vigorous internal competition and deep privatisation processes are, to say the least, questionable.

There is no doubt that infrastructure industries and services are crucial for generating economic growth, alleviating poverty, and increasing international competitiveness. Reliable electricity saves businesses and consumers from having to invest in expensive backup systems, or more costly alternatives. Widely available and affordable telecommunications and transportation services can foster grassroots entrepreneurship, and thus are critical to generating employment, and advancing economic development. In most transition economies, however, private participation in infrastructure, and restructuring have been driven by the high costs, and poor performance of state-owned network utilities. Under state ownership, services are usually under-priced, and making therefore extremely difficult their expansion.

The essential danger of a continuous state control of major chunks of the economy is an inability to outperform international competitors, an executives' aversion to take risks and a dysfunctional system of enterprise adaptability to developing technologies and management techniques. Similar concerns relate to the unopposed realisation of mergers and the formation of huge business blocks in the natural resources sector. The lack of competition prohibits the emergence of new business actors in the field, sustains consumer prices high or renders the whole business sector as uneconomic and probably leads to the unorthodox dilapidation of valuable and non replaceable natural resources.

Although privatisation, competitive restructuring, and regulatory reforms improve infrastructure performance, several issues must be considered and conditions met for these measures to achieve their public interest goals. First, reforms have to be undertaken to significantly improve

performance, leading to higher investment, productivity, and service coverage and quality. Second, effective regulation-including the setting of adequate tariff levels-is the most critical enabling condition for infrastructure reform. Regulation should clarify property rights, and assure private investors that their investments will not be subject to regulatory opportunism. Third, for privatisation to generate widely shared social benefits, infrastructure industries must be thoroughly restructured and able to sustain competition. Thus, restructuring to introduce competition should be done before privatisation, and regulation should be in place to assure potential buyers of both competitive, and monopoly elements.

Competition is an essential ingredient for the implementation of a sustainable process of economic expansion and development. Notwithstanding other public policy goals and priorities the lack of competition may endanger the rise of productivity and the international competitiveness of a nation's economy. Thankfully, the Russian competition watchdog, FAS, has done considerable leaps forward towards establishing a vigorous competition regime. It appears that as far as the retail market is concerned the efforts of the Russian competition authorities are bearing fruit. Foreign investment is flowing to the country, new entrepreneurial projects are initiated and tax evasion and street market outlets are being controlled. The country's laws are being fine tuned to adhere to international and European Union standards. What remains to be decisively tackled is the issue of competition violating mergers and the breaking up of established monopolies in the energy and metals industry sector.

The Russian consumer product industry has to find its own stable footing. It is important that lays out a line of products with great export potential. For this achievement to materialise competition has to be thorough and penetration achieved at every level of the Russian economy. The foundations have already been laid. The necessary legislation is in place. It remains for the authorities to implement it without exception and with a strict adherence to clearly defined principles and guidelines.

Chapter 2

THE APPLICATION FRAMEWORK OF EUROPEAN COMPETITION PROVISIONS

Demetrius A. Floudas

I. PRELIMINARY

Community competition law is undergoing a profound transition, after moving beyond the initial goals of opening markets and establishing a competition culture to become a mature, comprehensive enforcement structure centred on the European Commission.[37] The substantive principles that the Community institutions developed have now become a common legal framework shared with the national laws of the Member States.[38]

The competition law of the European Union responded to Europe's mid-century economic conditions. Its development, driven by the imperative of market integration, profited from the symbiosis between the protection of competition and the promotion of open trade. Decisions of the European Court of Justice (EUJ), pursuing the goals of strengthening the community and eliminating trade barriers, established the legal framework underpinning an ambitious Community competition policy. The European Commission's Competition Directorate (DG Comp, formerly DGIV) is in a nearly unique position in the European Community system, because in the area of competition policy the Commission can apply direct enforcement power that is not dependent on national governments.

With the internationalization of business and the advent of a global trading environment, one of the basic problems arising has been the modality of applying competition law to entities that (under traditional international or private law) are deemed to be 'foreign', whether that would refer to their ownership, headquarters, or main activities. On the other hand, it may be possible to acknowledge the right to control economic activity as a component essential to the sovereignty of a state[39] (or a multi-state legal order as the EU). Hence, it should be achievable for that state to enforce the prescriptions of its own competition legislation against foreign business in respect of their conduct within its territory. The issue may become much more

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[37] Cf. *inter alia*, Wise, Competition Law and Policy in the European Union, OECD, 2005, p. 8 ff.

[38] Articles 81 and 82 of the EC Treaty outlaw anti-competitive agreements and abuses of dominant market position when they may affect trade between Member States. They are enforced by the European Commission, which has powers to investigate infringements, and can impose fines of up to 10% of worldwide turnover on firms that break the law. Firms can appeal against Commission decisions in the European Courts. The European Commission also considers large merger cases, assessing whether mergers between companies with turnovers above certain defined thresholds would create or strengthen a dominant position which would significantly impede effective competition. Member States have a formal role in the process, but the final decision is for the Commission alone. As with cases under Articles 81 and 82, the Commission's decisions may be appealed to the European Courts.

[39] Lowe, "The Problems Of Extraterritorial Jurisdiction: Economic Sovereignty And The Search For a Solution", (1985) 34 *International and Comparative Law Quarterly*, 724.

complicated however if the state is attempting to impose its regulations so as to oblige such foreign entities to act in a manner at variance with the laws or policies of the jurisdiction where they originate.[40]

In theory, there are four broad approaches[41] to the problems of competition extraterritorial jurisdiction[42]: consultation, unilateral restraint, agreed allocations of extraterritorial competence and harmonisation of competition laws. It is this last solution is currently being implemented in what regards the Competition policy of the European Union and the Russian Federation.

II. THE LIMITS OF APPLYING EUROPEAN COMPETITION LAW

A. Delimitation between EU and Member-State Competition Legislation

An important question concerns the relationship between domestic competition rules and Community competition law.[43] How is the general dilemma of the dual application of domestic and Community competition rules resolved?

The EC Treaty establishes an independent legal order capable of affecting Member States governments and of conferring rights on individuals in certain instances. The basic rule regarding the relationship between this new legal system and existing national laws is that of the supremacy of Community law. Directly applicable Community rules, such as Community competition law, take precedence over national law. This principle of supremacy of

[40] A prototype situation here is the *Siberian Pipeline case*, which is of course all the more germane to our Russia-related study, as it concerns the USSR: in 1982 the United States tried to use its Export Administration Act to prevent European companies from fulfilling contracts, lawfully made, for the supply of equipment to the USSR for use in the construction of the Euro-Siberian gas pipeline. . The criteria for extraterritorial application were i) the argument that goods are subject to the jurisdiction of their State of origin even after they have lawfully passed into the hands of foreign businesses abroad, and ii) the assertion that even foreign businesses, if they are owned by US citizens, are subject to the jurisdiction of USA. Unsurprisingly, there was vigorous and concerted response from the European countries, and from the European Community itself in August 1982. The protests concentrated on the retroactive effect and extraterritorial application of the United States measures, and the EEC national governments instructed the European companies to ignore the US controls and fulfil their contracts. Not only was there no conduct in America, but there was no direct effect on the US market resulting from the acts of the European companies. In the face of such opposition, the United States withdrew the most controversial of its "pipeline" sanctions in November 1982. See with further information, Ergec, *La competence extraterritoriale à la lumière du contentieux sur le gazoduc Euro-Sibérien,* Brussels: Editions de 1'Université, 1984. "The affair has all the prerequisites for immortality as a legal *cause célèbre:* high drama; great political significance, as Europe sought to define its position in relation to the super powers; and, chiefly, a clear and deep division of opinion over legal issues of fundamental importance" Lowe, Book Review of "La competence extraterritoriale à la lumière du contentieux sur le gazoduc Euro-Sibérien" in*:* (1985) 34*International and Comparative Law Quarterly,* p. 868.

[41] Lowe, "The Problems Of Extraterritorial Jurisdiction: Economic Sovereignty And The Search For a Solution", (1985) 34 *International and Comparative Law Quarterly*, 724.

[42] "Extraterritoriality pertains to the operation of laws upon persons, rights, or jural relations, existing beyond the limits of the enacting state or nation, but still amenable to its laws. The problem of extraterritorial jurisdiction arises when nations advance conflicting claims in an attempt to apply their own policies and laws to regulate extraterritorial conduct in a way which may undermine and conflict with the laws and policies of a foreign Government." Himelfarb, "The International Language of Convergence: Reviving Antitrust Dialogue Between the United States and the European Union with a Uniform Understanding of "Extraterritoriality*"* 17 *U. Pennsylvania J. International Economic L.* 909, 913.

[43] Rodger, Competition law and policy in the EC and UK, 2nd ed., London: Cavendish, 2004, p. 69-71.

Community law was established in Community law by the important Court judgments in *Van Gend en Loos* and *Costa v ENEL*[44]. The basic rule delimiting jurisdiction between national competition authorities and the European Commission was elaborated in the *Walt Wilhelm* case[45]. However, in practice, it may lead to a degree of uncertainty.[46] The Community rules in Arts 81 and 82 only apply when there is an effect on interstate trade as a result of the conduct. Otherwise, only national competition rules may be applicable to the potentially anti-competitive activity. The result is that there is a potential overlap between the applicability of national and Community anti-competition rules for the same sanctioned activity.

B. Delimitation between EU and Third-Country Competition Legislation

Are there limits to a State's or the EU's jurisdictional competence to apply its own competition rules to undertakings situated outside its territory? In this particular case there needs to be a distinction between legislative jurisdiction and enforcement jurisdiction.

a) Legislative jurisdiction

As to legislative jurisdiction it is generally accepted in public international law that a State has power to make laws affecting the conduct of people within its territory, whatever their nationality (territoriality principle), and of its citizens, including when they are acting outside the national boundaries (nationality principle). This affirmation can be easily extended to the EU [47]. The territoriality principle has been extended in the classic international law theory to cover the case where the act objectionable under a State's law finds its origin abroad, but is completed or implemented within its territory. [48]

The question which arises is: could this extended territoriality principle be applied to competition cases? If an anti-competitive agreement is concluded by undertakings outside of the jurisdiction of a State, but its effects are felt within that jurisdiction, could the competition law of that State be applied? A similar question could arise if the behaviour of a dominant

[44] Van Gend en Loos, Case 26/62 [1963] ECR 1; Costa v. ENEL, Case 6/64 [1964] ECR 585.

[45] Walt Wilhelm v Bundeskartellamt, Case 14/68 [1969] ECR 1. That case involved a company which was allegedly involved in a price fixing cartel in the aniline dyes industry. Parallel proceedings were commenced in Germany, under German law, and by the European Commission under the Community competition rules. The German Court made a reference under Art 234, asking the Court if the company could be subject to penalties under national rules in respect of the same conduct which could be penalised under Community law. The Court confirmed that this was possible but that in imposing the penalties the national authorities must bear in mind the penalties which may imposed by the Community authorities.

[46] As it appears in the letter of article 83, EU institutions received a very broad mandate to enact and enforce Competition Law, which proved crucial in subsequent developments. Starting from the first piece of legislation implementing articles 85 and 86, regulation 17 of 1962,16 the Council has enacted several regulations, some of which empowered the Commission to regulate in further detail EC Competition Law. As a result, the Commission not only has competence to directly apply the law - indeed, it is exclusively competent in the case of certain provisions.

[47] It might be questionable however whether the notion of "European citizenship", as defined in the EU Treaty. is sufficiently broad to give the EU the power of pursuing an EU-established company for anticompetitive conduct having taken place entirely outside the EU-territory.

[48] The most frequently quoted academic example is that of a gun fired across the national boundary hitting the victim at the other side of the boundary. One could also quote the case of a bomb concealed in an envelope sent by post from a foreign country and exploding only when the envelope is opened by the recipient.

position abroad would produce *effects* in a State where such behaviour could be qualified as abuse under the national competition law. And finally, could the implementation of a planned concentration between undertakings based abroad be made subject to a notification and clearance procedure by the competition authority of a State if the effects of such a concentration would affect competition within that State's market?

Extraterritoriality concerns the extent to which competition laws can be applied and enforced outside the specific territory of their competence.[49] Thus, can EU competition law be applied to a price-fixing agreement between the Russian mobile telephony companies, or could Community law be applied in respect of the Rosneft acquisition of Yuganskneftegas? The reason for the significance of extra-territoriality in competition law is the potential for effects on international trade, or another economic area, as a result of competition violations. This potential has increased in recent years due to enhanced globalisation of markets. For instance, there may be a production cartel based in Russia which artificially increases the supply price of a specific product to the EU, thereby affecting its economic interests. As a result, the European Union may decide to apply its competition laws to the participating companies and impose fines. This issue is controversial as it implies a breach of the territorial sovereignty of Russia. On the other hand, many systems of competition law, which are applicable to anti-competitive action which is harmful within a State or which affects its economy, make no provision for conduct which produces effects only outside the State's territory.

The EU has so far succeeded by bringing most of the cases it was confronted with under this extended territoriality notion or by using the "economic entity doctrine". But cases can arise which would not be caught by these notions and where only a full fledged "effects doctrine" would be successful. The European Court of Justice has not so far recognised, however, such a doctrine, notwithstanding that on a number of occasions the European Commission attempted to convince the Court of Justice that this might be the appropriate approach.

b) Enforcement jurisdiction

As regards enforcement jurisdiction, the doubts about the compatibility with international law of attempting to enforce a State's competition law in the territory of another State without the permission of that other State are even greater than in the case of legislative jurisdiction. This does not only apply to final injunctions, including financial sanctions or injunctions to divert a part of the assets, but also to intermediate acts, like serving the act informing the undertaking that proceedings are started, requesting information, launching an investigation enquiry or trying to enforce provisional or conservative measures. This can give rise to acute conflicts between States or between a third State and the EU, with the risk that asserting such a jurisdiction can remain largely theoretical if the measures enacted cannot eventually be enforced.

C. The US doctrine of effects and reactions

Before trying to set out in details the EU position on these issues, one should recall the US doctrine of effects, against which the EU position can be better understood.

Concerning the legislative jurisdiction the effects doctrine has been expressed more than 50

[49] Rodger, op. cit., p. 72.

years ago in a very wide formulation by the US courts. In the 1945 *Alcoa*[50] case the American judge said that it was "settled law that any State may impose liabilities even upon persons not within its allegiance for conduct outside its borders which has consequences within its borders which the State reprehends"[51]. This was confirmed in the *Hartford Fire Insurance* case in 1993 where the American judge stated that jurisdiction could be taken in the US over "foreign conduct that was meant to produce and did in fact produce some substantial effects in the United States".[52] The *Antitrust enforcement Guidelines for International Operations*, jointly issued by the Department of Justice and the Federal Trade Commission in 1995, give a number of examples interpreting the "effects doctrine" in the light of such and other similar cases.

The only restriction to this wide doctrine results from possible negative "comity" considerations, i.e. by the concern that the US interests could be jeopardised by the reaction of a foreign State offended by the US pretension to assert the effects doctrine upon its territory.

Concerning the enforcement jurisdiction the effects doctrine is also traditionally and vigorously applied by the US authorities against foreign companies. Information requests, orders to hand over documents kept abroad, final injunctions requiring changes in commercial practice are currently notified to foreign companies. Sometimes the recipients do not comply with such measures, either voluntarily or on instructions from their national authorities, in which case the measures cannot be enforced. The US authorities hold however in such cases the executives of the companies concerned liable of being sentenced to terms of imprisonment if apprehended within US territory and this represents a strong instrument of pressure for obtaining compliance with their measures.

One final important feature of the US "effects doctrine" is that it also applies when the efforts of US companies to enter a foreign market are obstructed by the anti-competitive behaviour of the domestic undertakings operating in that market. In this case the difficulties encountered by US exports in penetrating that market are considered "effects" which justify the intervention of the US competition authorities against the foreign undertakings.[53] The US made use of this

[50] United States v Aluminium Co of America (Alcoa) 148 F 2d 416 (1945), 2 Circ.

[51] The Court's opinion was rather rigorous in that it looked beyond 'numerical' effects. In spite of the overall increase in the imports to the country, it was held that "there is reason to suppose that [the defendants] expected that [the depressant they had applied to the market] would have some effect, which it could have only by lessening what would have otherwise been imported." Leaving the merits of the decision aside, it remains that from the beginning the effects doctrine has been regarded as a powerful means to prevent certain international law mechanisms from providing legal shelter to subjects that negatively affected competition within the US. In essence, *Alcoa* mandates the application of antitrust laws to conduct abroad and to foreign defendants as long as the conduct *was meant to* and *in fact produced* a negative effect on competitive conditions in the US. The core of this doctrine has never been seriously disputed in spite of the various defences that may find application on account of the nationality of the defendant, the place where the conduct takes place, the degree of involvement of foreign sovereigns or consideration of political soundness and opportunity.

[52] For facts of the case and further details, see Chapter 6, *infra*.

[53] Interestingly, a number of countries have passed blocking statutes to prevent the extraterritorial application of US antitrust law, in some instances as a direct response to the *Alcoa* decision. This demonstrates how the extra-territoriality issue relates clearly to political and nationalistic considerations, as happened for example with the introduction of the Protection of Trading Interests Act 1980 in Britain. This Act gives the Secretary of State powers to prohibit the compliance of UK firms with foreign laws and also with any requirement to submit information to foreign authorities beyond their territorial jurisdiction. This legislation is not limited to the possible extra-territorial enforcement of US antitrust laws but may be more broadly applicable in relation to possible harm to the commercial interests of the UK.

doctrine in the nineties in a commercial dispute with Japan,[54] which had as a result that Japan was led to strengthen the penalties for infringement of its competition law by national companies, thus recognising indirectly the legitimacy of the interests invoked by the US.[55],[56]

D. The extraterritorial application of Articles 81 and 82 EC

Let us consider the extraterritorial application of EU competition law to anticompetitive agreements and abuse of dominant position. One of the conditions under which Art. 81 or 82 EU can be applied is that the conduct concerned has an effect upon intra-Community trade. This is a condition which can obviously be fulfilled in the case of an agreement between undertakings or by the conduct of a dominant position which is headquartered outside European territory. A Russian and a Ukrainian firm can conclude a cartel whereby their products sold in the EU have a deliberate sharing of the internal market between them or they are implementing uniformly fixed prices. Similarly a Moscow-based company can have a dominant position within the EU for the supply of a given product and its behaviour in the internal market can result in an abuse.

Thus, the basis that Community Competition law may apply beyond the EU borders would be if there is an effect on interstate trade. Beyond this basic rule, it is unclear how this effect will be measured.[57] The alternative may be to consider anti-competitive conduct as attributable to the parent company in the case of subsidiaries effectively under its control. The application of this latter option has been criticised as ignoring the separate legal personality of the companies but it has been relied on by the Commission.[58] The different legal doctrines, according to which prohibited behaviour attributable to foreign entities, may be penalise pursuant to European Union Competition Law, will be examined in the following chapter.[59]

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[54] *United States v. Nippon Paper Industries Co;* see also in Chapter 6, *infra.*

[55] Griffin, "Jurisdiction and Enforcement: Foreign Governmental Reactions to U.S. Assertions of Extraterritorial Jurisdiction*"* 6 *George Mason Law Review*, 505.

[56] Although this is disputed: see *inter alia*, Kojima, *International Conflicts over the Extraterritorial Application of Competition Law in a Borderless Economy,* Weatherhead Centre for International Affairs: Harvard University, 2002; "Japan maintains the territorial principle and rejects the effects doctrine, stating that the effects doctrine cannot be regarded as an established rule of international law. In the view of the Government of Japan, the extraterritorial application of U.S. domestic laws (including U.S. antitrust laws) based on the effects doctrine is not allowed under general international law. In the Nippon Paper case, where a Japanese company was prosecuted under the Sherman Act, the Japanese government submitted a brief of amicus curiae where it stated, inter alia, that the extraterritorial application of the Sherman Act to a conduct of a Japanese company engaged in business in Japan is unlawful under international law. Nonetheless, the U.S. Supreme Court affirmed the Court of Appeal decision, which assumed the extraterritorial application of the Sherman Act to a criminal case for the first time."

[57] E.g. the ECJ case *Béguelin Import Co. v. GL Import-Export S.A*. 1971 E.C.R. 949, "the fact that one of the undertakings which are parties to the agreement is situated in a third Country does not prevent application of that provision since the agreement is operative on the territory of the Common Market"

[58] Eg, Case 7/73 *Commercial Solvents v Commission* [1974] ECR 223; [1974] 1 CMLR 309. More details in the following chapter.

[59] See also Friedberg "The Convergence of Law in an Era of Political Integration: The Wood Pulp Case and the Alcoa Effects Doctrine" 52 *University of Pittsburgh Law Review* 289.

Obviously, disputes can arise between different legal systems due to the controversial nature of the extra-territorial application and enforcement of competition laws.[60] A definite trend can be observed in the expanding scope of the extraterritorial application of competition laws in the European Union.[61] Among the member states, the competition laws of Germany, Austria, and Greece, for instance, have specific provisions incorporating extraterritoriality.

III. CONFLICTS AND COMITY

An international perspective on competition rules has been a feature of major competition authorities for a number of years, being determined by increasingly globalised and liberalised economic activity. There are now more commercial practices that have an international element. Such activities can lead to an increase in cross-border anti-competitive practices, for example, international abuses of a dominant position or cartels with international elements. Government practices can also distort competition.

In the case that the application framework of Competition Law of a particular State or other entity expands outside its borders, via the application of extraterritoriality, it is quite conceivable that certain problems will ensue.[62] The causes for international conflicts over extraterritorial application of competition law retain two aspects:[63] jurisdictional conflicts and conflicts over substantive law and policy. And they can be mitigated by the international law principle of comity.

A. Conflicts of Jurisdiction

First, are conflicts that stem from different positions over state jurisdiction or sovereignty under international law, which are classic causes of disputes concerning the extensive extraterritorial application of U.S. antitrust laws based on the effects doctrine. Although the gap with regard to the extraterritorial application of competition law between e.g. the United States and the EU have narrowed, there remain considerable differences. The European Commission is against the extraterritorial application of competition law to protect exporters' interests. Even when the position with regard to state jurisdiction or sovereignty is no different, problems may arise in the concurrent claims for exercising jurisdiction over the same case. For instance, to what extent should the competition law of a state where the alleged conduct took place be applied to another state's law where the anticompetitive effects occurred?

[60] For example, in the mid-1980s, litigation involving Laker Airways suing for breach of US antitrust law against certain UK based airline companies, involved sensitive considerations of the possibility of UK courts preventing the US courts from enforcing their antitrust laws against the UK. British Airways v Laker Airlines [1984] 3 All ER 39

[61] In the Sixth Report on Competition Policy in 1977 the Commission restated its view, concluding that the Community authorities "can act against restrictions of competition whose effects are felt within the territory under their jurisdiction, even if companies involved are locating and doing business outside the territory, and of foreign nationality, have no link with that territory, and are acting under an agreement governed by foreign law.

[62] Griffin, "Extraterritoriality in U.S. and E.U. Antitrust Enforcement", 67 *Antitrust Law Journal*, 159.

[63] Dodge, "Extraterritoriality and Conflict-of-Laws Theory: An Argument for Judicial Unilateralism" 39 *Harvard International Law Journal*, 101.

Jurisdictional criteria are always likely to bring about some controversy, in the case of Antitrust. Of course each country has a vivid interest in maintaining its national market free from concerted or unilateral practices that negatively affect competitive conditions. Output reductions, lack of innovation and higher consumer prices can obviously harm the economy. Equally, any jurisdiction has an interest in protecting national businesses both from competition from outside and from competition they are bound to meet in the transnational arena. It is obvious that closing the borders to imports and encouraging national firms to gain monopolistic benefits in other national markets would assist the growth significantly.

B. Conflicts of Substance

Second, conflicts may arise over differences with respect to substantive law and policy in the field of competition, unlike in the criminal field where little substantive difference exists concerning law and policy. For instance, in competition law, certain conducts are lawful in one state while the same conduct can be unlawful in another state. In most jurisdictions, certain categories of conduct, such as export cartels, are exempted from the application of competition law. In the case of multi-jurisdictional merger.

Interestingly, the position of EU institutions on the issue of substantive law conflicts appears to be that international comity only matters in the event of an

objective conflict between two legislative measures. The main criterion whether one or more firms *must* abide by two conflicting bodies of rules. To the extent that they are required by law to behave in a certain way which causes a violation of EC Competition Law, the following violations will be excused.[64]

C. Comity

Comity is a term in international law signifying a reciprocal courtesy or mutual respect, which one member of the family of nations owes others in considering the effect of its official acts.[65] It contains two distinct aspects, "negative" and "positive" comity. According to negative comity, a country should notify other countries when its enforcement proceedings may affect their important interests, and give full and sympathetic consideration to ways of fulfilling its enforcement needs without harming those interests. As for positive comity, it is the principle of voluntary cooperation[66] in competition law enforcement involving a request from one country that another

[64] Thus in the *Woodpulp* case: "There is no need to inquire into the existence in international law of such a rule since it suffices to observe that the conditions for its application are in any event not satisfied. There is not, in this case, any contradiction between the conduct required by the United States and that required by the Community since the Webb Pomerene Act merely exempts the conclusion of export cartels from the application of United States anti-trust laws but does not require such cartels to be concluded." See commentary Lange & Sandage "The Wood Pulp Decision and Its Implications for the Scope of EC Competition Law" 26 Common Market Law Review, 136.

[65] "Comity in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and goodwill, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience and to the rights of its own citizens or of other persons who are under the protection of its laws..."; *Morguard Investments Ltd. v. DeSavoye* (1990) 3 S.C.R. 1077.

[66] Comity is the name given to the general principle that encourages the recognition in one country of the judicial acts of another. Its basis is not simply respect for other nations, but convenience and necessity, recognizing the need to facilitate inter-jurisdictional transactions; Connaught Laboratories Ltd. v. Medeva Pharma. Ltd, (2000) 4 C.P.R. (4th) 508.

country initiate or expand enforcement activities in order to remedy anti-competitive conduct going on in its territory that substantially and adversely affects the first country's interests. In 1991 the US and the EU signed an agreement[67] to increase co-operation. This agreement was reviewed in 1998,[68] and went a long way in strengthening the ties between the Commission and the US.[69]

[67] 30 I.L.M. 1491 (1991).

[68] Under the agreement, the requesting government or party relies on its counterpart to take action under its own laws, consulting frequently in the process. A positive comity referral will lead to efficient enforcement as each side deals with conduct occurring primarily in its own territory, and should help to resolve disputes over access to foreign markets. Under the 1998 agreement a requesting party will normally defer or suspend enforcement activities in favour of positive comity where anticompetitive conduct occurs in a foreign country but does not directly harm the requesting country's consumers. In cases where the anticompetitive conduct does harm the requesting country's consumers, the requesting country will still defer or suspend enforcement activities when the conduct occurs principally in and is directed principally towards the other party's territory. This presumption assumes that the requested party will investigate and take appropriate remedial measures in conformity with its own laws. In conducting its investigation, the requested party would also report back to the requesting party on the status of the investigation, notify any changes in enforcement intentions, and comply with any reasonable suggestions of the requesting party. Not withstanding the presumption, the agreement contemplates that the parties may pursue separate and parallel enforcement activities where anticompetitive conduct, such as international price fixing cartels, affects both territories and justifies the imposition of penalties within both jurisdictions. Refer to Griffin, "EC/US Antitrust Cooperation Agreement: Impact on Transnational Business" 24 *Law & Policy of International Business,* 1051.

[69] The new positive comity agreement provides that a requesting party authority 'will normally' defer or suspend its own activities in favour of the other in certain circumstances. This is intended to strengthen the Commission's hand in bilateral relations. The agreement also clarifies the circumstances in which one party can ask the other to act against anti-competitive behaviour. Certain areas fall outside the agreement's scope, for example, mergers and takeovers.

Chapter 3

THE PROBLEMS OF APPLICABLE JURISDICTION AND ITS SOLUTIONS -PRINCIPLES AND ECJ CASES-

Vincenzo Scordamaglia

I. INTRODUCTORY

A problem which arises more and more frequently in the practice of the competition authorities, is how to apply the competition rules to undertakings established outside the territory of the EU or the Member State concerned.

Generally speaking competition rules are legislative measures of public law, setting the framework and the limits within which the freedom of the undertakings to operate on the market must be contained in order to ensure that competition, which is a dynamic process, does not evolve under the exclusive influence of market forces toward a situation where the very existence of competition would be jeopardised. There are certainly divergent views as to the extent of the regulatory impact of the competition rules. In the US the focus is on market performance and the government's role in correcting economic deficiencies resulting from unregulated capitalism remains embedded in a concept of pragmatic *laissez-faire* liberalism. In the EU the concept of a strong protection of economic liberties and freedom of trade has found its expression in the principle of non discrimination and in the competition rules which, in the EC Treaty, have what we could call a constitutional value. But in both cases the US and EC competition rules have been introduced initially having mainly in mind the safeguard of their respective internal markets against unacceptable conducts by actors operating within those markets. This is particularly evident in the EC where one of the most frequent justifications for the decision to prohibit an anticompetitive agreement used to be that it created obstacles to the integration of the national markets into the European internal market.

The evolution of the markets toward a global economy has shown however that a competition policy approach centred exclusively on remedying the difficulties caused to a market by its internal actors has become insufficient. Acts performed by undertakings based abroad often extend their effects beyond the national boundaries, particularly when the products or services concerned have a relevant geographical market which tends in some cases to become world-wide. The need to protect the market against such effects is largely felt, but the national or regional nature of the legal instruments used, the competition laws, raises problems as to their ability to face this challenge. This chapter tries to analyse to which extent an extraterritorial application of the EC rules has succeeded in facing this challenge and what are the limits of this success.

This chapter will deal with two alternative means of solving this problem which will probably represent the instruments of the future. One way of tackling the issue of the effects on competition in a global economy would be to develop agreed competition rules at world level within the framework of an international organisation (the WTO would be the obvious candidate). The other way round would be to reinforce a process which has already started of bilateral cooperation agreements between important competition authorities: this would in

many cases, particularly if accompanied by commitments of "positive comity", solve difficulties that the unilateral extraterritorial application of competition law remains unable to solve.

II. THE BASICS

Competition laws belong to public law. Like administrative law, fiscal law, criminal law, they impose or prohibit certain conducts in the public interest. It was seen in the previous chapter that states may apply either the nationality or the territoriality principle. Measures based on the territoriality principle are generally of universal application within the relevant territory; the State enjoys a greater discretion to decide if, to which categories of persons and under which circumstances measures based on the nationality principle should apply to its citizens found outside the national territory, but from a public international law point of view such a legislative jurisdiction is uncontested.

It has become normal practice to speak about the EC territory and this notion may be found also in the EC Treaty[70]. As however the European citizenship is automatically linked to the nationality of any of the Member States, even without making use of this notion, the EC would have the jurisdictional power to apply its competition rules to individual and legal persons having the nationality of any Member State also when they happen to be or to operate outside the EC territory.

It is clearly impossible to answer these questions by a simple yes or no. In public international law the principles are the result of legislative and case law developments which eventually become acceptable by the vast majority of nations. It is difficult to say that such a development has already taken place as far as this extended territoriality principle would apply to competition rules. Failing a general consensus on a standard concerning the importance of the effects which would justify the application of the competition rules to the author of the objectionable act outside the boundaries of the State, the latter has to be very cautious in applying such a principle.[71] Its own undertakings may become the target of similar actions originating in other States and the way in which that State has operated that principle could be invoked against them and make the defence of national interests more difficult.

We are going to see in detail how the European Court of Justice (ECJ) has operated with both of them. It is, however clear that these principles cannot cover all the possible cases where an extraterritorial application of EC competition law may be felt useful. A recent development in the sector of merger control seems to open the way toward a broader application of an "effects-based doctrine", but it is yet too early to draw definitive conclusions from a so far isolated case law by the Court of First Instance (CFI) [72]. It must also be stressed that, if the ECJ has been extremely cautious with respect to a full fledged "*effects doctrine*", the European Commission and some Advocates General within the ECJ have at different occasions boldly invoked full acceptance of such a doctrine.

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[70] See Articles 17 to 22 EC, although –as it was explained in the previous chapter- it is inconclusive whether the nationality principle could be attached to the EC notion of "European citizenship", as the rights and duties linked to it are defined in the EC Treaty.

[71] Rojas-López, "The (R)Evolution of International Law: Rights and Obligations for all", (2005) 39 *CREIFUN Review*, 369.

[72] See Chapter 5. *infra*.

The "economic entity doctrine" is an instrument which allows not considering as anticompetitive the internal agreements concluded between undertakings which belong to a single economic unit, like a parent company and its subsidiaries or the principal and the agent. But the "economic entity doctrine" can be a double-edged argument. It can also be used in order to impute the responsibility of an infringement of the competition rules to the parent for an act of the subsidiary if it can be shown that the subsidiary does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company.

III. THE CASES

A. *Dyestuffs*

This doctrine was first used as a tool to ensure extraterritorial application of Article 81 EC in the famous *Dyestuff* cases [73], one of the landmark decisions on competition by the ECJ going back to 1972 and throwing light on the notion of concerted practice. Three of the various pharmaceutical undertakings found guilty by the Commission of participating in an illegal price fixing agreement within the EC were not based within the EC. The agreement in their case was carried out through subsidiary companies established within the EC.[74] The ECJ upheld the Commission view that the fact that the subsidiaries had separate legal personality from the parent companies did not take away from the parents their direct responsibility for the infringement of the EC competition rules, as "*the increases* [of prices] *at issue were put into effect within the common market and concerned competition between producers operating within it*".It was correct for the Commission to impute the conduct of the subsidiary to the parent company as "*unity of conduct on the market as between a parent company and its subsidiaries overrides the formal separation between those companies resulting from their separate legal personality*."

The "economic entity doctrine", which is of general application in the EC competition law,[75] has since been applied many times in situations where the responsibility of a foreign undertaking

73 Cases 48/69 etc. *ICI v. Commission* [1972] ECR 619.

[74] Within the framework of the case the European Commission uncovered a classic cartel agreement between several aniline dye sellers who fixed prices within the EC. One of the cartel participants, ICI, was located in a country that was not a Member State, but it implemented the cartel agreement by giving instructions to its subsidiary situated within the EC. The Commission decided that 'The competition rules of the Treaty are, consequently, applicable to all restrictions of competition which produce within the Common Market effects set out in Article 85 (1). There is therefore no need to examine whether the undertakings which are the cause of these restrictions of competition have their seat within or outside the Community [in order to justify responsibility]". ICI attempted to appeal against the Commission decision insisting on the wrong application of Article 81 of the EC Treaty to the foreign company by the Commission. It is indicative that defending its position the European Commission did not use the 'effects doctrine' but explained that "though subsidiaries which are located within the Community have separate legal personality, in reality they have just executed instructions of their parent companies [… and] thus they were no more than the ICI continuation on the territory of the common market". The ECJ supported the Commission's position and it was the first time when the Court of Justice openly applied the 'economic entity doctrine' to justify the application of the European legislation on protection of competition against a foreign company.

[75] Whilst the "economic entity doctrine", favours defendants in that it can exempt from liability in the merits the conduct of two or more undertakings belonging to the same group, as proposed by the Court it also proved to be a means to essentially pierce the corporate veil. In fact because the Court reasoned that the actions of the subsidiaries may in certain circumstances be attributed to the parent company, it appears that what follows is that the Commission is enabled to fine corporations that otherwise would be out of its reach. The implementation of the doctrine "widens the circle of undertakings subject to jurisdiction of EC Competition Law *by overcoming* extra-

had to be asserted.[76] It proved its usefulness also as an instrument permitting to ensure enforcement of the measures taken by the EC competition authority by addressing such measures to the subsidiaries established within the EU, where the enforcement would not depend upon the previous consent of the State where the parent is established.

B. *Woodpulp*

The other landmark case in this context, the 1985 *Wood Pulp* cases [77], where recourse to the economic entity principle would have been partly questionable in the absence of activities by subsidiaries operating within the EC, was decided by the ECJ by asserting the application of the EC competition rules to foreign companies under the "implementation doctrine". A number of companies, all established outside the EC, had been found guilty by the Commission of a concerted practice concerning the sales of wood pulp to the EC market.[78] The Commission and the Advocate General had insisted that the EC jurisdiction should in this case be based on a "doctrine of effects", as it was easy to demonstrate that all the anticompetitive consequences of

territorial and other jurisdictional problems." By finding conduct actually occurred abroad to have legally occurred within the EC (through a subsidiary) the Court felt that it could implement competition policies while avoiding the "knotty question" of extraterritoriality. Even though the involved Swiss and British corporations were not registered anywhere in the EC in first person, they did have wholly owned subsidiaries within it. By simply combining the legal premise mentioned above with the factual statement that the parent companies, because they "held all or at any rate the majority of the shares and were able to exercise decisive influence over the policy of the subsidiaries as regards selling prices", the ECJ opted to ignore further considerations of jurisdiction. Lev, "European Community Competition Law: Is the Corporate Veil Lifted Too Often?" 2 *Journal of Transnational Law & Policy*, 199.

[76] E.g. Europemballage Corp. v. Commission [1973] E. C. R. 215 (*Continental Can), where* a New York corporation had allegedly infringed article 86 by causing its Delaware subsidiary Europemballage (which was also registered in Belgium) to buy out its sole competitor in the relevant market. Continental Can's argument ran that generally accepted principles of international law exempted it from EC jurisdiction and that it was Europemballage, a distinct corporation having separate legal personality, that had accomplished the takeover. Reasoning *a contrario* the Court of Justice responded that autonomous legal personality provides shelter from liability for a subsidiary's conduct to the benefit of a parent company *only when the subsidiary determines its market behavior autonomously,* while legal personality alone should be considered as a sham. Continental Can's contested conduct consisted of "causing" Europemballage to bid for the target company, that is, it operated such an influence on the functioning and decision-making process of Europemballage that the latter could not be considered an autonomous entity. Continental Can's control was also exerted by making the necessary financial means available, which in the Court's holding made the parent "foremost" responsible.

[77] Joined cases 89, 104, 114, 116, 117 and 125 to 129/85 Reports 1988 p.5193

[78] The matter concerned the wood pulp cartel revealed in 1985, which consisted of 43 wood pulp producers and two trade associations which were all established in the States outside the EC. What is more, the cartel participants carried out direct sales of wood pulp to the EC market at a fixed price without using subsidiaries for this purpose and this fact did not allow the Commission to apply article 81 of the EC Treaty based on the economic entity doctrine. The decision of the European Commission on the Wood Pulp case was based on the American-style 'doctrine of effects', which to the Commission's opinion justified application of Article 81 to situations where all participants were foreign companies. This position of the European Commission was supported in the ECJ by the Advocate General. The Court, however, found unjustified the application of the doctrine of effects to the examined relations. In its decision, the ECJ stated different grounds for application of Article 81 to the actions of the participants of the wood pulp cartel: *"It should be observed that an infringement of Article 85 [=81], such as the conclusion of an agreement which has had the effect of restricting competition within the Common Market, consists of conduct made up of two elements, the formation of the agreement […] and the implementation thereof. If the applicability of prohibitions laid down under competition law were made to depend on the place where the agreement […] was formed, the result would obviously be to give undertakings an easy means of evading those prohibition. The producers in this case implemented their pricing agreement within the Common Market. It is immaterial in that respect whether or not they had recourse to subsidiaries, agents, sub-agents, or branches within the Community in order to make their contacts with purchasers within the Community."*

the agreement were taking place within the EC market. The ECJ did not, however, follow this request.[79] It considered that, if the formation of the agreement took place outside the EC, the implementation place was the decisive factor to take into account in order to determine jurisdiction. The pricing agreement was implemented within the common market and it was immaterial whether, to achieve this, the undertakings concerned had or not recourse to subsidiaries or agents to establish the contacts with the purchasers within the EC. The application of the EC competition rules could therefore be based on the territoriality principle recognised in public international law.

C. Discussion

The reluctance of the ECJ to accept an extended "effects doctrine" leaves open a case, which, as far as I am aware, has not so far been submitted to it, the case of an agreement concluded between foreign undertakings containing a refusal to supply customers within the EC. It is assumed that such a case could not be caught by the "economic entity doctrine", as it occurred in the famous *Commercial Solvents* case [80], where the sanction of the abuse of dominant position of a US company consisting in a refusal to supply the EC market was addressed and enforced upon its Italian controlled company ICI. It would be difficult, in a case where the "economic entity doctrine" could not be used, to apply the "implementation doctrine" as the refusal to supply or the boycott of a market would consist in a negative attitude of the undertakings concerned, not giving rise to any positive acts which should be implemented within the EC territory. In such a case only an extended "effects doctrine" of the US type could probably help. In view of the positions taken in the past, the Commission would probably not be reluctant to invoke such a doctrine, but the issue has not yet received a final answer by the ECJ.

It would be even more difficult to operate without an extended "effects doctrine" if the Commission would wish to attack the conduct of foreign undertakings operating a cartel in a third country with the result of creating a serious barrier to the access to that market for EC undertakings. It is known that the US has made use of this notion when complaining about the way in which Japanese undertakings were trying to protect themselves from entries into their market of US undertakings. This is a possibility which should not be excluded in a market getting increasingly global. Certainly a way of international agreements based on recognition of an obligation of "positive comity" would be preferable to a rude assertion of jurisdiction based exclusively on en extended "effects doctrine".

The case law evoked above has mainly dealt with issues of jurisdiction to act against foreign undertakings. The Commission has also tried to exert enforcement jurisdiction based on the EC competition rules against foreign companies, but with limited success.

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[79] In its reasoning, the ECJ considered the decision-making process, which consisted of conduct that had been accomplished completely outside the EC. Therefore, with respect to it, the EC could not seek to establish jurisdiction unless it adopted the effects doctrine. Secondly, it considered the implementation of the agreement, in the form of the sales performed within the Common Market. The Court found that the parties to the cartel could not escape the prohibition of article 81 simply by forming their agreements outside the EC and later "exporting" them to the EC along with the exportation of wood pulp. Finally, focusing on the place of implementation, the Court felt it could disregard the presence of establishments within the EC: because of that territorial link the application of article 81 would remain territorial.90 Of course, to achieve this, the Court had to consider the primary and the secondary element of the conduct as equally relevant

[80] Case 4/73 Reports 1974 p.491

In the Dyestuff cases the Commission had sent its statement of objections to the foreign companies at their seats outside the EC. The companies, acting according to instructions by their own public authorities, claimed that the service was unlawful under public international law and refused to take knowledge of it. The claim that the companies had not been lawfully served the statement of objections was not accepted by the ECJ. Since those cases the practice followed by the Commission is to send a registered letter to the non-EC undertakings and this is considered within the EU as a lawful service of the notice informing the undertaking of the opening of proceedings and an objection against the service based on public international law arguments would not be accepted by the ECJ.

A request for information can certainly be legitimately sent to foreign undertakings as long as it is contained in the first Commission invitation letter which does not entail any obligation to answer. On the contrary it would be very unlikely that a Commission decision imposing upon the undertaking the obligation to answer would be recognized as lawful in the foreign country concerned in the absence of a previous cooperation agreement. Similarly it is inconceivable that EC officials could carry out an investigation in the premises of a foreign undertaking by invoking the power granted to them by Regulation 1/2003 EC independently of the agreement of the authority of the third State concerned. An investigation within the EU by the Commission concerning a trade association of foreign companies established within the EU was however legitimately carried out [81].

In case of final decisions establishing that an infringement has taken place and imposing a sanction, the mere servicing of the decision by a registered letter to the foreign undertaking is considered as a lawful communication by the EU, even though the legitimacy of the service may be denied by the State concerned. As to the orders and injunctions contained in the decision, although lawfully served, they cannot be enforced as such in the territory of the foreign State and the EU institutions are fully aware of this limit. For this reason, any time this is possible, such a decision would also be notified to any subsidiary or agency the foreign undertaking could possess in the EU territory, by making use of the "economic unity doctrine".

[81] Commission Decision in the case Ukwal OJ (1992) L 121 p.45

Chapter 4

THE TREATMENT OF EXPORT CARTELS IN EU AND US LAW

Stephen Ryan

I. DEFINITION

The phenomenon of export cartels has been held up as an example of the failure of a jurisdiction-based approach to anti-trust enforcement, and in favour of more world-wide multilateral co-operation between agencies. According to this view export cartels usually or always escape the jurisdictional scope of the competition agency where they are based, and cannot in practice be investigated by the competition agency of the jurisdiction where their effects are felt. However, the extent of existence of export cartels is unknown, given that they are rarely if ever prosecuted. This chapter analyses the (very different) legal approaches to export cartels in the USA and the EU, the (largely anecdotal) evidence for their existence, and the prospects for investigating them, and discussions of export cartels at multilateral level.

Firstly, however, it should be clarified what an export cartel is, and what it is not. An **export cartel**, *stricto sensu*, is a cartel which concerns only the marketing of goods or services towards or in a different jurisdiction than that where the agreement is concluded and the parties are based, and of which the anticompetitive effects take place entirely outside that jurisdiction[82]. An export cartel should be distinguished from an **international cartel**, which is a cartel whose members are located in various competition jurisdictions, and whose cartel activities affect various jurisdictions (normally including also the home jurisdictions of its members).

II. THE LEGAL TREATMENT OF EXPORT CARTELS

A. Territoriality and jurisdictional principles

According to well-established case-law[83], the jurisdiction where an anti-competitive practice has its effects, or is implemented, has the right to prohibit and sanction it, even if the undertakings involved are located, and the planning was carried out, in another jurisdiction (where the practice may or may not be legal). The majority of competition laws in the world only prohibit anti-competitive practices having an effect within the territory or on the consumers of that jurisdiction, thus preventing competition authorities from investigating export cartels producing effects only outside their territory. Jurisdictions in which the competition law does not contain such a basic limitation of scope often have an explicit exclusion for cartels established solely for the purposes of export activity; such exclusions are sometimes linked to a notification and registration requirement, as in the best-known of such examples, the US *Webb-Pomerene Act* of 1918 (see below). Jurisdictions in which the prohibition of anti-competitive activity unambiguously includes anti-competitive practices which have their effects entirely outside the jurisdiction in question are hard to find.

[82] Where there is a cartel of purchasers of a commodity, and the commodity purchased is imported into a jurisdiction, the term "*import cartel*" should be used. As will be seen below, allegations exist that purchasers of raw materials may engage in such purchasing/import cartels with regard to raw materials sourced in developing countries.

[83] See, Chapter 2, *supra*.

B. Export cartels under article 81 of the EU Treaty

There is no explicit exclusion for export cartels from the prohibition on anti-competitive agreements contained in article 81 of the EU Treaty, but the requirement for an appreciable effect on trade between EU Member States makes it unlikely that an export cartel *stricto sensu*, as defined above, could be considered to infringe article 81. The European Court of Justice has stated that a measure concerning only exports to third countries is not in itself liable to affect trade between Member States[84]. On the other hand, such a measure can affect trade between Member States if it leads to any changes in the volume of sales within the Community by a participant in the cartel[85]. Any argument that an export cartel affects trade between Member States would thus have to be made on the basis of empirical evidence of knock-on effects within the EU.

C. National competition laws in the EU Member States

The national competition laws of the Member States have territorial competence normally based on the effects or implementation doctrines. Both the UK and Germany repealed in 1998 explicit exclusions for export cartels from their national competition laws, and now take the "effects" approach to application of the law[86]. Now, only two Member States have specific exclusions of export activity in their national competition laws:

- The Greek competition law does not apply to agreements "ensuring, promoting or strengthening exports"[87];
- Article 2.4 of the Finnish Competition Act provides that "*Unless otherwise decreed by the State Council, this Act shall not be applied to a competition restriction which restrains competition outside of Finland insofar as it is not directed against Finnish customers. The State Council may decree that the Act be extended to cover a competition restriction felt abroad if so required by an agreement made with a foreign state, or if it is in the interests of Finland's foreign trade.*"

D. Export cartels in US legislation

Three important US acts provide explicit exemption from the Sherman and Federal Trade Commission Acts for anti-competitive export activities, the *Foreign Trade Antitrust Improvement Act* of 1982, the *Webb-Pomerene Act of 1918*, and the *Export Trading Company Act of 1982*.

Of these, the most far-reaching is the *Foreign Trade Antitrust Improvement Act* (FTAIA), which lays down that the Sherman Act:

> *shall not apply to conduct involving trade or commerce (other than import trade or commerce) with foreign nations unless*
>
> 1. *such conduct has a direct, substantial, and reasonably foreseeable effect:*

[84] Court judgement of 18/2/1986, Bulk Oil v. Sun, case 174/84, ECR p.559, par.44.

[85] See for example the Commission decision in the Cement case, 30/11/94, OJ 1994 L 343/1, par.57.

[86] Prior to this, both the UK and Germany had US-style exclusion/registration systems.

[87] Article 6 of the law. See OECD (2001) Regulatory Reform in Greece, pp. 193-197. This exclusion can be withdrawn by ministerial decision.

> A. *on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or*
> B. *on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States;*
>
> 2. *such effect gives rise to a claim under the provisions of [the Sherman Act], other than this section.*[88]

The Department of Justice and Federal Trade Commission (FTC) international guidelines explain in what cases the FTAIA leaves them jurisdiction to take action against anti-competitive actions by US exporters:

> *the Agencies may in appropriate cases take enforcement action against conduct by U.S. exporters that has a direct, substantial, and reasonably foreseeable effect on trade or commerce within the United States, or on import trade or commerce. This can arise in two principal ways. First, if U.S. supply and demand were not particularly elastic, an agreement among U.S. firms accounting for a substantial share of the relevant market, regarding the level of their exports, could reduce supply and raise prices in the United States. Second, conduct ostensibly export-related could affect the price of products sold or resold in the United States. This kind of effect could occur if, for example, U.S. firms fixed the price of an input used to manufacture a product overseas for ultimate resale in the United States.*[89]

The *Webb-Pomerene Act* of 1918, whose importance has been considerably reduced by the FTAIA, removes the applicability of the Sherman Act to "an association entered into for the sole purpose of engaging in export trade and actually engaged solely in such export trade, or an agreement made or act done in the course of export trade by such association" provided that such an association does not restrain trade within the USA. Export trade associations must provide annual filings to the FTC, without which they do not benefit from the provisions of the Webb-Pomerene Act and must pay a fine of $100 per day. Filing is sufficient in order to benefit from the exemption of the Webb-Pomerene Act; there is no authorisation procedure.

As background to the Webb-Pomerene Act, it should be borne in mind that in 1918, most of the USA's trading partners did not have competition laws, therefore, to enforce the Sherman act strictly against exporters could have put them at a disadvantage in cartelised markets in other countries. Since the Second World War, the Courts have progressively narrowed the scope of the Webb-Pomerene Act[90], and the numbers of Webb-Pomerene registered export associations has steadily declined, from a peak of 62 in 1930, to 12 as of mid-2003[91]. There have been few new registrations since the adoption of the FTAIA in 1982, presumably as most US export cartels regard the "safe haven" provided by that Act as adequate.

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[88] Sherman Act, chapter 1, section 6a. The FTAIA also gives the FTC and DoJ jurisdiction in cases where action by foreign undertakings outside the USA has the effect of restraining US exports or imports to the USA.

[89] FTC/DoJ Antitrust Enforcement Guidelines for International Operations, 1995, section 3.122. Available at: http://www.usdoj.gov/atr/public/guidelines/internat.htm

[90] For example, the "alkali" judgement of 1949 confirmed that the Webb-Pomerene Act does not give immunity to US companies which enter into cartel arrangements with non-US companies, even when such arrangements do not affect the US market. The US Court also concluded that the "alkali" cartel did affect US domestic markets because its exporting of "surplus" production at cartel prices "artificially" kept US prices high. This argument could in theory be applied to any export cartel whose members have a high domestic market share.

[91] The list is on the FTC website at: http://www.ftc.gov/os/statutes/webbpomerene/index.htm. Some of the registered Webb-Pomerene associations exist in order to allocate among US exporters import quotas applied in other jurisdictions, particularly for agricultural products.

The *Export Trading Company Act* of 1982 allows US exporters to obtain, from the Department of Commerce, an export trade certificate of review ("ETCR"). This provides limited immunity under state and federal anti-trust laws[92], only for the specific activities detailed in the ETCR, and only if certain conditions are fulfilled[93].

According to the US Department of Commerce, typical joint activities for which ETCRs are granted include: market research and prospecting for clients, bidding for contracts, transportation and shipping, service and promotional activities, and joint pricing. On pricing, the Department of Commerce website states: "Two or more joint venture partners might agree to establish uniform minimum export prices for particular products in order to avoid price rivalry with each other. For some joint ventures, higher profits might be secured through joint negotiations on prices and on terms of sale with foreign buyers"[94]. This clearly indicates that hard-core cartel activities in the export field can benefit from an ETCR.

The added value of the Export Trading Company Act, compared with the FTAIA, would seem to be the opportunity for undertakings to obtain confirmation that their export activities do not affect domestic US trade in any way, and thus that the Sherman and FTC acts are of limited application. The Webb-Pomerene Act does not provide this security, as the "alkali" case proved. Webb-Pomerene registered associations, and exporters without an ETCR, run the risk that the FTC or Department of Justice (DoJ) will prosecute them, arguing that their anti-competitive export activity has effects within the USA.

E. Export cartels in other jurisdictions

Competition jurisdictions which have, along US lines, an explicit exclusion from the application of the competition law for export cartels, or other anti-competitive agreements aimed at export markets, combined with a notification and/or authorisation requirement, are: Australia, Brazil, Croatia, Japan, New Zealand[95]. Mexico has such an exclusion with no notification requirement, but limited to "small exporters"[96]. Again, many competition laws in the world only apply to

[92] Immunity from prosecution by the DoJ or FTC is near-total, and in private actions, the plaintiff bears the burden of proof and damages are limited to single, not treble damages.

[93] Specifically, to obtain an ETCR, an applicant must show that proposed export conduct will:

a) result in neither a substantial lessening of competition or restraint of trade within the United States nor a substantial restraint of the export trade of any competitor of the applicant;

b) not unreasonably enhance, stabilize, or depress prices in the United States of the class of goods or services covered by the application;

c) not constitute unfair methods of competition against competitors engaged in the export of the class of goods or services exported by the applicant; and

d) not include any act that may reasonably be expected to result in the sale for consumption or resale in the United States of such goods or services.

[94] Quotation found at: http://www.ita.doc.gov/td/oetca/teamup.html

[95] Source: "Can Developing Economies Benefit from WTO Negotiations on Binding Disciplines for Hard core Cartels?" by S. J. Evenett of the World Trade institute, April 2003.

[96] See OECD (1999) *Regulatory Reform in Mexico*, p199-204. The OECD document does not give the Mexican definition of "small exporter".

anti-competitive agreements with an effect within the territory of the state or jurisdiction in question, thus not including export cartels in their scope of application.

The Russian competition law of 2006[97], contains a stronger geographic limitation of applicability than most. Not only must the effects be felt within the Russian Federation, but the practice must also concern assets located in the Russian Federation[98]. Arguably, this wording might be so narrow as to exclude from the scope of the law an export cartel located entirely outside Russia but agreeing on prices of goods exported into Russia.

It should not however be assumed that jurisdictions which have explicit exclusions for export cartels in their competition law necessarily have a more positive approach to such cartels than jurisdictions which simply limit their scope to anti-competitive practices with effects within their jurisdiction. If the result is to make the prosecution of export cartels by their home jurisdiction impossible, then there is little difference in practice. In any case, there seem to be no examples of an export cartel *stricto sensu* being sanctioned by the competition authority of its "home" jurisdiction, even where that jurisdiction had the authority to do.

III. THE PRACTICAL TREATMENT OF EXPORT CARTELS

A. Proven and Alleged Examples of Export Cartels

Information on export cartels is necessarily largely anecdotal, since prosecutions of such cartels are rare. There are no examples of an export cartel *stricto sensu* successfully prosecuted by the European Commission, but the Commission's *Woodpulp* and *Lysine*[99] cases both concerned international cartels whose members were situated entirely outside the EU at the time, and exported their products into the EU, thus raising analogous enforcement problems to those posed by export cartels. The Commission's investigation of the Woodpulp cartel began in 1977, and led to a prohibition decision with fines in 1985[100]. The cartel's members were located in the USA and Scandinavia (before Swedish and Finnish accession to the EU), and the US members were grouped in a Webb-Pomerene association. The lysine cartel, on which a fine of €110 million was imposed in 2000, was another worldwide price-fixing and market-sharing arrangement, backed by a systematic information-sharing system. As an example of an EU-based cartel involving export restrictions, the Cement cartel ("Cembureau"), involved export

[97] Law 135-FZ of 26 July 2006. See *Appendix*.

[98] Provisions of the present Federal Law are applied to agreements which are reached between Russian or foreign persons or organizations outside the territory of the Russian Federation, if in the case of such agreements both the following conditions are fulfilled:

a) the agreements are reached in respect to the basic production assets and (or) intangible assets situated on the territory of the Russian Federation or with respect to stocks (shares) of the Russian business partnership, rights in respect to the Russian commercial organizations;

b) the agreements lead or can lead to restriction of competition in the Russian Federation.

[99] Connor, "Global Cartels Redux: The Amino Acid Lysine Antitrust Litigation." In Kwoka & White, *The Antitrust Revolution: Economics, Competition, and Policy"*, New York: OUP, 2004.

[100] It was the Court judgement of this decision on appeal which established the "implementation doctrine". However, the Commission decision was subsequently overturned on procedural grounds.

committees, with the purpose of channelling production surpluses in the EU to third countries, in which markets were shared. However, the cement cartel was not a pure export cartel, as the agreements concerning exporting were designed primarily to reinforce non-compete arrangements within the EU.

In the United States[101], Webb-Pomerene filings are very short, consisting only of the name and address of the association, its member firms and the names of its officials; there is no statement of what product is exported (this is not always clear from the name of the association), nor of the activities carried out; it is thus not possible to know whether a Webb-Pomerene association is an export cartel or not. Of the twelve currently registered Webb-Pomerene associations[102], three are in the film sector, two involve phosphates, two involve soda ash, one each in the sectors paperboard cotton and dried fruit, and two are unclear.

There are currently over 80 US Export Trade Certificates of Review issued[103]. One example of an ETCR, was issued to the Corn Refiners Association Inc. in 2003, and covers a complex mechanism for allocating among US exporters duty-free import quotas for corn syrup from the USA to Mexico[104]. It would seem that several ETCRs fulfil similar functions.

As examples of allegations of export cartels, which have not been investigated, one might quote the speech of Prof. F. Jenny at the 2003 Fordham conference[105], in which he alleged that the price of concrete in the Canary Islands was the subject of an export cartel based outside the EU, and also referred to the often-mentioned alleged "heavy electrical equipment" cartel, comprising US and EU companies, but whose cartel activities apparently only take place outside the EU and US markets[106].

Developing countries have informally alleged that EU-based agri-food undertakings engage in purchasing/import cartels when buying agricultural commodities in developing countries (e.g. coffee beans). The purpose of these cartels would be to keep the buying price low by preventing "overbidding". Such purchase cartels, if they exist, would seem to affect trade between Member States, as they affect the prices of imports into various EU Member States, but the direct victims of such cartels are not consumers but producers and suppliers in third countries. It is a moot question whether such cartels could or should be investigated by the Commission[107].

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[101] As for export cartels registered under national exclusion laws, only US examples have been analysed in the preparation of this chapter.

[102] AFRAM Films, Inc., American Cotton Exporters Association, American Natural Soda Ash Corporation, American-European Soda Ash Shipping Association, Inc., California Dried Fruit Export Association, Motion Picture Association, Motion Picture Association - International, Overseas Distribution Solutions, LLC, Paperboard Export Association, Phosphate Chemicals Export Association, Inc., Phosphate Rock Export Association, UAN Solutions Export Association.

[103] See http://www.ita.doc.gov/td/oetca/list.html.

[104] See http://www.ita.doc.gov/td/oetca/. The full texts of all ETCRs are however published in the Federal Register. The full list of the 83 organisations benefiting from ETCRs is not particularly useful, as many of them have names which do not reveal their activity.

[105] Jenny, "Competition, Trade and Development Before and After Cancun", *Proceedings of the 30th Annual Fordham Conference on Competition Law and Policy,* 2003.

[106] This alleged cartel is said to have existed since the 1930s and is frequently referred to in speeches and articles.

[107] The Commission's action against purchasing cartels, even within the EU, has so far been very limited. While such cartels might seem to benefit the consumers of the products involved (by keeping down the cost of inputs),

B. Investigating Foreign Export Cartels

Where a cartel is an international cartel involving members both inside and outside the investigating jurisdiction, the competition agency can try to obtain information on the participation of all the members through inspections on the premises of the members located on its territory. Where all the members are based outside the jurisdiction, this is more difficult, but normally foreign companies have subsidiaries or offices in the investigating jurisdiction, where inspections can take place. Written requests for information can be sent to locations outside the jurisdiction, but the likelihood of receiving useful information in reply is low. Information under leniency programmes is also an important potential source of information.

The potential for using bilateral co-operation agreements between competition agencies or jurisdictions in such cases is limited, since the majority of such agreements do not lay down obligatory co-operation with requests for investigatory assistance, and more formal binding instruments, such as Mutual Legal Assistance Treaties (which normally are only possible between jurisdictions with criminal sanctions for cartels), only cover practices which are illegal under the legislation of both parties.

One case in which DG Competition of the European Commission investigated members of a US Webb-Pomerene registered association was a case involving eight Hollywood film studies, members of the Motion Picture Association. The case was not a cartel case, concerning "Most favoured nation" clauses in distribution contracts for pay-TV rights for Hollywood films, which the Commission believed could lead to price alignment. According to a press release of 2004, six of the eight film studios agreed to drop such clauses from their distribution contracts; it is not clear if the other two studios subsequently agreed to do so[108].

In 2005, the Irish competition authority opened an investigation into eleven US Webb-Pomerene registered associations, to find out if their activities had any anti-competitive effects in Ireland. It would seem that one of the Webb-Pomerene corporations gave cause for concern, but the Irish Competition Authority would not state which one, and there is no follow-up action on the record[109].

C. Export Cartels in Multilateral Discussions on Competition

The problem of export cartels which escape sanction, and the externalities associated with this issue, was among the reasons why multilateral discussions on competition in the WTO were launched in 1996. However, during the subsequent WTO discussions on a possible WTO agreement on competition, the issue of export cartels led to certain divergences of view, because a large number of developing countries urged developed countries to take action themselves against export cartels operating from their territory. In the view of those developing countries, any multilateral agreement on competition should include a ban on export cartels, and an

there is not always a guarantee that the cost-reductions will be passed on to consumers, and there may be considerable harm to suppliers and distortion of the allocation of resources, which can indirectly harm consumers.

[108] Press release IP/04/1314, of 26/10/2004. That investigation involved inspections under article 14(2) of Regulation 17/62 on the premises of the EU broadcasters who were the distributors of the films in question. Article 14(3) inspections of the movie studios themselves were not possible as most of them have no presence in the EU.

[109] Source: "Competition body investigates US group over possible cartel activity", *The Irish Times*, 19/03/05.

obligation on competition authorities in jurisdictions where export cartels are based to provide assistance to "victim" jurisdictions in investigating them[110]. This position was based on the argument that the inculpatory material for such export cartels is often located entirely outside the territory of the "victim" country, which, when it is a developing country, often has very limited resources devoted to competition enforcement, and lacks the power to impose any sanctions. However, many developed jurisdictions argued their lack of legal competence to act in such cases (either because of explicit exclusions or because of a territorial effects-based approach to competence in their competition laws) to oppose any such obligations in a multilateral framework.

The International Competition Network, the worldwide grouping of competition enforcement agencies, has a working group looking at cartels. However, that working group has not so far tackled the issue of export cartels. It has however, produced a report on co-operation between competition agencies in cartel investigations[111]. One of the paths to greater co-operation outlined in the report is the granting of waivers of confidentiality by undertakings which have applied for immunity under the leniency programmes of different jurisdictions. The more jurisdictions around the world which adopt leniency programmes, the more potential there is for co-operation under such waivers.

It is also worth mentioning that regarding certain commoditised products, there existed hitherto global organisations, bringing together producing and consuming countries with a mandate specifically covering market management and balancing of demand and supply. Examples are the rubber sector, and the coffee sector. In the rubber sector, the International Natural Rubber Organisation (INRO) carried out supply and demand balancing activity from 1979 until its demise (largely at the instigation of the EU and its Member States) in 2001. Between 1962 and 1994, international coffee markets were regulated by "International Coffee Agreements" which included a price-setting mechanism to be applied if world coffee prices fell below a certain trigger price. The International Coffee Organisation, created by the 1962 Agreement, continues to exist, although under the 1994 and 2001 International Coffee Agreements, its functions are limited to such activities as study information and promotion, with no price setting or supply and demand management activities. It might be argued that the removal of such international mechanisms in inherently volatile commodity sectors, with no effective anti-trust regime of world-wide application to replace them, creates potential for collusion between multinational purchasers, who are relatively few in number, in order to try to maintain low purchase prices.

IV. CONCLUSIONS

A. Economic effects of Export Cartels

It must be emphasised that in economic terms, export cartels are just as damaging as other cartels. In brief, they:

- cause direct damage to consumers or suppliers;
- distort the allocation of resources;

[110] See Evenett "Can Developing Economies Benefit from WTO Negotiations on Binding Disciplines for Hard Core Cartels?", available at: http://www.evenett.com/articles/evenettpaperhauser.pdf.

[111] The report was drafted by DG Competition of the European Commission. ISBN 978-92-79-05128-9. Available from the Publications Office of the European Union. Available online at: http://ec.europa.eu/comm/competition/international/multilateral/catrels_cooperation.pdf

- harm the competitiveness of the participating undertakings by encouraging inefficiency; and
- establish a habit of collusion which risks spilling over into collaboration outside the area of exports.

The first of these types of damage is normally limited to the jurisdiction targeted by the export cartel, while the other types of damage can also potentially affect the "home" jurisdiction. If the export cartel allows the orderly removal of production surpluses from the "home" jurisdiction, or if the cartelised exports are inputs for finished products later re-imported into the "home" jurisdiction, then the effects on the home jurisdiction are even clearer. Thus, arguments that export cartels are of no interest to their "home" competition authority are based on a somewhat superficial analysis[112].

Nevertheless, no competition authority has so far shown any desire or ability to sanction "pure" export cartels operating from its territory[113]. This fact is more important than the exact details of the legal scope of national competition laws (whether they are based on the "effects doctrine", the "implementation doctrine" or have an explicit exclusion for export cartels).

B. Possible Methods of Action against Export Cartels

Supposing that export cartels do effectively exist, only three paths exist for dealing with them exist, a unilateral path, a bilateral path, and a multilateral path. These are dealt with in turn below.

- Unilateral action would mean amending competition laws to give a competition authority clear competence to act against anti-competitive agreements concluded on its territory, even where the effects are felt elsewhere. This would require the abrogation of any exclusions or exemptions, and the amendment of any effects-based jurisdictional criteria. However, such amendment of competition laws could create the risk of overlapping jurisdiction, and the violation of the *ne bis in idem* principle, since the competition law of the jurisdiction affected by the cartel would normally also be applicable[114].
- Bilateral action would require the signing of bilateral co-operation agreements between jurisdictions which would oblige one party to respond positively to a request for investigatory support from the other party, even in cases where the practice under investigation is not a violation of the competition law of the requested party. This would leave the "victim" jurisdiction responsible for sanctioning the cartel, based on evidence supplied by the "home" jurisdiction of the cartel. However, this approach

[112] However, this argument is less clear as far as import cartels are concerned, since they would (on a superficial analysis and all other things being equal) have the effect of reducing the cost of items imported into a jurisdiction.

[113] The only (rather old) counter-example being the "alkali" case brought by the US DoJ in the 1940s (against the wishes of the FTC), referred to in footnote 9 *supra*.

[114] In order to work, it would require either the "victim" jurisdiction giving up all competence to sanction the cartel in question, or the "home" jurisdiction limiting itself to investigating, while leaving the "victim" jurisdiction the competence for sanctioning (although developing countries might experience difficulties in collecting any fines imposed). In either case, legislative changes would certainly be necessary in both jurisdictions in order to implement such an approach.

would require a network of "second generation" co-operation agreements[115] between competition agencies worldwide, and such agreements are exceedingly rare given the legal complexities involved.

- Multilateral action against export cartels, of the type discussed in the WTO and described above, would simply consist of a framework of rules governing bilateral co-operation, and would thus have the same drawbacks as the bilateral option just discussed, as well as the political difficulties which occurred in the WTO talks on competition. A more radical, and more effective, type of multilateral action would consist of a worldwide competition jurisdiction with investigatory powers covering all signatory countries and jurisdictions. But since such an option is almost inconceivable politically, it is not discussed further here.

All of these approaches have strong drawbacks. Within the EU, it must be observed that only the creation of a legal jurisdiction passing national boundaries, and a corresponding enforcement agency, has definitively permitted the elimination of any potential expert cartels. This involves the pooling of sovereignty and the cession of power to an international body. The EU has consistently encouraged its trading partners, mainly but not exclusively in developing countries, to adopt the same approach to competition jurisdiction and enforcement by creating transnational rules and enforcement within their trading blocs. This has been done in several cases (CARICOM[116] and WAEMU[117] for example, whilst the Commonwealth of Independent States also has created a Interstate Council for Antimonopoly Policy which may be a precursor of such a development).

This raises the possibility of an intermediate option to those discussed above, that of a bilateral approach to export cartels and other such cross-border restrictions, but between jurisdictions consisting of groups of countries which have created regional-level competition laws and investigating agencies. If such an approach were more widely followed, it might permit a bilateral approach to export cartels to become feasible, by reducing the number of bilateral agreements necessary. If an export cartel existed between countries which themselves joined such a larger jurisdiction, then the competition agency of that grouping could itself investigate and sanction the export cartel without the need for co-operation with other jurisdictions[118]. The number of export cartels would thus de facto diminish, as more export cartels became "domestic" cartels within a single jurisdiction. Jurisdictions consisting of groups of countries

[115] A "second generation" co-operation agreement in the competition field is one which permits the exchange of "confidential" information of undertakings, including inculpatory material. So far, only one example exists, between the USA and Australia.

[116] The Common Market of Caribbean States

[117] West African Economic and Monetary Union.

[118] As the "Woodpulp" cartel referred to above, covering exports from Finland and Sweden to the EU, which following Finnish and Swedish accession to the EU, would no longer be considered as exports as they are within the same tariff zone and competition jurisdiction.

would probably have greater power to impose sanctions and enforce compliance. Of course, not all countries in the world would desire to join such transnational jurisdictions, and especially the larger countries would probably have little advantage in doing so. But regional groupings of competition jurisdictions and enforcement agencies seem to be the least problematic of the various approaches to export cartels which have been identified in this chapter.

Chapter 5

THE EXTRATERRITORIAL APPLICATION OF THE EU MERGER CONTROL RULES

Vincenzo Scordamaglia

I. BACKGROUND

The notion of merger control corresponds to the definition given in the EC merger control rules. Hence, the transaction must bring about a lasting change in control, joint or sole, over (the whole or part of) one or several undertakings or businesses.

This includes:

(i) Legal and financial mergers, i.e. where two or more previously independent undertakings merge or two undertakings, albeit remaining separated legal entities, create one common economic unit which has a permanent, single economic management.

(ii) Acquisitions of a controlling interest, i.e. one (or more) undertaking(s) obtain, whether by purchase of securities or assets, by contract or, in certain cases, by the establishment of economic dependence e.g. through important long-term supply agreements or credits coupled with structural links, decisive influence over another undertakings' strategic decisions.

(iii) The creation of full-function joint ventures, i.e. joint ventures that perform, on a lasting basis, all the functions of an autonomous economic entity.

Transactions that bring about a change in the quality of control, i.e. from joint to sole control and *vice versa*, or a change in the structure of control of a company, i.e. increase or decrease of the number of shareholders, may also constitute a concentration. Internal restructurings within a group of companies are, however, *not* covered by the EC Merger Control Rules, as there is no ultimate change of control.

Control (sole or joint) may be acquired on a legal or *de facto* basis. A decisive influence over decisions that foremost protect the minority shareholders' financial interests (e.g. changes in articles of association increase/decrease of capital and liquidation) do not confer control.[119] However, the acquisition of a minority shareholding may constitute a concentration when it enables the shareholder to determine the strategic commercial behaviour of the target undertaking, e.g. power to appoint more than half of the members of a board or when on a *de facto* basis the minority shareholder is highly likely to achieve a majority of the votes at the shareholders' meeting, e.g. because the remaining shares are widely dispersed between several shareholders.

[119] D. Banks "The Development of the Concept of Extraterritoriality under European Merger Law and its Effectiveness under the Merger Regulation Following the Boeing/McDonnell Douglas Decision *1997"* [1998] E.C.L.R. 306.

II. THE THEORY

A. The One-Stop Shop Principle

Before analysing the issue of the extraterritorial application of the EC Merger Control Rules it is necessary to recall that in the European Union the control of concentrations is not a matter of exclusive jurisdiction of the European Community. As a matter of fact the EC Treaty, contrary to the rules concerning the prevention of anticompetitive agreements and abuse of dominant positions, does not contain any provision directly addressing the issue of the control of concentrations. The 30 years long history of efforts by the European Commission in order to obtain some jurisdiction in this field before Council accepted in 1989, by adopting Regulation (EC) 4064/89 [120], to add this new tool to the Community competition policy instruments, shows how reluctant Member States have been to give up part of their sovereign powers in this field to the European institutions. The result achieved by Regulation (EC) 4064/89 has been a compromise. The Member States have kept their jurisdiction to control concentrations of undertakings below a certain level of economic importance, whilst the European Commission has been given the exclusive power to control and declare compatible with the common market concentrations above this level (the so-called "*Community dimension*"), no parallel jurisdiction being left to the Member States for this latter type of concentrations. The result was the so-called "*one-stop shop principle*", so that undertakings whose concentration achieved the Community dimension did no longer have to bother, within the European Community, about domestic rules on merger control of the Member States.[121] If the concentration was below the Community dimension, then the national rules of each Member States remained applicable, with the result that, according to the circumstances of the facts, parallel clearance procedures could frequently be carried out in two or more Member States.

This very sharp distinction between Community and national jurisdictions has found some correction in the most recent version of the Community legislation on merger control, Council Regulation (EC) 139/2004 [122]. Greater flexibility has been introduced allowing in certain cases for a referral of a concentration with a Community dimension to a Member State if it "*threatens significantly to affect competition in a market within that Member State presenting all the characteristics of a distinct market*" or if it "*affects competition in a market within that Member State, which presents all the characteristics of a distinct market and which does not constitute a substantial part of the common market.*"[123]. In other cases, to limit as far as possible parallel national clearance procedures, a concentration not reaching the Community dimension may be referred by the Member State or States concerned to the Commission if it "*affects trade between Member States and threatens to significantly affect competition within* [the Community] *territory*" [124]. Although this greater flexibility is welcomed and finds its justification in the principle of subsidiarity, the distinction between Community and national jurisdiction based on the notion of Community dimension remains the basis of the system.

[120] OJ L 395, 30.12.1989, p. 1. Corrected version in OJ L 257, 21.9.1990, p. 13. Regulation as last amended by Regulation (EC) No 1310/97 (OJ L 180, 9.7.1997, p. 1). Corrigendum in OJ L 40, 13.2.1998, p. 17

[121] Gifford & Kudrle. "Rhetoric and Reality in the Merger Standards of the United States, Canada, and the European Union.", (2004) 72 *Antitrust Law Journal,* 2.

[122] OJ L 24 , 29.1.2004, p. 1

[123] Art.9 (2) Reg. 139/2004

[124] Art. 22 (1) Reg. 139/2004

B. Criteria for the Community Dimension

The notion of "Community dimension" is an objective one. This dimension is reached if the combined aggregate worldwide turnover of the undertakings involved in the concentration exceeds 5 billions Euros, subject to two further conditions which establish the economic link with the European Union:

- two at least of the undertakings involved in the concentration must have a EU-wide turnover of at least 250 millions Euros and
- each of these undertakings must not achieve more than two thirds of its EU-wide turnover within one and the same Member State [125].

Concentrations which do not fulfil the 5 billions Euros threshold can still reach the Community dimension if the combined aggregate worldwide turnover of the undertakings involved exceeds 2,5 billions Euros, but in this case the conditions establishing the economic link with the EU are more complex:

- the combined aggregate turnover of all the undertakings concerned in each of at least three Member States must exceed 100 millions Euros,
- in each of at least three of the Member States fulfilling the previous condition each of two at least of the undertakings concerned must have an aggregate turnover of more than 25 millions Euros,
- the aggregate EU-wide turnover of each of at least two undertakings concerned must exceed 100 millions Euros, and
- each of the undertakings concerned must not achieve more than two thirds of its EU-wide turnover within one and the same Member State [126].

The possibility of extraterritorial application of the EC merger control rules results directly from the objective criteria on which the definition of the Community dimension is based. It is obvious that a number of large concentrations carried out by undertakings incorporated in third countries or having their seat or headquarters there can easily reach the worldwide turnover threshold and therefore become relevant for the purpose of application of the EC rules. The further conditions to be fulfilled establishing the economic link with the EU warrant however that no Community jurisdiction will arise if the economic activity within the EU of the undertakings concerned is inexistent or minimal or concentrated in one specific Member State. Such lack of jurisdiction excludes automatically in these cases the possibility of extraterritorial application of the EC merger control rules [127]. In such a case however it is not excluded that one or more Member States could individually pretend to apply their domestic legislation on merger control to such a concentration. In this case the issue of extraterritorial effects of their domestic legislation will be answered according to the views prevailing in each of such States. This is a situation which is likely to arise if the economic link of the concentration with the Member State concerned is particularly strong, albeit limited to that State within the EU.

[125] Art. 1 (2) Reg. 139/2004

[126] Art. 1 (3) Reg. 139/2004

[127] As a concentration could in certain cases be construed as an anticompetitive agreement or in other cases as a behaviour realising an abuse of dominant position, it is not excluded that in such cases, if trade between the Member States is affected, jurisdiction to proceed against the undertakings concerned on the basis of Art. 81 or 82 EC could arise.

The existence of conditions linking economically the concentration to the EU gives the possibility to rely, when applying EC merger control rules, on the "implementation principle", developed by the European Court of Justice in the 1985 *Wood Pulp* case [128]. We can leave aside the case where one at least of the undertakings concerned by the concentration is established within the EU, as this gives the EU a right to intervene on the basis of the "nationality principle". But even if all the undertakings concerned are based outside the EU, the fact that they, or at least some of them, must have a turnover of a certain level within the EU, implies that there is necessarily an industrial or commercial activity "implemented" within the EU [129]. In this respect the notion of "turnover" used by the EC rules presents an advantage with respect to the notion of "assets value" used in the Russian Federal Law on Protection of Competition [130], as it necessarily implies a dynamic commercial activity of sales of products or provision of services [131]. It makes it therefore more difficult for the undertakings concerned or the country from which they originate to object to the EU jurisdiction, even if the main activity of the concentration envisaged is primarily on markets having no bearing on the EU.

The philosophy set out in the previous paragraph is summarised in Recital n. 10 of Regulation 139/2004 which reads: "*A concentration with a Community dimension should be deemed to exist where the aggregate turnover of the undertakings concerned exceeds given thresholds; that is the case irrespective of whether or not the undertakings effecting the concentration have their seat or their principal fields of activity in the Community, provided they have substantial operations there*". The action that the Commission has to take in the appraisal of the concentration with a Community dimension must be guided by the following principle: the concentration must be declared "*compatible or incompatible with the common market"* according as to whether it would "*significantly impede effective competition, in the common market or in a substantial part of it*" [132]. The analysis carried out by the Commission during the examination procedure will therefore aim at identifying existing or potential restrictions to competition in the common market[133]. The undertakings concerned would then be required to eliminate such restrictions by entering into adequate commitments vis-à-vis the Commission so as to render the concentration compatible with the common market [134]. In case of a concentration between undertakings based in third countries, fulfilling the criteria for the Community dimension, but where the main activity of the concentration is outside the EU, the Commission must therefore limit itself to appraising the impact of the concentration on competition within the common market, without being led in its decision by policy considerations, particularly of industrial policy, which should remain the responsibility of the countries where the undertakings have their seat or their main activity.

[128] Cases C-89,104, 114, 116-117, 125-129/85 *Alström (A) Osakeyhtiö v. EC Commission* [1993] ECR I-1307.

[129] Some authors use for the "implementation principle" the notion of "effects-based approach". I prefer to avoid this terminology to maintain to the "effects principle" its full extent, which encompasses also cases where there is no activity implemented within the EU directly affected by the merger, but other negative merger's effects on competition within the common market, likely to occur as its logical direct consequence, are foreseeable, immediate and substantial.

[130] Art. 27 of the Russian Federal Law on Protection of Competition. See *Appendix.*

[131] Art. 5 (1). Reg. 139/2004 - See also the specific definition of "turnover" in the case of financial and insurance institutions in Art. 5 (3) Reg. 139/2004

[132] Art. 2 (2) and (3) Reg. 139/2004

[133] The terms "common market" are used in Regulation 139/2004 as a reference to the notion contained in the EC Treaty, particularly in Art. 81 and 82. It is however clear that this notion should be understood nowadays as referring to the "internal market", or "single market" or even, as a consequence of the European Economic Area Agreement, to the EEA, covering the 27 EU Member States, Iceland, Norway and Liechtenstein.

[134] Art. 8 (2) Reg. 139/2004

III. THE PRACTICE

A. The Gencor Case

Notwithstanding the precisions given above and the objective criterion of the Community dimension, which, a part from technicalities, would seem to be hardly disputable, the question whether a concentration of undertakings based in third countries could be really considered as subject to EC jurisdiction has given rise to some dispute. In this respect the leading case, which has been decided by the Court of First Instance (CFI), is the *Gencor/Lonrho* case [135], which deserves a detailed analysis.

Gencor Ltd. a South African, and Lonrho Ltd., a British company, decided to proceed to a merger of their subsidiaries Impala Platinum, controlled by Gencor, and Lonrho Platinum Division, controlled by Lonrho, both incorporated in South Africa and active in the platinum and rhodium sectors. The worldwide aggregate turnover of the two merging undertakings was the double of the Community threshold of 5 billions Euros and both had substantial commercial activities within the EU as suppliers of these metals. The objective conditions for the Community dimension were therefore fulfilled and a notification of the intended concentration has been made to the European Commission according to EC rules. The Commission found that the concentration raised serious doubts as to its compatibility with the common market and initiated proceedings with the undertakings concerned. Its concern was based on the consideration that the merger would have created a situation of duopoly in the world relevant market for platinum and other noble metals. Impala Platinum of Gencor and Eastern and Western Platinum, the two companies constituting the Lonrho Division, would have merged into one single undertaking supplying a very large share of the world market, the only one other relevant undertaking in this sector being Amplats, independent main competitor of Gencor and Lonrho and leading world supplier for platinum and other noble metals. The Commission reached the conclusion that, for a number of economic considerations, such an oligopolistic structure of the market would have had in the medium term a negative impact on the common market by restricting the output and leading to upward pressure on the prices. The undertakings concerned offered inadequate commitments of behavioural nature which could not be accepted by the Commission. Notwithstanding the positive assessment of the concentration envisaged communicated to the Commission by the South African Government, the Commission maintained its position and declared the concentration incompatible with the common market. As a result of this decision Lonrho communicated to Gencor its abandon of the envisaged concentration.

Gencor reacted by filing an appeal before the CFI against the Commission decision. A number of issues were raised, but the one which presents an interest for the purpose of this paper is the plea regarding the alleged lack of jurisdiction of the Commission.

Gencor submitted that the concentration concerned economic activities conducted within the territory of a third country. The main activity of the merging undertakings was mining and refining of platinum and other noble metals and this activity took place in South Africa. The commercial activities carried out in Europe by the undertakings or their subsidiaries could not be qualified as "implementing" the concentration, nor could they be considered as

[135] Case T-102/96 *Gencor/Lonrho v. Commission* [1999] ECR II-753

"substantial" if compared with the main activity carried out at home. The principle of proportionality should have required that the Commission decline its jurisdiction. As to the risk for competition arising out of the creation of a duopoly at world level, invoked by the Commission, it was entirely speculative. If it became real, it would have been a concern not only for the EU, but for the whole world because of the world-wide nature of the relevant geographical market concerned. Finally such a risk would not have been immediate, but rather the result of a long term development in case of a possible abusive behaviour by the duopoly, which could have been tackled with appropriate measures at the appropriate moment. The Commission decision to refuse clearance would give rise to a conflict with the South African Authorities which had approved of the concentration as a positive alteration of the industrial structure in that country. According to Gencor insisting on exerting jurisdiction under these circumstances would be incompatible with the public international law principle of territoriality.

The CFI took position first of all on the issue of the territorial scope of the EC merger control rules. It noted that the objective criteria for the Community dimension apply independently of the location of the undertakings concerned, whether within or outside the EU. They do not make any distinction between production or sales activity and the figures relating to the turnover within the EU are undisputed. The fact that the concentration, if carried out, would necessarily entail the supply of a large part of the EEA market by the new entity, reinforces rather than questions the "implementation" nature of its sales activity. As to the requirement that undertakings based outside the EU should have 'substantial operations" within the EU, as mentioned in a recital to the EC Regulation, such requirement does not differentiate between production and sales activities, but seems to give more importance to the latter by using the instrument of "turnover" to determine the level of interests which should be present in the EU to achieve the Community dimension. The Commission was therefore right in asserting its jurisdiction in the case at issue.

The CFI took also position on the issue of compatibility with public international law. The CFI recalled the principle of "extended territoriality", according to which public international law recognises the power to legislate if the act objectionable finds its origin outside the territory of the legislating entity, but its direct, immediate and substantial effects are felt within that territory. Par. (90) of the CFI decision reads: "*Application of the Regulation is justified under public international law when it is foreseeable that a proposed concentration will have an immediate and substantial effect in the Community*." The CFI shared the Commission analysis that the creation of a dominant duopoly on which the concerns of the Commission for the common market were based would have had such an immediate and substantive effect in the Community. The immediate effect resulted objectively from the alteration of the market structure where only two suppliers would have remained present as a direct consequence of the concentration, and not from a possible future abuse of a collective dominant position by the duopoly, which could have been controlled by using Articles 81 or 82 EC. As to the substantial effect, the Commission had convincingly established that the duopoly would create a lasting collective dominant position in the relevant world market and this would have affected competition within the Community far beyond the precedent levels of activity of the merging undertakings, as one should add to their sales the sales by the other independent entity constituting the duopoly. The fact that competition would be affected also in other parts of the world would in no case take away from the Community the right and the duty to defend competition within its own territory. The decision by the Commission was therefore consistent with public international law.

It is interesting to note that the CFI, after this clear statement, indulged in a further analysis showing that the Commission did not violate the principle of non interference or the principle

of proportionality. This seems to indicate a willingness to accept that a "comity" approach should be followed when applying EC merger control rules to foreign undertakings to take account of the possible reactions of the third countries whose appraisal of the concentration was not shared by the Commission.

What conclusions can be drawn from this case? The decision is clearly based, as far as the issue of the Community jurisdiction is concerned, over the "implementation" principle, which finds its legislative expression in the economic conditions linking the envisaged concentration with the EU. The Commission had jurisdiction simply because the merging undertakings had a sales activity within the EU fulfilling the turnover requirement for the Community dimension.

When discussing the public international law aspect, the CFI seems however to make an opening for a broader "effects principle". The refusal by the Commission to authorise the concentration is justified, from a public international law point of view, by the consideration that the duopoly necessarily emerging as a consequence of the concentration, would have constituted a change in the market structure such as to have "foreseeable, immediate and substantial effect" on competition within the EU. It is difficult to identify to which extent this principle is overlapping with the "implementation principle" (the decision contains e.g. the argument that the second undertaking in the duopoly, the one not implied in the concentration, has had and will keep an important share of the sales activity within the EU). One could however consider that, at least in a theoretical case, such an "effects principle" could be invoked if the Commission could demonstrate convincingly that the structural changes resulting from a concentration would inevitably at short term be the direct cause of substantial restrictions in the competition within the EU, and this even if such restrictions would not necessarily result in changes in the previous implementation activities, but would be of a different nature, eg new barriers to entry, shortage in the supply of products or services or the creation of a full functions joint venture operating in a third country.

B. Other cases

The Gencor/Lonrho case is not the only one where the Commission was confronted with the problem of applying the EC merger control rules to undertakings based outside the EU. Here follows a summary list of these cases, some of which have been largely commented in the media because of the tensions they had occasionally created between the Commission and the US authorities.

In the case *Boeing/Mc Donnell Douglas* the Commission examined the planned acquisition of Mc Donnell Douglas by Boeing, both US based undertakings, in close cooperation with the American competition authorities which were carrying out a parallel examination under US law. The conclusions reached by the two authorities at a certain point in time diverged: by a majority decision the US authorities decided not to oppose the merger, while the European Commission maintained its objections and announced that it would block the concentration. This gave rise to a tension between the two authorities, largely amplified by the media. The matter was ultimately resolved in 1997 [136] after Boeing gave commitments to the Commission designed to preserve competitive conditions within the EU, which allowed the Commission to give conditional clearance to the merger.

[136] Case n. IV/ M. 877 *Boeing/Mc Donnell Douglas* - Commission Decision OJ L [1997] 336/16

In 1998 in the case *WorldCom/MCI II* [137] the Commission gave conditional clearance to the merger between these two US undertakings operating in the telecommunication sector, subject to a commitment by MCI II to divest its Internet business activities. This case is a good example of parallel conduct of the examination by the EC and US competition authorities. It should be noted that the approval of the merger by the US authorities is still pending as the US Department of Justice is still examining the case.

In 2000 in the case *MCI WorldCom/Sprint* [138] the Commission prohibited the merger between the two US-based undertakings MCI-WorldCom and Sprint, both active in the sector of telecommunication. The Commission argued that this concentration would have created a dominant position in the market for top-level universal Internet connectivity. In the course of the examination the undertakings proposed to divest Sprint's interests in the Internet business, but this was not considered adequate by the Commission. Notwithstanding a letter of the undertakings announcing that they withdrew the notification of the planned concentration while reserving to notify a different plan for merger at the appropriate time, the Commission adopted a formal decision to prohibit the merger. The negative decision by the Commission was contested before the CFI, which eventually annulled the Commission decision [139]. As the arguments developed have no bearing on the issue of extraterritoriality it does not seem useful to analyse that judgment in this context.

In 2001 in the case *General Electric/Honeywell* [140], despite prior clearance given by the US authorities, the Commission decided to prohibit the proposed acquisition of Honeywell by General Electric, both US-based undertakings. The Commission considered that the merger would create or strengthen dominant positions on several markets and it would have severely reduced competition in the aerospace industry and resulted ultimately in higher prices for customers, particularly airlines. The remedies proposed by General Electric were considered insufficient by the Commission to answer its competition concerns. This was a case where the tension between the Commission and the American competition authorities reached unusual political dimensions. The Commission stressed that this was one of the exceptional cases where the two transatlantic authorities had reached divergent conclusion on a same case, as it is inevitable even with the best cooperation procedure, as sometimes facts may be interpreted differently and the effects of an operation may be forecast in different ways.

IV. SUPPLEMENTARY REMARKS

For the sake of completeness concerning the issue of extraterritorial application of merger control rules in Europe there are a few supplementary remarks, mainly of theoretical nature, which need to be made.

As indicate above, Regulation 139/2004 has introduced greater flexibility by making it easier for the Commission to refer a concentration case achieving the Community dimension to a Member State if it "*threatens significantly to affect competition in a market within that Member State*

[137] Case n. IV/M.1069 *WorldCom/MCI II* – Commission Decision OJ L [1999] 116/1

[138] Case n. COMP/M.1741 *MCI WorldCom/Sprint*- Commission Decision OJ L [2000]

[139] Case T-310/00 *MCI v. Commission* [2004] ECR

[140] Case n. COMP/M.2200

presenting all the characteristics of a distinct market" or if it "*affects competition in a market within that Member State, which presents all the characteristics of a distinct market and which does not constitute a substantial part of the common market*.". If a decision to refer a case is taken in accordance with the procedure provided in Article 9 of Regulation 139/2004, the case is then dealt with by the national authority of the Member State concerned and the domestic law on competition of that State applies. Although it would be rather unlikely that this type of referrals would be requested and agreed by the Commission if the concentration at issue is between foreign-based undertakings, this possibility cannot be entirely discarded. In this case the assessment of the effect on competition in the common market would be replaced by the assessment on competition in the distinct market in the Member State concerned. As to public international law considerations, they would be assessed according to the views prevailing in the Member State concerned, where, however, the case law of the CFI mentioned above would certainly also play a role.

A greater likelihood that the issue of extraterritoriality could arise exists in the opposite case, the one foreseen in Article 22 of Regulation 139/2004, when one or more Member States may request the Commission to exert jurisdiction over a concentration, even though not fulfilling the Community dimension, by reason that it "*affects trade between Member States and threatens to significantly affect competition within* [the Community] *territory*". In this case the EC merger control rules will apply to the concentration. Should the case concern a concentration planned between foreign-based undertakings, the public international law "effects based principle" should apply. In other terms the Commission would be expected to determine convincingly that the concentration will or will not entail a foreseeable, immediate and substantial effect for competition within the common market. In doing this analysis the Commission should also to a certain extent take account of comity considerations to smoothen possible conflicts with third countries. There is probably going to be frequently an "implementation" element in each of these cases, but it will not be possible to measure it as easily as it is the case when the existence of a Community dimension is determined. This seems to be a reason more to consider that an effects-based doctrine as described above would facilitate asserting the EC jurisdiction in cases where the Community dimension would by definition not be reached.

A final remark should be made, with reference to cases where the control of concentrations is carried out by the competition authorities of the Member States. If the undertakings concerned are based in third countries each Member State will apply its own law and its own views about jurisdiction over foreign companies and compatibility with public international law. But the same approach will be followed if the undertakings concerned are based in one or more other Member States. Dealing with national jurisdiction, such concentrations, although internal with respect to the EU, are international in nature and call for the same treatment as those concerning third countries.

It should however be considered that in such cases Member States have the possibility and the habit of consulting each other in the network of the EU-competition authorities. It is therefore highly unlikely that conflicts or tensions of the type evoked above could arise among Member States for conflicting assessments of the clearance of an intra-Community concentration. Should such a tension arise, it is almost inevitable that this would imply the existence of a problem for the functioning of competition within the internal market, with the result that the various instruments put at disposal by Regulation 139/2004, particularly the referral to the Commission under Article 22, could be used.

Chapter 6

APPLICATION OF COMPETITION LAWS TO FOREIGN UNDERTAKINGS IN RUSSIA, EUROPE AND USA

Alexey Sushkevich

I. INTRODUCTION

The factors that have led to the globalisation of commodity and financial markets (i.e. the considerable reduction of prices for communications and freight transportation) have equally facilitated the coordination of all practices restricting competition: conclusion of cartel agreements and control of their observance, implementation of concerted practices, mergers and acquisitions aimed at monopolisation of the market. Besides, market globalisation per se is able to impart international aspects to unilateral anticompetitive behaviour, e.g. when a dominant company refuses to supply national markets in some states, or when it establishes monopolistically high price, or implements price discrimination; or when such a company hinders access to the market of a particular state or removes its competitors using vertical agreements (with dealers, distributors, agents and other intermediate parties).

Out of a great number of known and legally defined types of anticompetitive behaviour, certain can result in the internal restriction of competition by foreign undertakings:

- commodity price-fixing agreements between sellers outside the territory of a certain state; it does not matter whether the commodity is imported directly by the participants of the agreement or by other companies.

- agreements on global partitioning of the market which result in elimination of competition within the internal market of a particular State; the criterion for market sharing (groups of consumers, types of products, geographical zones of servicing and etc.) does not matter.

- agreements (in which both competing and non-competing economic entities may participate) which impede the access to the market of a particular country; the subject of such agreements can, for example, be the participants' refusal to provide other economic entities with intellectual property rights, without which the access to the relevant market of a particular country is impossible.

- agreements whose subject is the expressly the boycott of the internal market of a particular state.

- unilateral actions of an undertaking that result in abuse of dominant position in the commodity market which is prohibited by the national legislation.

- coordination of activity of independent organisations by a foreign undertaking, as a result of which competition on the part of such organisations in the internal market of a particular state is eliminated.

By its nature, objectives and powers, a national antimonopoly authority is obliged to react to the anticompetitive effect caused by foreign companies. The administrative and economic nature of such response is quite clear: as well as in the case of disclosure of competition restriction by a national economic entity, the antimonopoly body investigates, discloses infringements, analyses the relevant commodity market and directs the infringing companies to implement actions aimed at restoring free competition.

Under the conditions of the commodity markets' globalisation, the internal restriction of competition by foreign companies causes a problem of availability of adequate legal tools necessary for enforcing and, even more difficult, for sanctioning infringing corporations for this particular type of restriction of competition. In contrast to some other spheres of social relations (e.g. suppression of terrorist activity), no international legal regulation of the multilateral cooperation system in the sphere of competition protection exists,[141] so it is too early to talk about universal antimonopoly jurisdiction that would guarantee punishment for the implementation of anticompetitive actions; thus, international institutions of multilateral competition cooperation remain embryonic.

The aim of the current chapter is to examine the ways of resolving this problem by various competition authorities (as well as by supranational and quasi-national organisations) and to analyse the adequacy of the Russian antimonopoly legislation and practice with regard to this problems of extraterritoriality.

II. APPLYING COMPETITION LAW AGAINST FOREIGN UNDERTAKINGS: THE USA AND EU APPROACH[142]

A. The Evolution of Extraterritoriality doctrines in US legislation

The USA faced the challenge of the internal restriction of competition by foreign undertakings much earlier than any other State: the first federal law on protection of competition, the well-known Sherman Act, was adopted in this country in 1890. The American courts, however, had not applied the antimonopoly legislation against foreign undertakings until 1945. The previous position had been formed by the USA Supreme Court in the case of *American Banana Co v. United Fruit Co* (1909) and was expressed by Supreme Court Judge Oliver Wendell Holmes in the following words: "the general and almost universal rule is that the character of the act as lawful or unlawful must be determined wholly by the law of the country where the act is done". The precedent, which became the basis of the extraterritoriality doctrine that is still in force, was established only in 1945 in the *US v. Aluminium Co of America (Alcoa)* case.[143] This

[141] Attempts to supplement the WTO Treaty with the relevant provisions are unsuccessful for the moment

[142] The following sources were used in this section: Jones & Sufrin, *EC Competition Law*, Oxford: OUP, 2nd ed, 2004; Yacheistova, *International Competition: Legislation, Regulation and Cooperation*, UNO: New-York/Geneva, 2001); Galhorn & Kovasik, *Antitrust Legislation and Economy*, International Law Institute, 1995; Scordamaglia, *Extraterritorial Application of The Antimonopoly Legislation – A Working Paper*, TACIS-Approximation of Competition Rules: Russian Federation, 2007.

[143] The Court of Appeal established that American and foreign aluminium producers had concluded a cartel agreement in Switzerland which had defined sales quotas for each participant of the agreement with the aim to establish new, higher price for the metal. The Court decided that under the circumstances the Sherman Act should be also applied to the Canadian company that was the participant of the cartel agreement, as 'any State may impose liabilities even upon person not within its allegiance for conduct outside its borders which has consequences within

particular case became the basis for the "effects doctrine" which justified application of the Sherman Act to foreign undertakings if their anticompetitive actions restricted trade in the USA.

The limits of application of the Sherman Act to foreign undertakings were established in the case *Timberlane Lumber Co v. Bank of America* (1976).[144] The Court of Appeal decided that when applying the Sherman Act in this way it is necessary to take into consideration 'international comity', i.e. requirements of "rules of politeness, convenience and goodwill observed by States in their mutual intercourse without being legally bound by them". A number of criteria which should be considered by courts during ruling on application of the Sherman Act to foreign undertakings were formalised in the Timberlane case, as well as in the subsequent decision *Mannington Mills Inc v. Congoleum Corp* (1979), in order to find the right balance between the doctrine of effects and the international comity considerations:

- whether the conduct of the foreign undertakings is in violation of the laws of the country of their location;
- the national identity or dependence of the parties in the case from a particular State or the main place of activities by the organisation participating in the case;
- the level of probability of application of the antimonopoly legislation by another State in order to remove the disclosed infringement;
- the relative effect of the infringement in the US in comparison with the significance of such effects in the other countries in question;
- the presence of direct intent to cause damage to US trade, the predictability of this effect, and the importance of the infringement in comparison with similar acts committed in USA.

The legislators used the existing court practice when they altered the Sherman Act in 1982. It was established that the federal antimonopoly laws could be applied to agreements concluded outside the US (except agreements on imports to USA) with participation of foreign undertakings or by them solely only in the case when such agreements had direct, significant and rationally predictable effect on US trade.[145] Thus, the legislator extended the principles that

its borders'. It also established that the Sherman Act should be applied to agreements concluded outside the USA whose aim and result was to influence on the American internal trade.

[144] The case was examined basing on the suit of the American company Timberlane Lumber Co, which accused companies and state officials of Honduras of collusion aimed at non-admission of Timberlane Lumber Co to the Honduran timber market. The American company was planning to export of Honduran timber to USA. Without prejudice to the doctrine of effects the judge pointed out that during decision-making on the case "*A tripartite analysis seems to be indicated. As acknowledged above* [in the Alcoa case], *the antitrust laws require in the first instance that there be some effect – actual or intended – on American foreign commerce before the federal courts may legitimately exercise subject-matter jurisdiction under those statutes* [against foreign undertakings and organisations]. *Second, a greater showing of burden or restraint may be necessary to demonstrate that the effect is sufficiently large to present cognisable injury to the plaintiffs and therefore a civil violation of the antitrust laws…Third, there is the additional question, which is unique to the international setting, of whether the interests of and links to the United States, including the magnitude of the effect on American commerce, are sufficiently strong, vis-à-vis those of other nations, to justify an assertion of extra-territorial authority* [of the Sherman Act]".

[145] The case of *Hartford Fire Insurance Co v. California* is illustrative in this respect. In 1993, the US Supreme Court found guilty of violation of the Sherman Act several reinsurance companies from Great Britain and USA. The companies had agreed not to conclude agreements with particular insurance companies and that made some types of insurance inaccessible for American consumers. Most of the judges agreed that 'the Sherman Act is applied to the actions of foreign companies which are aimed at achievement of the predetermined effect in the US and have actually achieved this effect'. The Court proceeded from the idea that the possibility of applying the Sherman Act to foreign companies should be established first and then it should be confirmed that such application was justified from the point of view of the international comity considerations. In fact, the international comity considerations allowed application of the Sherman Act to the British reinsurance companies in this case: the opinion

had been worked out in the *Alcoa* case (having supplemented the principle of rational predictability of effect on the American trade) to the relations connected with the agreements concluded outside the USA by foreign undertakings.

It should be noted that within the American legal community there is no complete consensus concerning this method of application of the Sherman Act: the necessity to take into consideration international comity considerations remains disputed, as it leads to doubts about the universality of application of the Sherman Act. From the point of view of the critics, international comity should precede the ascertainment of the question of application of the Sherman Act to particular relations and undertakings.

The US federal competition authorities– the Department of Justice and the Federal Trade Commission – consistently apply their powers to foreign undertakings: they send information requests and orders to hand over documents kept abroad, and also issue directions on the removal of the infringements and their consequences. This practice is based on recommendations on application of the antimonopoly legislation to foreigners that are based on the "doctrine of effects" balanced by international comity considerations, published by them jointly in 1995. As a rule, the requests, orders and sanctions are implemented by the foreign suspects under threat of criminal proceedings against the undertakings or their executives, if ever apprehended in US territory. The doctrine of effects was subsequently applied in the *United States v. Nippon Paper Industries Co* case, where preliminary investigation had been carried out by the US Department of Justice, and which became the first case when the authority held a foreign person criminally liable for violation of the Sherman Act.[146]

Extraterritorial application of the Sherman Act by the American courts and the federal competition authorities often meets open resistance in other countries.

B. Competition Extraterritoriality doctrines in the European Union

Doctrinal provisions of the EU antimonopoly legislation in what concerns its application to foreign undertakings are under the influence of different, particularly European legal realities.

Significant influence was exerted by the "economic entity doctrine" as the subject of market relations and the object of regulation introduced by Articles 81 and 82 of the EC Treaty. An economic entity as it is understood by the European Commission (as well as by the European Court of Justice (ECJ), which agreed with such interpretation of the EC Treaty) may include a number of undertakings which are connected by relations of control; e.g. a parent company and its subsidiary if the subsidiary company does not have economic independence from the parent company or 'if the undertakings form an economic unit within which the subsidiary has no real freedom to determine its course of action on the market'. The unified conduct on the market of the parent company and its subsidiaries takes precedence over the formal separation between those companies as a result of their separate legal personalities and allows consideration of such undertakings as a single economic entity.

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of the court was that although the conduct of the British participants of the cartel had not violated UK laws, the British authorities had not forced them to participate in the cartel and thus they had no grounds to impede American sanctions against the British companies.

[146] Participants of the cartel that fixed prices for fax paper delivered to the USA were solely Japanese companies, which implemented their actions within the frames of the agreement on the territory of Japan. The District Court of Appeal confirmed the conclusions of the Department of Justice that the Japanese companies had violated the Sherman Act and found the participants of the cartel criminally liable.

The economic entity doctrine as an object to which prohibitions established in Articles 81 and 82 of the EC Treaty are applied, inevitably raised the issue of application of these prohibitions to foreign undertakings (along with establishing their liability for infringement) whose subsidiaries had infringed the prohibitions within the territory of the European Community. The *ICI v. Commission (Dyestuffs)* case is a leading precedent.[147] However, the next case examined by the European Commission[148] contained a fundamentally new basis[149] for application of Article 81 of the EC Treaty to foreign companies, the so-called 'implementation doctrine'.

Particular commentators express the opinion that the implementation doctrine as a basis for application of the EC legislation on competition to foreign companies can be applied only when a foreign company implements direct sales on the territory of the Community (or other direct action implemented within the EU). Unlike the effects doctrine it cannot be applied to foreign companies' cartel agreements which aim to boycott the European Common market (refusal to sell or purchase goods within the EU). Some analysts, however, underline that application of the implementation doctrine will help the European Community to avoid extraterritorial application by the other States of their antimonopoly legislation to undertakings of the Member States since in this particular case the EU itself establishes its jurisdiction on the territorial principle.

The European Commission also applies the 'implementation doctrine' in merger control of foreign companies. Following this doctrine, the European Commission examines mergers of foreign companies on the condition that these companies implement (or implemented before the merger) sales of their products on the territory of the common market, and also if these companies are subjected to merger control in accordance with the formal criteria established in the EU (sales value in the common market and number of Member States where the sales are implemented).[150]

Comparing the effects doctrine with the implementation doctrine as a basis for application of antimonopoly legislation to foreign entities, it should be noted that the differences between them are mainly of terminological character and that they are practically levelled in the course of examination of particular cases by the competition authorities of the USA and the European Commission. In fact, anticompetitive practices subject to control and suppression are identical on both sides of the Atlantic, and they vary only because of distinctions in their antimonopoly legislations but not because of any doctrinal differences in their approach to extraterritorial application.

III. EXTRATERRITORIAL APPLICATION OF RUSSIAN ANTIMONOPOLY LEGISLATION

The extraterritorial application of Russian antimonopoly legislation against foreign undertakings was introduced in 1995, when the legislator for the first time gave expanded formulation of the sphere of application of the then-existing Law of the RSFSR of 22 March 1991

[147] . See further Chapter 3, *supra*.

[148] Wood Pulp II. Cases C-89/85 etc, *.Ahlstrom Oy v. Commission* (1993) ECR I-1307, (1993) 4 CMLR 407.

[150] Cf, Chapter 5, *supra*.

№948-1 "On Competition and Restriction of Monopolistic Activity in Commodity Markets" (Law "On Competition"):

"The present law is extended to relations influencing competition in the commodity markets of the Russian Federation and in which the Russian and foreign legal persons, the federal bodies of executive authorities, the bodies of executive authorities of the Subjects of the Russian Federation, the bodies of local self-government as well as natural persons participate. *The law is also applied to cases when actions and agreements accordingly implemented or concluded by the mentioned persons outside the territory of the Russian Federation lead or can lead to restriction of competition or entail other negative consequences in the markets of the Russian Federation."*

This wording of the provision on the sphere of application of the law had remained unchanged until October 2006 and had facilitated application of the law to any anticompetitive practices of foreign undertakings. Prohibited behaviour included any kind of restriction of competition through anticompetitive practices or other negative consequences in the markets of the Russian Federation to which the Russian antimonopoly legislation referred: cartel agreements and concerted practices restricting competition within the territory of the Russian Federation, unfair competition and abuse of dominant position as well as transactions and other actions that were subjected to economic concentration control, i.e. were to be implemented only after the antimonopoly body's consent or following obligatory notification.

It is interesting that within the period of 1995 – 2006 the provisions of the Russian antimonopoly legislation allowed use of the European 'economic entity doctrine' as the basis for extraterritorial application of the Russian antimonopoly legislation. The law "On Competition" established that 'Provisions of the present law relating to an undertaking also concern a group of undertakings' and this was interpreted by the antimonopoly bodies as the possibility to take coercive action against any corporation (including foreign ones) included into the same group of companies with the infringer, if that corporation was able to restore competition by its actions as well as the possibility to make them responsible for non-compliance with the prescribed actions.[151]

Today it is too early to speak about any doctrinal expression of the practice of application of the Russian antimonopoly legislation to foreign undertakings and organisations as the length of practice is clearly insufficient. Since 2006, the Russian competition authorities did not investigate and did not suppress any manifestation of monopolistic activity resulting in the internal restriction of competition by foreign undertakings.

The only actual example of application of the Russian antimonopoly legislation to foreign undertakings and organisations is the occasional practice of examining applications of foreign companies for consent to transactions with foreign corporations (e.g. in the case of merger of aluminium producers). As a rule applications of this type are submitted to the antimonopoly body in case the potential participants of the transaction import their products to Russia or if they directly or by subsidiaries own shares in the Russian undertakings or property in the Russian Federation.

[151] . This interpretation of the law found its reflection in the Information letter by the Presidium of VAS of the RF of 30 March 1998 № 32 'Review of the practice of settlement of disputes connected with application of the antimonopoly legislation': *'If the antimonopoly legislation was infringed by one member of a dominant group of companies the relevant decisions may be directed to the members of the group which are able to ensure removal of the infringement.*'

The new law "On Protection of Competition", which came into force on 26 October 2006, and which substituted the law "On Competition" and the federal law "On Protection of Competition in the Financial Services Market", ensures application of the antimonopoly legislation to foreign undertakings and organisations only when they implement transactions and other actions subjected to economic concentration control in accordance with Chapter 7 of the law "On Protection of Competition". Part 2 of Article 3 of the law establishes that:

'Provisions of the present Federal Law are applied to agreements which are reached between the Russian or foreign undertakings or organisations outside the territory of the Russian Federation, if in the case of such agreements both the following conditions are fulfilled:
1) the agreements are reached in respect to the basic production assets and (or) intangible assets situated on the territory of the Russian Federation or with respect to stocks (shares) of the Russian business partnership, rights in respect to the Russian commercial organisations;
2) the agreements lead or can lead to restriction of competition in the Russian Federation.'

In theory, the new law may also be applied to cases when foreign undertakings implement agreements which according to the general rule of Chapter 7 are not subjected to economic concentration control. However, it is unlikely that the Russian competition authority would be able to provide justification for this, i.e. to prove restriction of competition in Russia by a transaction for which the law does not establish presumption of influence on the state of competition[152].

The possibility to apply the law "On Protection of Competition" to foreign undertakings and organisations if they implement agreements which are subjected to economic concentration control is also established in Article 31 of the law. This article establishes the rules according to which the undertakings, included in one group of undertakings, are permitted to pass from preliminary control of transactions by the competition authority (i.e. from obligation to submit application) to informative control (i.e. to exercise the obligation of notification) when they implement transactions within the group. One of the conditions for receiving an exemption is for a company to submit to the competition authority the list of undertakings included in one group and to publish it on the FAS web-site. More than 100 groups of undertakings had already declared their membership by the beginning of the second half of 2007 and many of these groups included tens of foreign undertakings and organisations and thus foreign undertakings and organisations like these got the possibility to transact in the regime of notification even if in accordance with the general rule of Chapter 7 they were subjected to preliminary control and part 2 of Article 3 of the law could be applied to such transactions.

Unfortunately, such cases as implementation by foreign corporations of transactions and other actions which do not conform with the condition of paragraph 1 of part 2 of Article 3 (for example, merger of foreign companies importing their products to the territory of the Russian Federation if the merging parties have no subsidiaries in the RF, do not own shares or property of the Russian companies) shall be excluded from the sphere of application of the new law. This condition also removes from the law "On Protection of Competition" almost all possible cases of international cartels and abuse of dominant position by a foreign company that may negatively influence competition in Russia.

[152] According to paragraph 21 of Article 4 of the new law 'economic concentration – is transactions, and other actions, whose fulfilment influences the state of competition'. The list of such transactions is given in the law.

IV. RUSSIA AND INTERNATIONAL BILATERAL AGREEMENTS ON ANTIMONOPOLY PRACTICE

A. Other International Agreements

The effectiveness of application of the antimonopoly legislation to foreign undertakings and organisations mostly depends on their State of residence. International law does not give a clear and unanimously accepted answer to the issue of the limits of exerting jurisdiction based on competition rules over undertakings based abroad. That is exactly the reason why the tendency for concluding bilateral agreements has accelerated since the 1970s. As a result of the process initiated by the OECD in 1967 the USA concluded bilateral agreements with Germany (1976), Australia (1982) and Canada (1984 and 1995). Later, in 1991, elaboration of agreement on bilateral cooperation in suppression of violation of antimonopoly legislation between the USA and the EU started and it was finished by conclusion of a regular international agreement in 1995. According to the Agreement the USA and the EC were obliged to inform each other about all cases of application of the antimonopoly legislation if they became aware that it may affect interests of the other party; the Agreement established rules on the exchange of information and on regular meetings of the representatives the relative authorities as well as established obligations on mutual assistance and cooperation in investigations.

Commentators mark that one of the most important provisions of the Agreement is establishment of the principle of the so-called "positive comity", i.e. the right of one party to demand from the other one to take the necessary actions (to carry out investigation, to suppress actions, to call to account) against the company which has restricted competition on the territory of the requested party but is located and is implementing its activity on the territory of the country-addressee. The Agreement contains the relevant procedure and the limits for this type of cooperation, establishing that each party should take into consideration the interests of the other party when demanding to take the necessary actions on its territory (commentators call it "negative comity").

The EC/USA Agreement on application of the antimonopoly legislation helped to achieve successful cooperation of the two authorities in the issue of protection of competition, though according to the European Commission's DG Competition 'the procedures of notification and consultation as well as comity principle let us approximate our approaches in the cases which constitute mutual interest but do not contain the mechanism for solving the conflicts in case there exists considerable clash of opinions'.

Thus, the Agreement solves the problem of extraterritorial application of the antimonopoly legislation allowing to achieve the established goal (suppression of the monopolistic activity) by means of application of the antimonopoly legislation of the country where the infringer is located.

B. Russia and the CIS

The Russian competition authority also made efforts to achieve international consensus in matters concerning procedures and principles of suppression of internal restriction of competition resulting from the activities of foreign undertakings. The Accord on pursuing concerted competition policy concluded between the Member States of the CIS on 25 January 2000 can serve as an example of these efforts. In addition to standard provisions on exchange of information, consultations and the like, the Accord contains a rather detailed procedure of

assistance of competition authority between the signatory parties. The Accord establishes that 'the competition authority examines the facts of infringement and takes decision in accordance with the requirements of the national legislation on the basis of the application of the competition authority of the other State-participant of the Accord.'. Unfortunately neither Russia nor the other States-participants of the Agreement have implemented the necessary changes into their national antimonopoly legislations. What is still a *lacuna*, in particular, is the establishment of an expanded territorial sphere of application so that the cases of restriction of competition on the territory of the other countries could be recognised directly as an infringement of the Russian law.

Appendix

FEDERAL LAW № 135-FZ of JULY 26, 2006

"ON PROTECTION OF COMPETITION"

RUSSIAN FEDERATION

Adopted by
the State Duma
on July 8, 2006

Approved by
the Federation Council
on July 14, 2006

Chapter 1. General Provisions

Article 1. Subject and Objectives of the Present Federal Law

1. The present Federal Law determines organizational and legal basis for protection of competition including prevention and restriction of:

1) monopolistic activity and unfair competition;

2) prevention, restriction, elimination of competition by federal bodies of executive authority, public authorities of the subjects of the Russian Federation, bodies of local self-government, other bodies or organizations exercising the functions of the above-mentioned bodies, as well as public off-budget funds, the Central Bank of the Russian Federation.

2. Objectives of the present Federal Law are to ensure common economic area, free movement of goods, protection of competition, freedom of economic activity in the Russian Federation and to create conditions for effective functioning of the commodity markets.

Article 2. Antimonopoly Legislation of the Russian Federation and Other Statutory Legal Acts on Protection of Competition.

1. The antimonopoly legislation of the Russian Federation (hereinafter referred to as antimonopoly legislation) is based on the Constitution of the Russian Federation, the Civil Code of the Russian Federation and consists of the present Federal Law, other federal laws regulating relations stated in article 3 of the present Federal Law.

2. Relations stated in article 3 of the present Federal Law may be regulated by Regulations of the Russian Federation Government, statutory legal acts of the Federal Antimonopoly Authority in cases directly provided for in the antimonopoly legislation.

3. If International Treaty of the Russian Federation establishes different rules than those provided for in the present Federal Law, the rules provided for in the International Treaty of the Russian Federation are applied.

Article 3. Sphere of Application of the Present Federal Law

1. The present Federal Law is applied to the relations which are connected with protection of competition, including prevention and restriction of monopolistic activity and unfair competition and in which Russian legal persons and foreign legal persons, federal bodies of executive authority, public authorities of the subjects of the Russian Federation, bodies of local self-government, other bodies or organizations exercising the functions of the above-mentioned bodies, as well as public off-budget funds, the Central Bank of the Russian Federation, natural persons, including individual entrepreneurs are involved.

2. Provisions of the present Federal Law are applied to agreements which are reached between Russian or foreign persons or organizations outside the territory of the Russian Federation, if in the case of such agreements both the following conditions are fulfilled:

1) the agreements are reached in respect to the basic production assets and (or) intangible assets situated on the territory of the Russian Federation or with respect to stocks (shares) of the Russian business partnership, rights in respect to the Russian commercial organizations;

2) the agreements lead or can lead to restriction of competition in the Russian Federation.

Article 4. Basic Definitions Used in the Present Federal Law

The following basic definitions are used in the present Federal Law:

1) commodity – is an object of civil rights (including work, service, financial service) intended for sale, exchange or trade in another form;

2) financial service – is a banking service, an insurance service, a service in the securities market, a leasing service, as well as a service provided by a financial organization and connected with attracting and allocating funds of legal and natural persons;

3) substitute goods – are goods that can be compared by their functional purpose, application, qualitative and technical characteristics, price and other parameters in such a manner that purchaser actually substitutes or is ready to substitute one commodity with another in the process of consumption (including consumption for production purposes);

4) commodity market – is an area of circulation of a commodity (including commodity of foreign manufacture), which cannot be substituted by another commodity, or substitute goods (hereinafter referred to as a certain commodity), within the frames of which (including geographical frames) basing on economic, technical or other possibility, or expediency the purchaser can obtain the commodity and this possibility or expediency is absent outside its frames;

5) economic entity – is an individual entrepreneur, a commercial organization as well as non-commercial organization exercising activity bringing income;

6) financial organization – is an economic entity providing financial services: credit institution, credit consumer cooperative, insurer, insurance broker, mutual insurance association, stock exchange, monetary exchange, pawnshop, leasing company, non-governmental pension fund, management company of investment fund, management company of unit investment fund, specialized depositary of investment fund, specialized depositary of unit investment fund, specialized depositary of non-governmental pension fund, professional participant of the securities market;

7) competition – is a rivalry between economic entities during which the independent actions of each of them exclude or restrict the possibility for each of them to influence unilaterally on the general conditions of circulation of commodities in the relevant commodity market;

8) discriminatory conditions – are conditions of access to a commodity market, conditions of production, exchange, consumption, purchase, sale, another way of transfer of goods, when an economic entity or several economic entities are placed at a competitive disadvantage in comparison with another economic entity or the other economic entities;

9) unfair competition – is any actions of economic entities (groups of persons) aimed at getting benefits while exercising business activity, contradicting with the legislation of the Russian Federation, business traditions, requirements of respectability, rationality and equity and which inflicted or can inflict losses to the other economic entities-competitors or harmed or can harm their business reputation;

10) monopolistic activity – is abuse by an economic entity, a group of persons of their dominant position, agreements or concerted practices prohibited by the antimonopoly legislation, as well as other actions (inaction) recognized as monopolistic activity in accordance with the federal laws;

11) systematic implementation of monopolistic activity – is implementation of monopolistic activity by an economic entity exposed more than two times in three years in accordance with the procedure established by the present Federal Law;

12) unjustifiably high price of a financial service, unjustifiably low price of a financial service – is the price of a financial service or financial services, which is established by a financial organization occupying a dominant position, and which differs considerably from the competitive price of a financial service and (or) impedes access to the commodity market for the other financial organizations and (or) has negative impact on competition;

13) competitive price of a financial service – is the price for which a financial service can be provided in the conditions of competition;

14) coordination of business activity – is coordination of business activities of economic entities by a third person which is not included in one group of persons with any of such economic entities. Actions of a self-regulated organization on establishing conditions for access of its members to a commodity market or withdrawal from the commodity market, which are exercised in accordance with the federal laws, are not coordination of business activity;

15) antimonopoly authority – is the federal antimonopoly authority and its territorial bodies;

16) acquisition of stocks (shares in the authorized capital) of business partnerships – is purchase as well as gaining of another opportunity to exercise the voting rights given by the stocks of business partnerships (shares in the authorized capital) on the basis of agreements on trust management, agreements on joint activity, contract of agency, other transactions, or on other grounds;

17) indicators of restriction of competition – are reduction in the number of economic entities, which are not included in one group of persons, in the commodity market, increase or decrease in commodity price which is not connected with the relevant changes of other general conditions of commodity circulation in the commodity market, refusal of economic entities, which are not included in one group of persons, from

independent actions in the commodity market, defining of general conditions of commodity circulation in the commodity market by agreement between economic entities or in accordance with instructions of another person which are obligatory for fulfillment by them, or in the result of coordination of actions in the commodity market by the economic entities not included in one group of persons as well as other circumstances creating opportunity for an economic entity or several economic entities to impact unilaterally on the general conditions of circulation of commodity in the commodity market;

18) agreement – is a written understanding contained in a document or several documents, as well as verbal understanding;

19) vertical agreement – is an agreement between economic entities which are not competing with each other, one of which purchases commodity or is its potential purchaser and the other provides commodity or is its potential sellers;

20) state and municipal aid – is provision by the federal bodies of executive authority, executives authorities of the subjects of the Russian Federation, bodies of local self-government, other bodies or organizations exercising the functions of the above-mentioned bodies of advantages ensuring to some economic entities more favourable conditions of activity in the relevant commodity market in comparison with the other market participants (potential market participants) by means of disposal of property and (or) other objects of civil rights, the right of priority access to information.

21) economic concentration – is transactions, other actions, which fulfillment influences on the condition of competition

Article 5. Dominant Position

1. Dominant position is recognized when position of an economic entity (a group of persons) or several economic entities (groups of persons) in the market of certain commodity giving such economic entity (a group of persons) or such economic entities (groups of persons) an opportunity to have a decisive impact on the general conditions of commodity circulation in the relevant commodity market and (or) to remove other economic entities from this commodity market and (or) to impede access to this commodity market for the other economic entities. The position of an economic entity (except financial organizations) is recognized as dominant:

1) whose share in the certain commodity market exceeds fifty per cent if only in the course of examination of the case of violation of the antimonopoly legislation or in the course of exercising state control over economic concentration it would be established that despite the excess of the aforementioned quantity position of the economic entity in the commodity market is not dominant;

2) whose share in the certain commodity market is less than fifty per cent in case the dominance of this economic entity was established by the antimonopoly authority proceeding from stable or subjected to insignificant changes share of the economic entity in the market as compared to the shares of its competitors in this commodity market, opportunities for access to this commodity market of new competitors, or proceeding from other criteria characterizing commodity market.

2. The position of an economic entity (except a financial organization) whose share in the certain commodity market does not exceed thirty five per cent cannot be recognized as dominant, except the cases stated in part 3 and 6 of the present article.

3. The position of each of several economic entities (except financial organizations) is recognized dominant if all of the conditions below apply to the entity:

1) the aggregate share of not more than three economic entities, share of each of these exceeds the shares of the other economic entities in this market, exceeds fifty per cent, or the aggregate share of not more than five economic entities, the share of each of these exceeds the shares of the other economic entities in the relevant commodity market, exceeds seventy per cent (this provision is not applied if the share of at least one of the aforementioned economic entities is less than eight per cent);

2) during a long period (during not less than a year or in case this period is less than a year during the period of the relevant commodity market existence) the relevant sizes of such economic entities' shares are stable or subjected to insignificant changes, as well as access of new competitors to the relevant commodity market is impeded;

3) the commodity sold or purchased by economic entities cannot be substituted with another commodity in the process of consumption (including consumption for production purposes), growth of the commodity price does not condition corresponding to such growth reduction in demand for this commodity, information about the price, conditions of selling or purchasing of this commodity in the relevant commodity market is available to indefinite group of persons.

4. An economic entity has the right to provide evidence before court or antimonopoly authority that the position of this economic entity in the commodity market cannot be recognized as dominant.

5. The position of an economic entity - subject of a natural monopoly in a commodity market, which is in a state of natural monopoly, is recognized dominant.

6. The federal laws can establish cases of recognizing as dominant the position of an economic entity whose share in the market of a certain commodity is less than thirty five per cent.

7. The conditions for recognizing as dominant the position of a financial organization (excluding a credit organization) are established by the Government of the Russian Federation taking into consideration the restrictions provided for by the present Federal Law. The conditions for recognizing as dominant the position of a credit organization are established by the Government of the Russian Federation in agreement with the Central Bank of the Russian Federation taking into consideration the restrictions provided for by the present Federal Law. The conditions for recognizing as dominant the position of a financial organization (excluding a credit organization) are established by the antimonopoly authority in accordance with the procedure approved by the Government of the Russian Federation. The procedure of establishing the dominant position of a credit organization is approved by the Government of the Russian Federation in agreement with the Central Bank of the Russian Federation. The position of an business partnership, whose share in the commodity market of the Russian Federation does not exceed ten per cent in the single in the Russian Federation commodity market or does not exceed twenty per cent in the commodity market when the commodity circulating this market circulates as well in the other commodity markets of the Russian Federation, cannot be recognized as dominant.

Article 6. Monopolistically High Price of a Commodity

1. Monopolistically high commodity price (except financial service) is a price established by an economic entity occupying a dominant position if:

1) this price exceeds the price, which, in the competitive conditions of the commodity market comparable by the quantity of the commodities sold within definite period of time, by qualitative structure of customers or sellers of the commodity (which is defined proceeding from the aims of purchasing or selling of the commodity) and also by the conditions of access (hereinafter - comparable commodity market), is established by economic entities which are not included in one and the same group of persons with purchasers or sellers of the commodity and are not occupying a dominant position in comparable commodity market;

2) this price exceeds the sum of expenses and returns necessary for production and sale of such commodity.

2. The commodity price is not recognized as monopolistically high if it does not meet at least one of the criteria mentioned in part 1 of the present article. The price is not recognized to be monopolistically high if it is established by a subject of the natural monopoly within the limits of the tariff for such commodity determined by the body regulating natural monopolies.

Article 7. Monopolistically Low Price of a Commodity

1. Monopolistically low commodity price (except financial service) is a commodity price established by an economic entity occupying a dominant position if:

1) this price is lower than the price which in the competitive conditions at the comparable commodity market is established by economic entities which are not included in one and the same group of persons with purchasers or sellers of the commodity and are not occupying a dominant position in such a comparable commodity market;

2) this price is lower than the sum of expenses necessary for production and sale of such commodity.

2. The commodity price is not recognized as monopolistically low if it does not meet at least one of the criteria mentioned in part 1 of the present article. The commodity price is not recognized monopolistically low if its establishment has not resulted in restriction of competition because of reduction of the number of economic entities which are not included in one and the same group of persons with the purchasers or sellers of the commodity in the relevant commodity market. The commodity price is not recognized to be monopolistically low if it is established by a subject of the natural monopoly within the limits of the tariff for such commodity determined by the body regulating natural monopolies.

Article 8. Concerted Practices of Economic Entities

1. Concerted practices of economic entities are the actions of economic entities in the commodity market that meet both the following conditions:

1) the result of such actions meets the interest of each mentioned economic entity only on the condition that their actions are known to each of them in advance;

2) the actions of each mentioned economic entity are caused by the other economic entities' actions and are not the consequences of the circumstances equally influencing upon all economic entities in the relevant commodity market. Such circumstances, in particular, can include change of the regulated tariffs, change in the prices for raw material used for the commodity production, change in the prices of the commodity in the world commodity markets, significant change in commodity demand within the period not less than a year or within the period of existence of the relevant commodity market if it exists for less than a year.

2. Implementation of actions on agreement by an economic entity is not referred to concerted practices.

Article 9. Group of Persons

The following business partnerships are recognized as a group of persons:

1) a business partnership and a natural person or a legal person if such natural person or such legal person has, due to its participation in this business partnership or according to the authority given by the other persons, more than fifty per cent of the total vote related to voting stocks (shares) in the authorized (joint) capital stock of this business partnership;

2) a business partnership where one and the same natural person or one and the same legal person has, due to its participation in this business partnership or according to the authority given by the other persons, more than fifty per cent of the total vote related to voting stocks (shares) in the authorized (joint) capital stock of each of these business partnerships.

3) a business partnership and a natural person or a legal person if such natural person or such legal person exercises the functions of the sole executive body of this business partnership;

4) business partnerships where one and the same natural person or one and the same legal person exercises the function of the sole executive body;

5) a business partnership and a natural person or a legal person if such natural person or such legal person basing on constituent documents of this business partnership or on agreement concluded with this business partnership has the right to give this business partnership directions obligatory for execution;

6) business partnerships in which one and the same natural person or one and the same legal person has the right on the basis of constituent documents of these business partnerships or agreements concluded with such business partnerships to give such business partnerships obligatory for execution;

7) a business partnership and a natural person or a legal person if on such natural person's or such legal person's proposal the sole executive body of this economic unity was appointed or elected;

8) business partnership whose sole executive body was appointed or elected on the proposal of one and the same natural person or one and the same legal person;

9) a business partnership and a natural person or a legal person if on such natural person's or such legal person's proposal more than fifty per cent of the quantitative membership of the collegial executive body or the Board of Directors (supervisory board) of this business partnership was elected;

10) business partnerships where more than fifty per cent of the quantitative membership of the collegial executive body and (or) the Board of Directors (supervisory board) has been elected on proposal of one and the same natural person or one and the same legal person;

11) business partnerships where more than fifty per cent of the quantitative membership of the collegial executive body and (or) the Board of Directors (supervisory board) are one and the same natural persons;

12) persons which are participants of one and the same financial-industrial group;

13) a natural person, his spouse, parents (including adoptive parents), children (including adopted), own and step brothers and sisters;

14) persons, each of which is included into a group with one and the same person, on any ground stated in items 1-13 of the present part, as well as all the other persons which are the members of a group with one and the same person, on any ground stated in items 1-13 of the present part.

2. Prohibitions on actions (inaction) of an economic entity, economic entities, established by the present Federal Law are extended to actions (inaction) of a group of persons.

Chapter 2. Monopolistic Activity. Unfair Competition

Article 10. Prohibition of Abuse of Dominant Position by an Economic Entity

1. Actions (inaction) of an economic entity occupying a dominant position, which result or can result in prevention, restriction or elimination of competition and (or) infringement of the interests of other persons are prohibited, including the following actions (inaction):

1) establishment and maintaining of monopolistically high or monopolistically low price for a commodity;

2) withdrawal of a commodity from circulation, if the result of such withdrawal is increase of price of the commodity;

3) imposing on a counterparty of contractual terms which are unprofitable for the latter or not connected with the subject of agreement (economically or technologically unjustified and (or) not provided for directly by the federal laws, statutory legal acts of the President of the Russian Federation, statutory legal acts of the Government of the Russian Federation, statutory legal acts of the authorized federal bodies of executive authority or judicial acts, requirements on transfer of financial assets, other property, including property rights, as well as consent to conclude a contract on conditions of including in it of provisions, concerning the commodity in which the counterparty is not interested and other requirements);

4) economically or technologically unjustified reduction or cutting off the production of a commodity if there is demand for the commodity or the orders for its delivery are placed and there is possibility of its profitable production, as well as if such reduction or cutting off the production of the commodity is not provided for directly by the federal laws, statutory legal acts of the President of the Russian Federation, statutory legal acts of the Government of the Russian Federation, statutory legal acts of the authorized federal bodies of executive authority or judicial acts;

5) economically or technologically unjustified refusal or evasion form concluding a contract with individual purchasers (customers) in the case when there are possibilities for production or delivery of the

relevant commodity as well as in the case if such refusal or evasion is not provided for directly by the federal laws, statutory legal acts of the President of the Russian Federation, the Government of the Russian Federation, authorized federal bodies of executive authority or judicial acts;

6) economically, technologically or in any other way unjustified establishment of different prices (tariffs) for one and the same commodity if another is not established by the law;

7) establishment of unjustifiably high or unjustifiably low price of a financial service by a financial organization;

8) creation of discriminatory conditions;

9) creation of barriers to entry into the commodity market or leaving from the commodity market for the other economic entities;

10) violation of the procedure of pricing established by statutory legal acts.

2. An economic entity has the right to provide evidence that its actions (inaction) stated in part 1 of the present article (except actions indicated in items 1, 2, 3, 5, 6, 7 and 10 of part 1 of the present article) can be recognized as eligible in accordance with the requirements of part 1 of article 13 of the present Federal Law.

3. Government of the Russian Federation establishes rules of access to the commodities of the subjects of natural monopolies, aimed at prevention of creating conditions which place one consumer in unequal position in comparison with the other consumers of commodities of the subjects of natural monopolies.

4. Requirements of the present article are not extended over the actions on implementation of exclusive rights for the results of intellectual activity and equalized to them means of individualization of a legal person, means of individualization of production, executed works or rendered services.

Article 11. Prohibition of Agreements Restricting Competition or Concerted Practices of Economic Entities

1. Agreements between economic entities or concerted practices of economic entities in the commodity market are forbidden if such agreements or concerted practices lead or can lead to:

1) establishment or maintaining of prices (tariffs), discounts, markups (extra charges), margins;

2) raising, lowering, or maintaining of prices at tenders;

3) division of the commodity market according to the territorial principle, the volume of sales or purchases of commodities, the range of sold products or composition of sellers or purchasers (customers);

4) economically or technologically unjustified refusal from concluding contracts with certain sellers or purchasers (customers) if such refusal is not provided for directly by the federal laws, statutory legal acts of the President of the Russian Federation, statutory legal acts of the Government of the Russian Federation, statutory legal acts of the authorized federal bodies of executive authority or judicial acts;

5) imposing on a counterparty of contractual terms which are disadvantageous for the latter or are not connected with the subject of agreement (unjustified requirements of transfer of funds, other property, including property rights, as well as consent to conclude a contract on conditions of including in it of provisions, concerning the commodity in which the counterparty is not interested and other requirements);

6) economically, technologically or in any other way unjustified establishment of different prices (tariffs) for one and the same commodity;

7) reduction or cutting off the production of commodities for which there is a demand or the orders for their delivery are placed and there is possibility of their profitable production;

8) creation of barriers to entry into the commodity market or exit from the commodity market for the other economic entities;

9) establishment of conditions for the membership (participation) in professional and other associations, if such conditions lead or can lead to prevention, restriction or elimination of competition, as well as to establishment of unjustified membership criteria which are barriers to the participation in payment or other systems without participation in which competing financial organizations would not be able to provide the necessary financial services.

2. Other types of agreements between economic entities (except "vertical" agreements which are recognized permissible in accordance with article 12 of the present Federal Law) or other concerted practices of economic entities are forbidden if such agreements or concerted practices lead or can lead to restriction of competition.

3. Natural persons, commercial organizations and non-commercial organizations are forbidden to coordinate economic activity of economic entities if such coordination leads or can lead to the consequences indicated in part 1 of the present article.

4. An economic entity has the right to provide evidence that the agreements reached by it or concerted practices fulfilled by it can be recognized eligible in accordance with article 12 and part 1 of article 13 of the present Federal Law.

Article 12. Permissibility of "Vertical" Agreements

1. "Vertical" agreements in written form (except "vertical" agreements between financial organizations) are permitted if these agreements are agreements of commercial concession.

2. "Vertical" agreements between economic entities (except "vertical" agreements between financial organizations) are permitted if the share of each economic entity in any commodity market does not exceed twenty percent.

Article 13. Permissibility of Actions (Inaction), Agreements, Concerted Practices, Transactions, Other Actions

1. Actions (inaction) of economic entities provided for in part 1 of article 10 of the present Federal Law (except actions (inaction) stated in items 1, 2, 3, 5, 6, 7 and 10 of part 1 of article 10 of the present Federal Law), agreements and concerted practices provided for in parts 2 and 3 of art. 11, deals, other actions provided for in articles 27-30 of the present Federal Law can be recognized as permissible if such actions (inaction), agreements and concerted practices, transactions, other actions do not create for particular persons opportunity to eliminate competition in the relevant commodity market, do not impose restrictions superfluous for achievement of the goal of these actions (inaction), agreements and concerted practices, transactions, other actions on the participants or third persons and also if they result or can result in:

1) perfection of production, sale of goods or stimulation of technical, economic progress or raising of competitive capacity of the Russian goods in the world market;

2) obtaining by consumers of benefits (advantages) which are proportionate to the benefits (advantages) obtained by the economic entities in the result of actions (inaction), agreements and concerted practices, transactions, other actions.

2. The Government of the Russian Federation has the right to determine the cases of permissibility of agreements and concerted practices meeting the conditions stated in items 1 and 2 of part 1 of the present article (general exemptions). General exemptions, concerning agreements and concerted practices indicated in part 2 of article 11 of the present Federal Law, are defined by the Government of the Russian Federation on proposal of the federal antimonopoly authority, are introduced for a specific period of time and provide for:

1) type of agreement or concerted practice;

2) conditions which cannot be considered as permissible in regard to such agreements or concerted practices;

3) obligatory conditions for ensuring competition which should be contained in such agreements;

4) obligatory conditions under which such concerted practices are permissible.

3. General exemptions can provide, alongside with the conditions indicated in part 2 of the present article, for the other conditions which agreements and concerted practices should satisfy.

Article 14. Prohibition of Unfair Competition

1. Unfair competition is not permitted, including:

1) dissemination of false, inaccurate, or distorted information, which can inflict losses on economic entity or cause damage to its business reputation;

2) misrepresentation concerning the nature, method, and place of manufacture, consumer characteristics, quality and quantity of a commodity or concerning its producers;

3) incorrect comparison by an economic entity of the products manufactured or sold by it with the products manufactured or sold by other economic entities;

4) sale, exchange or other way of input of a commodity into circulation if there was illegal use of the results of intellectual activity and equalized to them means of individualization of a legal person, means of individualization of production, works, services;

5) illegal receipt, use, and disclosure of information constituting commercial, official or other protected by law secret.

2. Unfair competition connected with acquisition and use of exclusive rights for the means of individualization of a legal person, means of individualization of production, works, services is not permitted.

3. Decision of the Federal Antimonopoly Authority concerning violation of the provisions of part 2 of the present article concerning acquisition and use of exclusive rights to a trademark is sent by an interested party to the federal executive authority for intellectual property for recognizing invalid the legal protection granted to this trademark.

Chapter 3. Prohibition of Acts, Actions (Inactions), Agreements, Concerted Practices of Federal Bodies of Executive Authority, Public Authorities of the Subjects of the Russian Federation, Bodies of Local Self-Government, Other Bodies or Organizations Exercising the Functions of the Above-Mentioned Bodies, as well as Public Off-Budget Funds, the Central Bank of the Russian Federation that Restrict Competition

Article 15. Prohibition of Acts and Actions (Inactions) of Federal Bodies of Executive Authority, Public Authorities of the Subjects of the Russian Federation, Bodies of Local Self-Government, Other Bodies or Organizations Exercising the Functions of the Above-Mentioned

Bodies, as well as Public Off-Budget Funds, the Central Bank of the Russian Federation that Restrict Competition

1. It is forbidden for federal bodies of executive authority, public authorities of the subjects of the Russian Federation, bodies of local self-government, other bodies or organizations exercising the functions of the above-mentioned bodies, as well as public off-budget funds, the Central Bank of the Russian Federation to pass acts and (or) exercise actions (inaction) which lead or can lead to prevention, restriction, elimination of competition, except the cases of passing acts or exercising of actions (inaction) provided for by the federal laws, in particular, the following is forbidden:

1) introduction of restrictions concerning creation of economic entities in any sphere of activity as well as imposition of bans or introduction of restrictions concerning exercising specific activities or production of certain types of products;

2) unjustified prevention of economic entity from exercising activities;

3) imposition of bans or introduction of restrictions concerning free movement of products on the territory of the Russian Federation, other restrictions of the rights of economic entities for sale, purchase, other acquisition, exchange of commodities;

4) issuing requests to economic entities on priority supply of products for a certain category of purchases (customers) or on conclusion of contracts in priority order;

5) imposition of restrictions for purchasers of products on the choice of economic entities which provide such products.

2. It is forbidden to vest public authorities of the Russian Federation Subjects, bodies of local self-government with powers execution of which lead or can lead to prevention, restriction or elimination of competition, except cases provided for by federal laws.

3. It is forbidden to combine functions of federal bodies of executive authority, public authorities of the subjects of the Russian Federation, bodies of local self-government, other authority bodies or bodies of local self-government and functions of economic entities, except the cases provided for by federal laws, Decrees of the President of the Russian Federation, Regulations of the Government of the Russian Federation, as well as granting economic entities with functions and rights of the above-mentioned bodies, including the functions and the rights of the bodies of state control and supervision.

Article 16. Prohibition of Agreements or Concerted Practices of Federal Bodies of Executive Authority, Public Authorities of the Subjects of the Russian Federation, Bodies of Local Self-Government, Other Bodies or Organizations Exercising the Functions of the Above-Mentioned Bodies, as well as Public Off-Budget Funds, the Central Bank of the Russian Federation that Restrict Competition

Agreements between federal bodies of executive authority, public authorities of the subjects of the Russian Federation, bodies of local self-government, other bodies or organizations exercising the functions of the above-mentioned bodies, as well as public off-budget funds, the Central Bank of the Russian Federation or between them and economic entities or execution of concerted practices by these bodies and organizations are forbidden if such agreements or such execution of concerted practices lead or can lead to prevention, restriction or elimination of competition, in particular, to:

1) increase, decrease or maintaining of prices (tariffs) except the cases when such agreements are provided for by federal laws or statutory legal acts of the President of the Russian Federation, statutory legal acts of the Government of the Russian Federation;

2) economically, technologically or in any other way unjustified establishment of different prices (tariffs) for one and the same commodity;

3) division of the commodity market according to the territorial principle, volume of sale or purchase of commodities, range of sold products or composition of sellers or purchasers (customers);

4) restriction of entry into a commodity market (exit from a commodity market) or removal of economic entities from it.

Chapter 4. Antimonopoly Requirements to Tenders and Peculiarities of Selection of Financial Organizations

Article 17. Antimonopoly Requirements to Tenders

1. The actions that lead can lead to prevention, restriction or elimination of competition in the course of tender are prohibited, including:

1) coordination of activities of the participants of tenders by the tenders' organizers or customers;

2) creation of preferential conditions for participation in the tender to one or several participants, including by means of access to information, unless otherwise is determined by the Federal Law;

3) violation of the order of procedure of estimation of a winner or winners of the tender;

4) participation in the tender of the tender's organizers or of the tender's customers and (or) employees of the tender's organizers or employees of the tender's customers.

2. Alongside with the established by part 1 of the present article prohibitions concerning tenders' procedure, if the tender's organizers or the tender's customers are federal bodies of executive authority, executive authorities of the subjects of the Russian Federation, bodies of local self-government, public off-budget funds, as well as during tenders' procedure on placement of orders for goods, works and services for state and municipal needs it is forbidden to restrict access to participation in tenders which is not provided for by the federal laws or other statutory legal acts.

3. Alongside with the established by part 1 and 2 of the present article prohibitions concerning tenders' procedure on placement of orders for goods, works and services for state and municipal needs it is forbidden to restrict competition by means of including in the tenders' lots structure of production (goods, works, services) which technologically and functionally are not connected with goods, works, services which provision, execution, rendering are the subject of the tender.

4. Violation of the rules established by the present article is a ground for the court to admit invalid the relevant tender and the transactions concluded in the result of such tender, including at the suit of the antimonopoly authority.

Article 18. Peculiarities of Selection of Financial Organizations

1. The federal bodies of executive authority, executive authorities of the subjects of the Russian Federation, bodies of the local self-government, state off-budget funds, subjects of natural monopolies select financial organizations by means of holding open tender or open auction in accordance with provisions of the federal law on placement of orders for goods, works and services for state and municipal needs for providing the following financial services:

1) attraction of the funds of legal person in;
2) opening and keeping of accounts of legal persons, settlement on these accounts;
3) credit granting;
4) encashment of funds, bills, payment and account documents and cash servicing of legal persons;
5) issue of bank guarantees;
6) services in the securities market;
7) leasing services;
8) property insurance;
9) personal insurance, including medical insurance;
10) private pension insurance;
11) liability insurance.

2. Violation of the rules established by part 1 of the present article is a ground for the court to admit invalid the relevant transactions or tenders, including at the suit of an antimonopoly authority.

Chapter 5. Granting of State or Municipal Aid

Article 19. State or Municipal Aid

1. In accordance with competences of the bodies of public authority or bodies of local self-government, state or municipal aids can be granted with the aim of:

1) ensuring vital functions of population in the regions of remote North and territories equated with it;
2) carrying out fundamental research works;
3) protection of environment;
4) development of culture and conservation of cultural heritage;
5) production of agricultural products;
6) support of the subjects of small business exercising priority types of activity;
7) social service of the population;
8) social support of unemployed citizens and employment assistance.

2. The following is not state or municipal aids:

1) provision of advantages to a person as a result of defined by the federal laws actions of the authorized body, on the basis of court decision coming into legal force, as the results of tender or in any other way provided for by the federal law on placement of orders for goods, works and services for state and municipal needs;

2) securing of state or municipal property for economic entities on the rights of economic administration or day-to-day management;

3) transfer, granting, distribution of state or municipal property to individuals for the purposes of liquidation of the consequences of emergency situations, military operations and conducting counter-terrorist operations;

4) granting of monetary funds (budgetary credits, grants, subventions, budgetary investments) from budget of the subject of the Russian Federation for the relevant year, local budget for the relevant year to each

person which applied for monetary funds and conforms to the established in the law or statutory legal act requirements on the type of recipient's activity and place of its fulfillment by the recipient, provided for by the law of the subject of the Russian Federation on budget for the relevant financial year or by legal act of the representative body of local self-government on budget for the relevant financial year.

Article 20. Procedure of Granting of State or Municipal Aids

1. State or municipal aids are granted on preliminary consent of the antimonopoly authority in written form, except the cases if state or municipal aids are granted:

1) in accordance with the federal law;

2) in accordance with the law of the subject of the Russian Federation on budget for the relevant financial year;

3) in accordance with the legal act of the representative body of local self-government on budget for the relevant financial year;

4) at the cost of reserved fund of the body of executive authority;

5) at the cost of reserved fund of the body of local self-government.

2. The federal body of executive authority, body of executive authority of the subject of the Russian Federation, body of local self-government intending to grant state or municipal aids sends in an application to the antimonopoly authority to get consent to such aids granting. The following is attached to the application:

1) draft act which provides for state or municipal aids granting with indication of the aims of state or municipal aids and amount of such aids if it is granted by means of transference of state or municipal property;

2) enumeration of types of activity implemented by the economic entity, to which state or municipal property is planned to be granted, within two years preceding the date of submitting the application or within the period of implementation of the activity if it is less than two years as well as copies of the documents confirming the right for implementation of the types of activity if, in accordance with the law, a special permit is necessary for its implementation;

3) description of types of products, volume of products produced and sold by the economic entity, to which state or municipal property is planned to be granted, within two years preceding the date of submitting the application or within the period of implementation of the activity if it is less than two years, together with indication of nomenclature codes of the types of products;

4) the last balance sheet preceding the date of submitting application of the economic entity, to which state or municipal property is planned to be granted or other documentation provided for by the Russian Federation legislation on dues and fees if the economic entity does not submit its balance sheet to taxation bodies;

5) a list of persons included into one group of persons with the economic entity, to which state or municipal property is planned to be granted, indicating the grounds on which such persons are included in this group of persons.

3. Additional list of documents which are submitted to the antimonopoly authority together with the application for consent to grant state or municipal aid can be established by the Government of the Russian Federation.

4. The antimonopoly authority examines the submitted application and documents and takes decision on the application within the period not more than two months from the date of receipt of the application and documents. If in the process of examination of the submitted application and documents the antimonopoly authority takes decision that the actions specified in the application, and for which implementation consent of the antimonopoly authority is obtaining, are not state or municipal aids, the antimonopoly authority notifies the applicant that for implementation of such actions there is no need for the antimonopoly bodies' consent.

5. Having examined application on consent to grant state or municipal aid the antimonopoly authority takes the following decisions:

1) to satisfy the application if state or municipal aids are granted with the aims stated in part 1 of article 19 of the present Federal Law and its granting can not lead to elimination or prevention of competition;

2) to prolong the term of examination of the application if in the course of the application's examination the antimonopoly authority comes to the conclusion that granting of such aids can lead to elimination or prevention of competition as well as possible noncompliance of such aids with the aims indicated in part 1 of article 19 of the present Federal Law and that there is a necessity to get additional information for making decision provided for by items 1, 3 or 4 of the present part. The term of the application's examination can be prolonged for a period not more than two months. The antimonopoly authority notifies the applicant immediately after adoption of such decision;

3) to refuse to satisfy the application if state or municipal aids do not comply with the aims indicated in part 1 of article 19 of the present Federal Law or if its granting can lead to elimination or prevention of competition;

4) to satisfy the application and impose restrictions regarding granting of state or municipal aid. Such decision is taken by the antimonopoly authority for ensuring conformity of the state aids with the aims stated in part 1 of article 19 of the present Federal Law and decrease of the negative influence of such aids on competition. The restrictions can be:

a) deadline for granting of state or municipal aids;

b) circle of persons to whom state or municipal aids can be granted;

c) amount of state or municipal aids in case of transference, granting, distribution of state or municipal property;

d) specific aims of granting of state or municipal aids;

e) other factors which can influence on conditions of competition.

6. The applicant is obliged to submit documents confirming the compliance with the restrictions to the antimonopoly authority within the period not exceeding one month from the date of granting of state or municipal aid, in the case if the antimonopoly authority takes the decision provided by item 4 of part 5 of the present article basing on the results of examination.

Article 21. Consequences of Violation of Requirements of the Present Federal Law during Granting and Usage of State or Municipal Aid

1. The acts, including those at the suit of the antimonopoly authority, can be admitted entirely or partly invalid by court, in case if the acts on granting of state or municipal aid were not preliminary submitted to the antimonopoly authority, except the acts provided for by items 1 - 3 of part 1 of article 20 of the present Federal Law. In case when the court admits the act on granting of state or municipal aid entirely or partly invalid the antimonopoly authority issues to the federal body of executive authority, body of executive authority of the subject of the Russian Federation, body of local self-government which granted state or municipal aid a direction to take measures to return the property that was transferred while allocating state or municipal aid, if state or municipal aid were granted by means of transference of state or municipal property.

2. Acts, indicated in items 2 and 3 of part 1 of article 20 of the present Federal Law, as well as the acts on granting of aid at the cost of reserved funds of the bodies of executive authority of the subjects of the Russian Federation or the acts on granting of aid at the cost of reserved funds of the bodies of local self-government can be admitted by court invalid in the part concerning granting of state or municipal aid, including at the suit of the antimonopoly authority if implementation of these acts leads or can lead to prevention or elimination of competition.

3. In the case when in the course of exercising control of use of state or municipal aid the antimonopoly authority establishes inadequacy of its use to the aims declared in the application, the antimonopoly authority issues to the federal body of executive authority, body of executive authority of the subject of the Russian Federation, body of the local self-government, which granted such aid, a direction to take measures to return the property that was transferred while allocating state or municipal aid, if state or municipal aid were granted by means of transference of state or municipal property, or a direction to take measures to stop the use of advantages by the economic undertaking which got state or municipal aid if state or municipal aid were granted in other form.

Chapter 6. Functions and Authorities of the Antimonopoly Authority

Article 22. Functions of the Antimonopoly Authority

The antimonopoly authority fulfills the following main functions:

1) ensures state control over observance of the antimonopoly legislation by federal bodies of executive authority, public authorities of the subjects of the Russian Federation, bodies of local self-government, other bodies or organizations exercising the functions of the above-mentioned bodies, public off-budget funds, economic entities, natural persons;

2) reveals violations of the antimonopoly legislation, takes measures to stop violations of the antimonopoly legislation and calls to account for such violations;

3) prevents monopolistic activity, unfair competition, other violations of the antimonopoly legislation by federal bodies of executive authority, public authorities of the subjects of the Russian Federation, bodies of local self-government, other bodies or organizations exercising the functions of the above-mentioned bodies, public off-budget funds, economic entities, natural persons;

4) implements state control over economic concentration in the sphere of use of land, interiors of the Earth, water and other natural resources, including control in the course of tenders in the cases provided for by the federal laws.

Article 23. Authorities of the Antimonopoly Authority

1. The antimonopoly authority fulfills the following authorities:

1) initiates and examines cases of violation of the antimonopoly law;

2) issues binding directions to economic entities in cases stated by this Federal Law:

a) on termination of concerted practices restricting competition and (or) termination of agreements restricting competition and fulfillment of actions aimed at ensuring competition;

b) on termination of abuse of dominant position by economic entity and fulfillment of actions aimed at ensuring competition;

c) on termination of violation of rules of non-discriminative access to products;

d) on termination of unfair competition;

e) on prevention of actions which can be obstacle for beginnings of competition and (or) can lead to prevention, restriction or elimination of competition and violation of the antimonopoly legislation;

f) on elimination of the consequences of violation of the antimonopoly legislation;

g) on termination of other violations of the antimonopoly legislation;

h) on restoration of the situation that existed prior to the violation of the antimonopoly legislation;

i) on conclusion of contracts, change of contractual terms or abrogation of contracts in the case if in the course of examination by the antimonopoly authority of the case of violation of the antimonopoly legislation the persons whose rights were breached or can be breached applied the relevant application or in the case when the antimonopoly authority exercises state control over economic concentration;

j) on transference of the profit gained in the result of breach of the antimonopoly legislation to the federal budget;

k) on change or restriction of use of brand name in the case if in the course of examination by the antimonopoly authority of the case of violation of the antimonopoly legislation the persons whose rights were breached or can be breached applied the relevant application or in the case when the antimonopoly authority exercises state control over economic concentration;

l) on fulfillment of economic, technical, informational, and other requirements on elimination of discriminative conditions and prevention of its creation;

m) on fulfillment of actions aimed at ensuring of competition, including actions on ensuring of access to production facilities or information according to the order established be the federal law or other statutory legal acts, on granting a right to facilities of industrial property protection according to the order established be the federal law or other statutory legal acts, on transference of property rights or prohibition of transference of property rights, on preliminary informing of the antimonopoly authority about intention to fulfill actions provided for in the defenitions;

3) issues binding directions to the federal bodies of executive authority, public authorities of the subjects of the Russian Federation, bodies of local self-government, other bodies or organizations exercising the functions of the above-mentioned bodies, public off-budget funds, as well as their officials, except the cases established by item 4 of the present article:

a) on cancellation or amendment of acts violating the antimonopoly legislation;

b) on cancellation or amendment of contracts violating the antimonopoly legislation;

c) on termination of other violations of the antimonopoly legislation;

d) on fulfillment of actions aimed at ensuring competition.

4) sends to the federal body of executive authority of the securities market, the Central Bank of the Russian Federation proposals on bringing in correspondence with the antimonopoly legislation of acts adopted by them and (or) on remission of actions if such acts and (or) actions violate the antimonopoly legislation;

5) brings to responsibility for violation of the antimonopoly legislation commercial organizations, non-commercial organizations, their officials, officials of the federal bodies of executive authority, of the bodies of executive authority of the subjects of the Russian Federation, of the bodies of local self-government, and of other bodies or organizations exercising the functions of the said bodies, as well as other officials of the public off-budget funds, natural persons, including individual entrepreneurs in the cases and in accordance with the procedure established by legislation of the Russian Federation;

6) applies to arbitration court with claims and applications concerning violations of the antimonopoly legislation, including claims and applications:

a) on admitting invalid either invalid fully or partially contradicting with antimonopoly legislation of statutory legal acts or non-normative acts of federal bodies of executive authority, public authorities of the subjects of the Russian Federation, bodies of local self-government, other bodies or organizations exercising the functions of the above-mentioned bodies, as well as public off-budget funds, the Central Bank of the Russian Federation;

b) on admitting ineffective or invalid fully or partially of contracts not conforming to the antimonopoly legislation;

c) on obligatory conclusion of a contract;

d) on changing or canceling of a contract;

e) on liquidation of legal persons in the cases provided by the antimonopoly legislation;

f) on recovery of the profit gained in the result of violation of the antimonopoly legislation to the federal budget;

g) on bringing responsobility for violation of the antimonopoly law of persons that allowed such violation of the antimonopoly legislation;

h) on admitting tenders invalid;

i) on forcing to execution of decisions and directions of the antimonopoly authority;

j) in other cases provided for by the antimonopoly legislation;

7) participates in examination by the court or the arbitration court of the cases connected with application and (or) violation of the antimonopoly legislation;

8) keeps the register of economic undertakings holding over thirty five percent share in the certain commodity market. The order of forming and keeping the register is established by the Russian Federation Government;

9) posts on the website of the antimonopoly authority in Internet decisions and directions concerning the interests of indefinite range of persons;

10) establishes dominant position of economic undertaking in the course of examination of the case of violation of the antimonopoly legislation and while exercising control over economic concentration;

11) controls compliance with the antimonopoly legislation of commercial organizations, non-commercial organizations, federal bodies of executive authority, bodies of public authority of the subjects of the Russian Federation, bodies of local self-government, other bodies or organizations exercising the functions of the above-mentioned bodies, as well as by public off-budget funds, natural persons, gets from them the necessary documents and information, explanations in written and verbal form, and in accordance with the procedure established by the legislation of the Russian Federation applies to the agencies discharging operative investigatory activities with request to carry out operative investigations;

12) exercises, according to the procedure established by the Government of the Russian Federation, control over the activity of economic undertakings ensuring organization of trade in the markets of certain products, for example electrical energy (capacity) market in the conditions of stopping of the state regulation of prices (tariffs) for such products;

13) exercises other authorities provided for by the present Federal Law, other federal laws, Decrees of the Present of the Russian Federation, Regulations of the Government of the Russian Federation.

2. Alongside with the authorities indicated in part 1 of the present article the federal antimonopoly authority exercises the following authorities:

1) approves the forms of presenting data to the antimonopoly authority during the conclusion of transactions and (or) actions provided by article 32 of the present Federal Law;

2) approves methodology of determination of an unjustifiably high and unjustifiably low price of a credit organization's service and methodology of determination of justification for a price set by a dominant credit organization for a service not provided by other financial organizations, on coordination with the Central Bank of the Russian Federation;

3) approves the procedure of conducting analysis of condition of competition in order to establish dominant position of an economic undertaking and to reveal other cases of prevention, restriction or elimination of competition (procedure of conducting analysis of condition of competition in order to establish dominant position of a financial organization is approved by the federal antimonopoly authority , on coordination with the Central Bank of the Russian Federation);

4) issues legal statutory acts provided for by the present Federal Law;

5) gives explanations on issues connected with application of the antimonopoly legislation by it;

6) gives conclusions, in accordance with the established procedure, on presence or absence of indications of restriction of competition during introduction, change or termination of current customs tariffs and during introduction of special protective, antidumping and compensation measures;

7) submit proposals to licensing bodies on cancellation, revocation of economic undertakings' violating the antimonopoly legislation licenses for exercising some types activities or suspension of such licenses;

8) cooperates with international organizations and State bodies of foreign countries, participates in development and implementation of international treaties of the Russian Federation and the work of intergovernmental or interdepartmental commissions coordinating international cooperation of the Russian Federation, implementation of international programs and projects on the questions of protection of competition;

9) sums up and analyzes the practice of application of the antimonopoly legislation, works out recommendations on its application;

10) annually submits report on condition of competition in the Russian Federation to the Government of the Russian Federation and posts it in the website of the antimonopoly authority in Internet.

Article 24. Rights of the Antimonopoly Authority's Employees during Inspections of Observance of the Antimonopoly Legislation

Officials of the antimonopoly authority have the right to impeded access to federal bodies of executive authority, bodies of executive authority of the subjects of the Russian Federation, bodies of local self-government, other bodies or organizations exercising the functions of the above-mentioned bodies, as well as to public off-budget funds, commercial and non-commercial organizations for getting documents and information necessary to the antimonopoly authority in the course of examination of application on violation of the antimonopoly legislation, investigation of the cases of violation of the antimonopoly legislation, control over economic concentration and defining condition of competition in accordance with their authorities and having introduced

their certificates and decision on examination of the Head (Deputy Head) of the antimonopoly authority. The procedure of execution of examination of observance of the antimonopoly legislation is established by the federal antimonopoly authority.

Article 25. Obligation to Provide Information to the Antimonopoly Authority

1. Commercial organizations and non-commercial organizations (their management), federal bodies of executive authority of the Russian Federation (their officials), bodies of public authority of the Subjects of the Russian Federation (their officials), bodies of local self-government (their officials), other bodies or organizations exercising the functions of the above-mentioned bodies, as well as public off-budget funds (their officials), natural persons, including individual entrepreneurs, are obliged to provide the antimonopoly authority on its motivated request with documents, explanations in written or verbal form and information (including information constituting commercial, official, other legally protected secret) necessary to the antimonopoly authority, in accordance with its authorities, for examination of application on violation of the antimonopoly legislation, for examination of the cases of violation of the antimonopoly legislation, for exercising control over economic concentration and for defining condition of competition.

2. The Central Bank of the Russian Federation is obliged to produce its standard acts and other information necessary for making analysis of the condition of competition in the market of services of credit organizations and execution of control over its condition, except the information constituting banking secret, on letter of inquiry of the federal antimonopoly authority.

3. Information constituting commercial, official or other legally protected official secret is produced to the antimonopoly authority in accordance with the requirements established by the federal laws.

Article 26. Obligation of the Antimonopoly Authority to Observe Commercial, Official, and Other Legally Protected Secret

1. Information constituting commercial, official, and other legally protected secret and obtained by the antimonopoly authority in the process of execution of its authorities, must not be disclosed except the cases established by the federal laws.

2. Employees of the antimonopoly authority bears civil, administrative, criminal liability for disclosing information constituting commercial, official, other legally protected secret.

3. The damage inflicted on a natural or a legal person in the result of disclosure of information constituting commercial, official, other legally protected secret by the antimonopoly authority or its officials must be compensated at the expense of the Russian Federation treasury.

Chapter 7. State Control over Economic Concentration

Article 27. Incorporation and Restrusturing of Commercial Organizations subject to the Antimonopoly Authority prior consent

1. The following actions shall only be performed with the antimonopoly authority's prior consent:

1) the merger of commercial organizations (with the exception financial institutions), if the aggregate value of the assets thereof (assets of their group of persons) in accordance with the accounting balance sheets as at the latest reporting date preceding the date of submission of the petitions (hereinafter, the latest balance sheet, in case of submission of a notice, shall be deemed to be the accounting balance sheet as at the latest reporting date preceding the date of submission of the notice) exceeds three billion Rubles ot if the aggregate revenues from sale of commoditites of such organisations (their group of persons) for the calendar year preceding the merger exceed six billion Rubles, or where one of the organisations is encluded into the register of economic entities because its share in a particular commodity market exceeds thirty five percent (hereinafter the register);

2) the consolidation of one commercial organization (with the exception of a financial institution) with another commercial organization (with the exception of a financial institution) if the aggregate value of the assets thereof (assets of their groups of persons) in accordance with their latest balance sheets exceeds three billion Rubles or if the aggregate revenues from the sale of commodities of such organizations (their group of persons) from the calendar year preceding the consolidation year exceed six billion Rubles or where one of the organizations is listed in the register;

3) the merger of financial institutions or consolidation of one financial institution with another financial institution, if the aggregate value of the assets thereof in accordance with their latest balance sheets exceeds the amount established by the Government of the Russian Federation (in case of a merger or consolidation of landing institutions, this amount shall be established by the Government of the Russian Federation in coordination with the Central Bank of the Russian Federation);

4) the incorporation of a commercial organization if its authorized capital shall be paid by stocks (shares) and (or) property of another commercial organization (with the exception of a financial institution), the commercial organization being incorporated shall acquire, in respect of these stocks (shares) and (or) property, the rights stipulated by Article 28 of the present Federal Law, and the aggregate value of the assets in accordance with the latest balance sheets of the organisation's founders (their group of persons) and persons (their groups of

persons) whose stocks (shares) and (or) property are contributed to the authorized capital, exceeds three billion Rubles or if the aggregate revenues from the sale of commodities of the organisation's founders (their groups of persons) and persons (their groups of persons) whose stocks (shares) and (or) property are being contributed to the authorized capital exceed six billion Rubles or if the organization whose stocks (shares) and (or) property are contributed to the authorized capital is entered in the register;

5) the incorporation of a commercial organization if the authorized capital thereof shall be paid by stocks (shares) or assets of a financial institution, the commercial organization being incorporated shall acquire, in respect of these stocks (shares) or assets, the rights stipulated by Article 29 of the present Federal Law, and the aggregate value of the assets in accordance with the latest balance sheet of the financial institution whose stocks (shares) or assets are being contributed to the authorized capital exceeds the amount established by the Government of the Russian Federation (in case of the stocks (shares) or assets of a financial institution are being contributed to the authorized capital this amount is established by the Government of the Russian Federation in coordination with the Central Bank of the Russian Federation).

2. The requirement for obtaining the antimonopoly authority's prior consent to the performance of actions which stipulated by Part 1 of the present Article shall not apply where such actions are performed subject to the conditions stipulated by Article 31 of the present Federal Law or the performance of such actions are stipulated be acts of the President of the Russian Federation or acts of the Government of the Russian Federation.

Article 28. Transactions with Shares (Onership Interest), the Property of Commercial Organizations, or Rights in respect of Commercial Organizations Subject to the Antimonopoly Authority's Prior Consent

1. If the aggregate value of assets in accordance with the latest balance sheets of persons (groups of persons) acquiring stocks (shares), rights and (or) property and the person (group of persons) whose stocks (shares) and (or) property and (or) rights concerning whom are being acquired exceeds three billion Rubles or if their aggregate revenues from the sale of commodities for the latest calendar year exceeds six billion Rubles and the assets value according to the latest balance sheet of the person (group of persons) whose stocks (shares) and (or) property and (or) rights are being acquired exceeds one hundred and fifty million Rubles, or if one the mentioned persons is included in the Register, the following transactions with stocks (shares), rights and (or) property shall be conducted subject to the antimonopoly authority's prior consent:

1) the acquisition by a person (group of persons) of voting stocks of a joint-stock company if such person (group of persons) acquires the right to manage more than twenty five percent of the stocks prior to this acquisition such person (group of persons) did not manage the voting stocks of the joint-stock company or manages less than twenty five percent of voting stocks of the joint stock company. This requirement shall not apply to the founders of the joint-stock company during its incorporating;

2) the acquisition by a person (group of persons) of shares in the authorized capital of a limited liability company if such person (group of persons) acquires the right to manage more than one third of stocks in the authorized capital of the company provided that prior to this acquisition such person (group of persons) did not manage any stock of this particular company or managed less than one third of stocks in the authorized capital of the company. This requirement shall not apply to the founders of the limited liability company during its incorporation;

3) the acquisition of shares in the authorized capital of a limited liability company by a person (group of persons), managing not less than one third of the stocks and not more than fifty percent of the stocks in the authorized capital of the company if such person (group of persons) acquires the right to manage more than fifty percent of the shares;

4) acquisition by a person (a group of persons) administering not less than twenty five percent and not more than fifty percent of voting stocks of a joint stock company, of the voting stock of such joint stock company if this person (a group of persons) gets the right to administer more than fifty percent of these voting stocks;

5) acquisition of shares in the authorized capital of a limited company by a person (a group of persons) administering not less than fifty percent and not more than two thirds of shares in the authorized capital of this company if this person (a group of persons) gets the right to administer more than two thirds of the indicated shares;

6) acquisition by a person (a group of persons) administering not less than fifty percent and not more than seventy five percent of voting stocks of a joint stock company if this person (a group of persons) gets the right to administer more than seventy five percent of such voting stocks;

7) obtaining by an economic entity (a group of entities) of fixed production assets and (or) non-material assets of another economic entity (with the exception of a financial organization) in possession, usage or ownership, if the balance value of property which constitutes the subject of transaction or mutually related transactions exceeds twenty percent of the property book value of the fixed production assets and non-material assets of the economic entity alienating or transferring the property;

8) acquisition by a person (a group of persons) in the result of one or several transactions including transactions based on agreement on trust management, joint activity or agency contract, of rights enabling to determine the terms of exercising business activity of the economic entity (except a financial organization) or exercise the functions of its executive body.

2. Requirement provided for by part 1 of the present article on getting preliminary consent of the antimonopoly authority for execution of actions is not applied if the actions stated in part 1 of the present article

are exercised in accordance with the conditions established in article 31 of the present Federal Law or if their execution is provided for by the acts of the President of the Russian Federation or acts of the Government of the Russian Federation or if the transactions are exercised with stocks (shares) of financial organizations.

Article 29. Transactions with Stocks (Shares), Assets of Financial Institutions and Rights in respect of Financial Institutions Subject to the Antimonopoly Authority 's Prior Consent

1. If the value of the assets according to the latest balance sheet of a financial institution exceeds the amount established by the Government of the Russian Federation (in case of conclusion of transactions with stocks (shares), assets of a lending institutions or with rights in respect of a lending institution, this amount shall be established by the Government of the Russian Federation in coordination with the Central Bank of the Russian Federation), the following transaction with stocks (shares), assets of a financial institutions or with rights in respect of a financial institution shall be conducted subject to the antimonopoly authority's prior consent:

1) the acquisition by a person (group of persons) of voting stocks of a joint-stock company if this person (group of persons) acquires the right to manage more than twenty five percent of the voting stocks provided that prior to this person (group of persons) did not manage the voting stocks of the joint-stock company This requirement shall not apply to the founders of the financial institution during its incorporation;

2) the acquisition by a person (a group of persons) of stocks in the authorized fund of a company of limited liability if this person (a group of persons) gets the right to administer more than one third of stocks in the authorized fund of this particular company on the condition that before the acquisition such person (a group of persons) did not administer stocks of this company or administered less than one third of stocks in the authorized fund of the mentioned company. This requirement is not applied to the promoters of a financial organization during its foundation;

3) acquisition of stocks in the authorized fund of a company of limited liability by a person (a group of persons) administering not less than one third of stocks and not more than fifty percent of stocks in the authorized fund of this company if this person (a group of persons) gets the right to administer more than fifty percent of the mentioned stocks;

4) acquisition of voting stocks of a joint stock company by a person (a group of persons) administering not less than twenty five percent and not more than fifty percent of voting stocks of a joint stock company if this person (a group of persons) gets the right to administer more than fifty percent of such voting stocks;

5) acquisition of shares in the authorized fund of a company of limited liability by a person (a group of persons) administering not less than fifty percent and more than two thirds of stocks in the authorized fund of this company if this person (a group of persons) gets the right to administer more than two thirds of the mentioned stocks;

6) acquisition of voting stocks of a joint stock company by a person (a group of persons) administering not less than fifty percent and not more than seventy five percent of voting stocks of a joint stock company if this person (a group of persons) gets the right to administer more than seventy five percent of such voting stocks;

7) acquisition by a person (a group of persons) in the result of one or several transaction of assets of a financial organization, the amount of which exceeds the amount established by the RF government;

8) acquisition by a person (a group of persons) in the result of one or several transactions, including transactions based on agreement on trust management, joint activity or agency contract, of rights enabling to determine the terms of conducting business activity or exercise the functions of its executive body.

2. Requirement provided for by part 1 of the present article on getting preliminary consent of the antimonopoly authority for execution of actions is not applied if the actions stated in part 1 of the present article are exercised in accordance with the conditions established in article 31 of the present Federal Law or if their execution is provided for by the acts of the President of the Russian Federation or acts of the Government of the Russian Federation.

Article 30. Transactions, Other Actions about Execution of Which the Antimonopoly Authority Should be Notified

The antimonopoly authority should be notified:

1) by a commercial organization about its creation in the result of merger between commercial organizations (except the mergers between financial organizations) if aggregate asset value according to the last balance sheet or aggregate revenues from the sale of products for the calendar year preceding the year of merger of commercial organizations, whose activity is terminated in the result of merger, exceed two hundred million Rubles – not later than forty five days from the date of merger;

2) by a commercial organization of joining to it of another commercial organization (except joining of a financial organization) if the aggregate asset value of the mentioned organizations, according to the last balance sheet or the aggregate revenues from the sale of products for the calendar year preceding the year of joining exceeds two hundred million Rubles, - not later than forty five days from the date of joining;

3) by a financial organization about its creation in the result of merger between financial organizations if its asset value according to the last balance sheet does not exceed the amount established by the Government of the Russian Federation (if the credit organization is created in the result of merger this amount is established by

the Government of the Russian Federation in coordination with the Central Bank of the Russian Federation), - not later than forty five days from the date of merger;

4) by a financial organization on the joining to it of another financial organization if the asset value of the financial organization created in the result of merger according to the last balance sheet does not exceed the amount established by the Government of the Russian Federation (if the credit organization is created in the result of joining this amount is established by the Government of the Russian Federation in coordination with the Central Bank of the Russian Federation), - not later than forty five days from the date of joining;

5) by persons acquiring stocks (shares), rights and (or) property (except stocks (shares) and (or) assets of financial organizations) about transactions, other actions stated in article 28 of the present Federal Law, if the aggregate asset value according to the last balance sheet or the aggregate revenues from the sale of products of persons (group of persons) stated in article 28 of the present Federal Law for the calendar year preceding the year of such transactions, other actions, exceed two hundred million Rubles and at the same time the aggregate asset value according to the last balance sheet of the person (group of persons), whose stocks (shares) and (or) property are acquired, or concerning whom the rights are acquired exceeds thirty million Rubles or if one of these persons is entered into the register, - within forty five days from the date of implementation of such transaction, other actions.

2. Requirement on notification of the antimonopoly authority provided for by part 1 of the present article is not applied if transactions, other actions are exercised with preliminary consent of the antimonopoly authority.

Article 31. Peculiarities of State Control Over Economic Concentration in a Group of Persons

1. Transactions, other actions stated in articles 27 – 29 of the present Federal Law are exercised without preliminary consent of the antimonopoly authority, but with its further notification about their implementation in accordance with the procedure established by article 32 of the present Federal Law in the case if in aggregate the following conditions are observed:

1) transactions, other actions stated in articles 27 – 29 of the present Federal Law are exercised by persons included in one group of persons;

2) list of persons included into one group with indication of the grounds, on which these persons were included into this group, was submitted by any included into this group person (applicant) to the federal antimonopoly authority in the established form not later than one month before the implementation of transactions, other actions;

3) list of persons included into this group has not changed for the moment of implementation of transactions, other actions in comparison with the list of such persons submitted to the federal antimonopoly authority.

2. Within ten days from the date of receipt of the list of persons included into one group with indication of the grounds on which these persons were included into this group the federal antimonopoly authority sends the applicant one of the following notifications about:

1) receipt of such list and its displaying on the official site of the federal antimonopoly authority in the Internet, if this list was submitted in the form approved by the antimonopoly authority;

2) violation of the form of submitting of such list and non-compliance with the conditions stated by part 1 of the present article.

3. The antimonopoly authority must be informed about transactions, other actions, exercised in accordance with the conditions established by the present article, by a person which was interested in implementation of transactions, other actions stated in articles 28 and 29 of the present Federal Law or by a person which was created in the result of implementation of transactions, other actions stated in article 27 of the present federal law, - not later than forty five days from the date of implementation of such transactions, other actions.

4. The federal antimonopoly authority approves the form of submitting list of persons included into one group with indication of the grounds on which these persons were included into one group.

Article 32. Persons, Submitting Pre-merger and Post-merger Notifications about Implementation of Transactions and Other Actions Subjected to State Control, as well as Documents and Information to the Antimonopoly Authority

1. With the aim of getting the antimonopoly authority's preliminary consent in the cases stated in articles 27 – 29 of the present Federal Law or with the aim of notification of the antimonopoly authority in the cases stated in articles 30 and 31 of the present Federal Law, the following persons apply to the antimonopoly authority as applicants:

1) one of the persons interested in implementation of transactions, other actions provided by articles 27 – 29 of the present Federal Law;

2) persons which are obliged by articles 30 and 31 of the present Federal Law to notify the antimonopoly authority about implementation of transactions, other actions.

2. Persons interested in implementation of transactions, other actions stated in articles 27 – 29 of the present Federal Law submit to the antimonopoly authority an application for getting consent for implementation of transaction, other action.

3. Persons who are obliged by articles 30 and 31 of the present Federal Law to notify the antimonopoly authority about implementation of transactions, other actions submit to the antimonopoly authority a pre-merger notification about implementation of such transactions, other actions.

4. Pre-merger or post-merger notification about implementation of transactions, other actions can be submitted to the antimonopoly authority by a representative of applicant.

5. The following documents are submitted to the antimonopoly authority together with the pre-merger or post-merger notification about implementation of transactions, other actions subjected to control:

1) notarized copy of the constituent documents for the applicant – legal person and name of the applicant – natural person, data of the identifying document (series and (or) number of the document, date and place of its issue, body that issued the document) reflecting its status on the date of submission of pre-merger or post-merger notification;

2) documents defining subject and content of the transaction, other action subjected to state control;

3) information about the types of activity exercised by the applicant during the last two years before the date of submitting pre-merger or post-merger notification or the period of implementation of activity if it is less than two years and also copies of the documents confirming the right for implementation of those types of activity which can be exercised only by special permission in accordance with the law;

4) description of types of products, volume of products produced and sold by the applicant for the last two years before the date of submitting pre-merger or post-merger notification or the period of implementation of the activity if it is less than two years, together with indication of the products' nomenclature codes;

5) applicant's information about the main types of activity of the persons stated in articles 27 – 30 of the present Federal Law, description of types of products, volume of products produced and sold by these persons during the last two years before the date of submitting pre-merger or post-merger notification or the period of implementation of the activity if it is less than two years, together with indication of the products' nomenclature codes or a written application confirming that the applicant does not dispose of this information;

6) the last balance sheet produced before the date of submitting pre-merger or post-merger notification;

7) financial, economic and other reports submitted to the Central Bank of the Russian Federation and the federal bodies of executive authority regulating the financial services market;

8) a list of commercial organizations where the applicant administers more than five percent of stocks (shares) on any grounds or written application about that the applicant does not administer stocks (shares) of commercial organizations;

9) a list of persons included into one group of persons with the applicant, indicating the grounds on which these persons are included into this group;

10) a list of persons included into one group with other persons which are stated in articles 27 -30 of the present Federal Law with indication of the grounds on which these persons are included into this group or a written application confirming that the applicant does not dispose of this information.

6. An application on getting consent for merger between commercial organizations, joining to a commercial organization of one or several commercial organizations, creation of a commercial organization or notification about merger, joining or creation of a commercial organization is signed by the applicant as well as by other persons participating in merger, joining or creation of a commercial organization. The applicant submits to the antimonopoly authority documents and information about other persons participating in merger, joining or creation of a commercial organization in accordance with the list stated in part 5 of the present article, together with application or notification.

7. The federal antimonopoly authority approves the form of submitting information provided by part 5 of the present article.

Article 33. Decision-Making on the Basis of Results of Examination of Application by the Antimonopoly Authority, Issue of Direction to Applicant by the Antimonopoly Authority.

1. The antimonopoly authority is obliged to examine the application provided by article 32 of the present Federal Law and to notify the applicant of the taken decision in written form within 30 days from the date of receipt of application.

2. The antimonopoly authority takes one of the following decisions on the results of examination of application for getting consent to exercise transaction, other action, subjected to state control:

1) on satisfaction of the application if transaction, other action declared in the application will not lead to restriction of competition;

2) on prolongation of the period of examination of application because of the necessity of its additional examination as well as of getting additional information for taking decision provided by items 1, 3, 4 and 5 of the present part on the results of examination of application, if it is established that declared in the application transaction, other action can lead to restriction of competition, including in the result of emerging or strengthening of dominant position of the person (a group pf persons);

3) on prolongation of the period of examination of the application on getting consent for merger between commercial organizations, joining to a commercial organization of one or several commercial organizations, creation of a commercial organization in the cases stated in article 27 of the present Federal Law, in connection with defining of conditions after fulfillment of which by the applicant and (or) other persons participating in such merger, joining or creation the antimonopoly authority takes decision to satisfy the application or defines

the period for fulfillment of theses conditions which cannot exceed nine months. These conditions are the integral part of decision on prolongation of the period of examination of this application;

4) on satisfaction of the application for getting consent on implementation of transaction, other action stated in articles 28 and 29 of the present Federal Law and simultaneous issue of directions provided by item 2 of part 1 of article 23 of the present Federal Law to the applicant on fulfilling actions aimed at ensuring competition in the course of implementation of transaction, other action declared in the application;

5) on refusal to satisfy application if transaction, other action declared in the application leads to restriction of competition including such as in the result of emerging or strengthening of the dominant position of the applicant as well as the dominant position of the person which will be created in the result of implementation of such transaction, other action declared in the application, and if in the process of examination of the submitted documents the antimonopoly authority finds that the information contained in the documents and significant for the decision-making is unreliable.

3. The period stated in part 1 of the present article can be prolonged for the period not more than two months by decision provided for by item 2 of part 2 of the present article. In case if such decision is taken the antimonopoly authority posts on its official site in the Internet the information about the expected transaction, other action declared in the application for getting consent for implementation of transaction, other action. The interested persons have the right to submit to the antimonopoly authority the information about the influence of this transaction, other action on the condition of competition.

4. Decision on prolongation of the period of examination of application provided by item 3 of part 2 of the present article is taken by the antimonopoly authority in the case if merger between commercial organizations, joining to a commercial organization of one or several commercial organizations, creation of a commercial organization leads or can lead to restriction of competition including such as in the result of emerging or strengthening of the dominant position of person (group of persons) which will be created in the result of implementation of such actions.

5. The conditions provided by item 3 of part 2 of the present article can contain the following with the aim of ensuring competition:

1) procedures of access to infrastructure, other production facilities or information managed by the applicant as well as by other persons participating in merger between commercial organizations, joining to a commercial organization of one or several commercial organizations, creation of a commercial organization;

2) procedures of granting rights to facilities of industrial property protection which are managed by the applicant as well as by other persons participating in merger between commercial organizations, joining to a commercial organization of one or several commercial organizations, creation of a commercial organization to other persons;

3) requirements to the applicant and (or) other persons participating in merger between commercial organizations, joining to a commercial organization of one or several commercial organizations, creation of a commercial organization on transference of the property to the other person which is not included into one group of persons with the applicant and (or) other persons, on concession of rights of chose in action and (or) obligations of the mentioned applicant and (or) other persons to the other person which is not included into one group of persons with the mentioned applicant and (or) other persons;

4) requirements to the composition of a group of persons in which the applicant as well as other persons participating in merger between commercial organizations, joining to a commercial organization of one or several commercial organizations, creation of a commercial organization are included.

6. After having complied with the conditions provided by item 3 of part 2 of the present article the applicant submits documents confirming their implementation to the antimonopoly authority. Within thirty days from the date of the documents receipt the antimonopoly authority takes the decision to satisfy the application on merger between commercial organizations, joining to a commercial organization of one or several commercial organizations, creation of a commercial organization if the submitted documents confirm the fulfillment of the conditions in time, otherwise the decision to refuse in satisfying the application is given.

7. Decision on granting the application with simultaneous issue of directions provided by item 4 of part 2 of the present article is taken by the antimonopoly authority in case if transactions, other actions declared in the application lead to competition restriction.

8. Decision of the antimonopoly authority to grant permission for transactions, other actions is ceased to be effective if such transactions, other actions are not carried out within a year from the date of the said decision approval.

9. The persons obliged by article 30 of the present Federal Law to notify the antimonopoly authority of implementation of transactions, other actions, subjected to state control, have the right before implementation of such transactions, other actions to request the antimonopoly authority's consent for their implementation and the antimonopoly authority is obliged to examine the applications in accordance with the procedure established by this article.

10. In case if transactions, other actions provided by article 30 of the present federal law led or can lead to restriction of competition, including such as in the result of emerging or strengthening of the economic entity's dominant position in the market, the applicant submitted to the antimonopoly authority the relevant notification or a group of persons in which the applicant is included is obliged to fulfill actions, aimed at ensuring competition in accordance with the directions of the antimonopoly authority issued according to item 2 of part 1 of article 23 of the present Federal Law.

Article 34. Consequences of Violation of the Procedure of Getting the Antimonopoly Authority's Preliminary Consent for Implementation of Transactions, Other Actions as Well as the Procedure of Submitting to the Antimonopoly Authority of Notifications About Transactions, Other Actions Subjected to Control

1. A commercial organization founded without preliminary consent of the antimonopoly authority, including organization appeared as the result of merger or joining of commercial organizations in the cases stated in article 27 of the present Federal Law is liquidated or reorganized in the way of separation or detachment at law on the antimonopoly authority's claim if its foundation led or can lead to restriction of competition, including such as in the result of emerging or strengthening of the dominant position.

2. Transactions, other actions stated in articles 28 and 29 of the present Federal Law, which were exercised without preliminary consent of the antimonopoly authority are recognized invalid at law on the antimonopoly authority's claim if these transactions or other actions led or can lead to restriction of competition, including such as in the result of emerging or strengthening of the dominant position.

3. Commercial organization, which is obliged to notify the antimonopoly authority about implementation of transactions, other actions stated in items 1 – 4 of part 1 of article 30 of the present Federal Law, and which violated the procedure of notification of the antimonopoly authority about implementation of such transactions, other actions is liquidated or reorganized by means of separation or detachment at law on the antimonopoly authority's claim if these transactions, other actions led or can lead to restriction of competition, including such as in the result of emerging or strengthening of the dominant position.

4. If transactions, other actions stated in item 5 of part 1 of article 30 of the present Federal Law were settled with violation of the order of notification of the antimonopoly authority these transactions, other actions are recognized invalid at law on the antimonopoly authority's claim if these transactions, other actions led or can lead to restriction of competition, including such as in the result of emerging or strengthening of the dominant position.

5. Noncompliance with directions of the antimonopoly authority, issued in accordance with the procedure provided by item 4 of part 2 of article 33 of the present Federal Law is the reason for recognition these transactions invalid at law on the antimonopoly authority's claim.

6. Noncompliance with directions of the antimonopoly authority, issued in accordance with the procedure provided by article 33 of the present Federal Law, other violations of the requirements of articles 27 – 32 of the present Federal Law alongside with the consequences indicated in the present article involves administrative responsibility in the cases established by the Russian Federation legislation on Administrative Offences.

Article 35. State Control Over Agreements Restricting Competition of Economic Entities

1. Economic entities intending to conclude an agreement which can be recognized permissible in accordance with the present Federal Law have the right to apply a written application to the antimonopoly authority to verify compliance of the draft agreement with the requirements of the antimonopoly legislation.

2. Economic entities intending to conclude an agreement submit to the antimonopoly authority documents and information according to the list approved by the federal antimonopoly authority together with the application.

3. The antimonopoly authority takes a decision whether the draft agreement in written form complies with the antimonopoly law or not within 30 days from the date of submitting of all required information necessary for examination of the application.

4. The basis for taking decision on non-compliance of the draft agreement in written form with the antimonopoly legislation are:

1) conditions provided by parts 1 and 3 of article 11 of the present Federal Law;

2) unreliability of the information containing in the documents as well as other information important for decision-making, provided by the economic entity;

3) failure to provide information and documents provided by part 2 of the present article.

5. If necessary, the period of consideration of the application stated in part 1 of the present article may be extended by the antimonopoly authority, but not longer than for twenty days. The antimonopoly authority shall notify the applicant in writing of extending the period of consideration of the application, specifying the reasons for the extension.

6. Decision of the antimonopoly authority concerning compliance or non-compliance of a draft agreement in written form with the antimonopoly law shall expire if such agreement has not been concluded within one year from the date of adoption of the relevant decision.

7. The antimonopoly authority has the right issue an direction aimed at ensuring of competition to participants in an agreement alongside with the decision concerning the compliance of the draft agreement in written form with the antimonopoly law.

8. The antimonopoly authority has the right to cancel its decision concerning the compliance of a draft agreement in written form with the antimonopoly legislation in the cases if:

1) it was established after the decision had been taken that the information presented for examination by the economic entity intending to conclude an agreement was unreliable;

2) the economic entities intending to conclude an agreement fail to fulfill the direction of the antimonopoly authority provided by part 7 of the present article.

9. Financial organizations are obliged to submit notification to the federal antimonopoly authority about all agreements concluded in any form between each other or with bodies of executive authority, bodies of local self-government, as well as with any organizations in accordance with the procedure established by this Federal Law, except:

1) agreements between financial organizations whose aggregate share in the commodity market is below the margin established by the Government of the Russian Federation;

2) agreements which are agreements for providing financial services;

3) agreements which are agreements concluded in the course of every day activity of a financial organization.

10. Form of the notification stated in part 9 of the present article is established by the federal antimonopoly authority. The notice shall be supplemented with the following documents:

1) a copy of the agreement concluded in written form with enclosures ;

2) information about the main types of activity of the persons, which concluded the agreement, and about their profit from the main types of activity;

3) financial and economic accounts submitted to the Central Bank of the Russian Federation, and the federal executive authorities regulating the market of financial services.

11. The federal antimonopoly authority is not empowered to request financial organizations to present other documents and information except that are provided by part 10 of the present article.

12. The obligation to notify the federal antimonopoly authority in written form about concluding the agreement is exercised by the person which concluded the agreement within fifteen days from the date of its conclusion.

Chapter 8. Responsibility for Violation of the Antimonopoly Legislation

Article 36. Obligation to Fulfill Decisions and Directions of the Antimonopoly Authority

Commercial organizations and non-commercial organizations (their officials), federal bodies of executive authority of the Russian Federation (their officials), bodies of public authority of the Subjects of the Russian Federation (their officials), bodies of local self-government (their officials), other bodies or organizations exercising the functions of the above-mentioned bodies, as well as public off-budget funds (their officials), natural persons, including individual entrepreneurs, are obliged to fulfill decisions and directions of the antimonopoly authority within the period established by such decisions and directions.

Article 37. Responsibility for Violation of the Antimonopoly Legislation

1. Officials of federal bodies of executive authority, public authorities of the subjects of the Russian Federation, bodies of local self-government, other institutions or organizations discharging the functions of the aforementioned authorities or bodies of local self-government, officials of other bodies or organizations exercising the functions of the above-mentioned bodies, as well as officials of public off-budget funds, commercial and noncommercial organizations and their officials, natural persons, including individual entrepreneurs bear responsibility provided for by legislation of the Russian Federation

2. Imposing responsibility on persons stated in part 1 of this article do not exempt them from the duty to fulfill the decision and direction of the antimonopoly authority, to submit to the antimonopoly authority application or notices for examination or carry out other actions provided by the antimonopoly legislation.

Article 38. Forced Division or Separation of Commercial Organizations as well as Non-commercial Organizations Exercising Profit Generating Activity

1. In case of systematic implementation of monopolistic activity by commercial organization occupying dominant position as well as noncommercial organization exercising profit generating activity, the court on the claim of the antimonopoly authority (on the claim of the antimonopoly authority in coordination with the Central Bank of the Russian Federation with regard to a credit organization) has the right to take decision on forced division of such organizations or decision on separation of one or several organizations from them. Organizations created in the result of forced separation cannot be included in one group of persons.

2. Court decision on forced division of commercial organization or on separation of one or several organizations from it is taken with the aim of development of competition, if in aggregate the following conditions are fulfilled:

1) there is possibility of separation of the structural units of the commercial organization;

2) absence of technologically conditioned interconnection between structural units of the commercial organization (specifically, if thirty or less percent of overall volume of products (works, services) produced by its structural unit is consumed by the other structural units of this commercial organization);

3) there is possibility of independent operation in the relevant commodity market for legal persons created in the result of this reorganization.

3. Court decision on forced division of commercial organization or on separation of one or several organizations from it as well as on such division or separation of noncommercial organization exercising profit generating activity shall be fulfilled by the owner or the latter's authorized representative agency, taking into consideration requirements provided by the stated decision and within the period determined by it, which can not be less than six months

Chapter 9. Consideration of Cases of Violation of the Antimonopoly Legislation.

Article 39. The Grounds for Initiation of a Case of Violation of the Antimonopoly Legislation, Location of Examination of the Case, as Well as Consequences of Revealing of Signs of Administrative Offence in the Course of Examination of the Case

1. The antimonopoly authority initiates and reviews the cases of violation of the antimonopoly legislation, adopts decisions on these cases and issues directions based on these decisions within the frames of its authorities

2. Basis for initiation and review of the cases of violation the antimonopoly legislation (hereinafter – the case) by the antimonopoly authority are:

1) receipt of documents (hereinafter – documents) indicating the signs of violation of the antimonopoly legislation from state bodies or bodies of local self-government;

2) an application from a legal person or a natural person (hereinafter – the application);

3) detection by the antimonopoly authority of the signs of violation of the antimonopoly legislation;

4) mass media reports, natural and legal persons' reports pointing out the signs of violation of the antimonopoly legislation

3. Case of violation of the antimonopoly legislation can be considered by the antimonopoly authority at the territory where the offence was committed or at the location (residence) of the person against whom the complaint on the antimonopoly law violation is lodged.

4. The rules of passing applications, documents and cases of violation of the antimonopoly legislation by the antimonopoly authority to another antimonopoly authority for examination are established by the federal antimonopoly authority.

5. If in the course of examination of the case of violation of the antimonopoly legislation the antimonopoly authority reveals circumstances indicating the presence of administrative violation, the antimonopoly authority initiates a case of administrative violation in accordance with the procedures established by the law on Administrative Offences of the Russian Federation.

Article 40. The Commission for Review of Cases of Violation of the Antimonopoly Legislation

1. For examination of each case of violation of the antimonopoly legislation, the antimonopoly authority establishes a Commission for examination of the case of violation of the antimonopoly legislation (referred to hereinafter as the Commission) in accordance with the procedures provided by the present Federal Law. The Commission speaks in the name of the antimonopoly authority. The membership and the chairman of the Commission are approved by the antimonopoly authority.

2. The Commission consists of employees of the antimonopoly authority. The head of the antimonopoly authority or his/her deputy can be a chairman of the Commission. The number of the Commission members must be not less than three. A member of the Commission can be substituted on the basis of the antimonopoly authority's motivated decision.

3. For examination of the case of violation of the antimonopoly legislation by a credit organization in the banking services market representatives of the Central Bank of the Russian Federation should be included in the Commission on a permanent basis and should compose a half of the members.

4. For examination of the case of violation of the antimonopoly legislation by financial organizations (except credit organizations) having license issued by the federal body of executive authority on securities market representatives of the mentioned body should be included in the Commission and should compose a half of the members.

5. Number of members (including the Chairman) of the Commission on examination of the cases of violation of the antimonopoly legislation stated in parts 3 and 4 of the present article should be even.

6. The Commission is eligible to examine the case of violation of the antimonopoly legislation if not less than fifty percent of the whole number of members of the Commission are present at the session but not less than three members of the Commission.

7. Questions arising in the process of examination of the case of violation of the antimonopoly legislation should be solved by a majority vote. In case of equal spread of affirmative and negative votes the Commission chairman has a casting vote. The members of the Commission have no right to abstain from vote, the chairman of the Commission votes the last.

Article 41. Acts Adopted by the Commission

1. The Commission adopts orders, decisions, directions.

2. Upon the completion of the review of the case of violation of the antimonopoly legislation the Commission adopts decision at its session. Decision of the Commission is presented as a separate document and is signed by all members of the Commission present at the session where the decision has been taken. The member of the Commission who disagrees with the Commission's decision is obliged to sign the act adopted by the Commission and to present his special opinion in written form and it will be joined to the case papers. Decision of the Commission is made in one copy which is joined to the case papers.

3. Decision on the case of violation of the antimonopoly legislation contains:

1) conclusions on presence or lack of grounds for dismissal of the case;

2) conclusions on presence or lack of violation of the antimonopoly legislation in the actions (inaction) of the defendant;

3) conclusions on presence or lack of grounds for issuing direction and a list of obligatory actions, included in the direction;

4) conclusions on presence or lack of grounds for taking other measures for ceasing violation of antimonopoly legislation and (or) reverting its consequences , ensuring competition (including such measures as appeal to court, documents' transfer to the law machinery, recommendations on the actions aimed at development and ensuring of the conditions for competition given to the authority bodies and bodies of local self-government by the antimonopoly authority).

4. The Commission issues a direction on the basis of the decision. Direction is made out like a separate document for each person who is obliged to fulfill the actions determined in the decision within the period established in the direction, and it is signed by the chairman and members of the Commission presenting at the meeting

5. Chairman of the Commission or the Commission pronounces an order in the cases mentioned in the present article. The order is presented as a separate document, signed by the chairman and the members of the Commission and sent to the persons participating in the case as well as to other persons in the cases stated in the present article.

6. Templates of acts adopted by the Commission are approved by the federal antimonopoly authority.

Article 42. Persons Participating in Violation of the Antimonopoly Legislation Case

1. Persons participating in the violation of the antimonopoly legislation case are:

1) applicant – is the person who submitted an application, state body or body of the local self-government which sent the documents;

2) defendant – is the person regarding to who the application was submitted and documents were sent, or in whose actions (inaction) the antimonopoly authority found the signs of the antimonopoly law violation. The mentioned persons are recognized as defendants in the case of violation of the antimonopoly legislation from the moment of initiation of the proceedings;

3) interested persons – are the persons on whose rights and legitimate interests influence examination of the case of violation of the antimonopoly legislation.

2. The persons participating in examination of the case of violation of the antimonopoly legislation have the right to exercise their rights and obligations by themselves or through their representative.

3. If during examination of the case of violation of the antimonopoly legislation the Commission establishes that the actions (inaction) of a person other than the defendant contain the elements of violation of the antimonopoly legislation, the Commission has the right to impose liability on such person as a defendant or the second defendant in the case. If the Commission fails to find the fact of violation of the antimonopoly legislation in the actions of one of the defendants, the Commission issues order on termination of the person's participation in the case examination. Copy of the order on termination of the person's participation in the case examination is immediately sent to the persons participating in the case.

4. In the course of examination of the case of violation of the antimonopoly legislation the Commission has the right to involve experts, translators as well as persons obtaining information about the circumstances examined by the Commission and are not the persons participating in the case. The mentioned above persons are not persons participating in the case. The Commission issues order on involvemnt of experts, translators as well as persons obtaining information about the circumstances examined by the Commission to the examination of the case and sends them copies of the order within three days since the date of the order's issuance.

Article 43. The Rights of Persons Participating in the Violation of the Antimonopoly Legislation Case

From the moment of initiating the violation of the antimonopoly legislation case persons participating in the case have the right to familiarize themselves with the materials of the case, to make abstracts from them, to give evidence and to familiarize themselves with the evidence, to put questions to the other participants, to enter petitions, to give written and oral explanations to the Commission, to present their arguments on all questions arising in the course of examination of the case, to familiarize themselves with the petitions entered by the other persons, to object to the other participants' of the case petitions, arguments.

Article 44. Examination of Application and Documents and Initiation of Violation of the Antimonopoly Legislation Case

1. The antimonopoly authority examines an application or documents within the period of one month from the date of their submission. In the case of lack or absence of evidence that let the antimonopoly authority come to the conclusion that there are or there are no elements of violation of the antimonopoly legislation the antimonopoly authority has the right to prolong the period of examination of application or documents for not more than two months. The applicant is informed about the prolongation of the period of examination of application or documents in written form by the antimonopoly authority.

2. In the course of examination of application or documentation the antimonopoly authority has the right to request from natural persons, legal persons, state bodies and bodies of local self-government documents, information, written or oral explanations connected with the circumstances stated in the application observing the requirements of the legislation on state, bank, commercial and other registered secret.

3. On the results of the application's examination the antimonopoly authority adopts one of the following decisions:

1) on initiating of the violation of the antimonopoly legislation case ;

2) on refusal from initiating the violation of the antimonopoly legislation case due to lack of elements of its violation.

4. If the decision to initiate the violation of the antimonopoly legislation case is adopted, the antimonopoly authority issues an order to initiate a case and to establish the Commission. The copy of the order is sent to the applicant and the defendant within three days from the date of its issue.

5. Decision on refusal to initiate the violation of the antimonopoly legislation case is sent by the antimonopoly authority to the applicant indicating the reasons for adopting such decision within the period established in part 1 of the present article.

6. Within the term not exceeding fifteen days from issuing the order on establishing violation of antimonopoly legislation case and appointment of the reviewing Commission the Chairman of the Commission issues an order on submitting case for consideration and sends its copies to all parties of the case..

Article 45. Examination of the Case of Violation of the Antimonopoly Legislation

1. Case of violation of the antimonopoly legislation is examined by the Commission within three months period from the date of issuing the order to initiate proceedings. In some cases involving a necessity of getting more information by the antimonopoly authority as well as in the cases established in this Chapter the mentioned period may be prolonged by the Commission but not longer than for six months. The Commission issues a order about prolongation of the period of the case examination and sends copies of the order to the persons participating in the case.

2. Examination of the case of violation of the antimonopoly legislation is exercised at the Commission session. Persons participating in the case should be notified about time and place of its examination. If the persons participating in the case were duly informed of time and place of the case examination but failed to attend the session the Commission has the right to consider the case in their absence. During the case examination the minutes, which are signed by the Commission chairman, are kept. The Commission has the right to take shorthand or audio recording of the session making an entry about it in the minutes.

3. The Chairman of the Commission:

1) opens the session;

2) announces the list of the Commission members;

3) announces the case subjected for examination, checks the appearance of persons participating in the case at the Commission session, considers their authorizations, establishes whether the persons who failed to appear at the session were duly notified and that information concerning the reason of their non-appearance is available;

4) ascertains the possibility of consideration of the case;

5) explains their procedural rights and liabilities to the persons participating in the case, establishes the sequence of holding procedural actions;

6) directs the Commission session, ensures conditions for comprehensive and complete examination of evidence and circumstances of the case, ensures consideration of applications and presentations of the persons participating in the case;

7) takes measures to ensure proper order at the Commission session.

4. At the Commission session the members:

1) hear the persons participating in the case;

2) hear and discuss the petitions, adopt decisions on the petitions which are reflected in the minutes of the session;

3) examine the evidence;

4) hear opinions and explanations of the persons participating in the case concerning the evidence presented by the persons participating in the case;

5) hear and discuss the position of experts and specialists attracted with the purpose of making conclusions;

6) hear the persons disposing of information concerning the circumstances of the case under examination;

7) on application of the persons participating in the case or on the Commission initiative the questions about the necessity to make a recess in the session, to postpone or to stay an action are discussed.

5. During the consideration of the case of violation of the antimonopoly legislation the Commission has the right to require from the persons participating in the case documents and information, written and oral explanations on the questions arising in the course of examination, to attract other persons to participation in the case.

6. Having examined the case evidence, presentation of position of the persons participating in the case, conclusions of experts and specialists, questioning of the persons disposing of factual evidence on the circumstances examined by the Commission, the Commission chairman announces the conclusion of the case examination and asks the persons participating in the case and other persons assisting in the case examination to leave so that the Commission takes a decision.

Article 46. A Recess in the Session of the Commission

1. On application of the persons participating in the case of violation of the antimonopoly legislation or on its own initiative the Commission has the right to announce a recess in the session for a period not exceeding seven days.

2. Examination of the case of violation of the antimonopoly legislation by the Commission after the recess is continued from the moment where it was interrupted. A repeated examination of the evidence considered before the recess in the Commission session is not conducted.

Article 47. Postponement and Suspension of Examination of a Case of Violation of the Antimonopoly Legislation

1. The Commission has the right to postpone the examination of the case of violation of the antimonopoly legislation:

1) on petition of a party to the case in connection with impossibility of this person or his/her representative appearance at the Commission session for a valid reason, confirmed by relevant documents;

2) in connection with the necessity to obtain complementary evidence;

3) for attracting to participation in the case of persons assisting the case consideration and other persons, whose participation is considered necessary by the Commission;

4) if in the course of examination it is established that in the actions (inactions) of the defendant there are elements of some other violation of the antimonopoly law than the violation that is examining;

5)) in other cases provided by this article.

2. If the case of violation of the antimonopoly legislation is postponed the running of the term of the case examination is not interrupted. The examination of the case at a new session after the recess is continued by the Commission from the moment where it was interrupted.

3. The Commission can suspend examination of the case of violation of the antimonopoly legislation in the case and for the period of:

1) examination by the antimonopoly authority, the court, investigative authorities of another case, the conclusions on which would be significant for examination of the case of violation of the antimonopoly legislation;

2) making an expert examination.

4. The running of the term of examination of the case of violation of the antimonopoly legislation is interrupted for the period of suspension of the case examination, and resumes from the moment of the case resumption. The examination of the case resumes from the moment at which it was suspended

5. The Commission issues a order about postponement, suspension or resumption of examination of the case of violation of the antimonopoly legislation as well as about making an expert examination a copy of which is sent to the persons participating in the case within three days period from date of its issue. Copy of the order about an expert examination is also sent to the expert within three days period from date of its issue.

Article 48. Dismissal of the Case of Violation of the Antimonopoly Legislation

1. The Commission terminates the legal proceedings of the case of violation of the antimonopoly legislation in the following cases:

1) voluntary elimination of violation of the antimonopoly legislation and its consequences by the person who has committed the violation;

2) absence of violation of the antimonopoly legislation in the examined by the Commission actions (inaction);

3) liquidation of the legal person – the only one respondent in the case;

4) death of natural person – the only one respondent in the case;

5)) if there is a legal act which came into force where there are conclusions on presence or absence of violation of the antimonopoly legislation in the actions (inaction) which are the subject of the consideration in the case.

2. The Commission adopts the decision to stop the legal proceedings of the case of violation of the antimonopoly legislation in accordance with the requirements established by article 41 of the present Federal Law.

Article 49. Adoption of a Decision on a Case of Violation of the Antimonopoly Legislation by the Commission

1. In the course of adopting decision the Commission:

1) assesses evidence and arguments submitted by the persons participating in the case;

2) assesses conclusions and explanations of experts as well as of persons disposing of factual evidence about the circumstances considered by the Commission;

3) determines the norms of the antimonopoly or other legislation of the Russian Federation which were violated by the actions (inaction) examined by the Commission;

4) establishes rights and obligation of the persons participating in the case;

5) decides question about issuing directions and about their content, as well as of the necessity to exercise other actions aimed at elimination and (or) prevention of the antimonopoly law violation, including the question of sending materials to the law enforcement agencies, referring a claim to court, sending proposals and recommendations to the authority body and local government bodies.

2. The decision adopted by the Commission should be declared after the case examination is completed. In so doing only the resolution part of the decision may be declared. The decision should be formulated in full volume and sent to the persons participating in the case within the period not exceeding ten working days from the moment of declaration of the resolution part of the decision. Copies of the decision are immediately sent or presented to the persons participating in the case.

Article 50. Directions on the Case of Violation of the Antimonopoly Legislation

1. On the results of examination of the case of violation of the antimonopoly legislation and on the basis of the decision the Commission issues directions to the defendant in the case.

2. The direction on the case of violation of the antimonopoly legislation is made out simultaneously with the decision. Copy of the direction is immediately sent or presented to the person, to whom it is prescribed to fulfill the actions determined in the decision

Article 51. Fulfillment of the Direction on the Case of Violation of the Antimonopoly Legislation. Consequences of Non-Fulfillment of the Direction on Transference to the Federal Budget of the Revenue Received from Monopolistic Activity or Unfair Competition

1. The direction on the case of violation of the antimonopoly legislation is subjected to be fulfilled within the period specified in it. The antimonopoly authority exercises control over fulfillment of its directions.

2. The failure to fulfill direction on the case of violation of the antimonopoly legislation in time entails administrative responsibility.

3. person, whose actions (inaction) in accordance with the procedures established in the present Federal Law are recognized as monopolistic activity or unfair competition and are impermissible according to the antimonopoly legislation is obliged to transfer to the federal budget the revenue received from these actions (inaction) according to the direction of the antimonopoly authority. In the case of failure to fulfill direction the revenue received from the monopolistic activity or unfair competition is subjected to collecting into the budget at the suit of the antimonopoly authority.

4. Partial fulfillment of the direction within the established period or deviation from fulfillment or belated fulfillment of the direction is implied under the failure to fulfill direction on the case of violation of the antimonopoly legislation in time.

Article 52. Order of Appeal against Decisions and Directions of the Antimonopoly Authority

Decision or direction of the antimonopoly authority may be appealed against within three months from the date of the decision adoption and the directions issuance. The appeal to court or court of arbitration suspend

the fulfillment of the antimonopoly authority directions for the period of its examination in court until the court decision comes into legal force.

Chapter 10. Concluding Provisions and Coming into Effect of the Present Federal Law

Article 53. Concluding Provisions

1. Starting from the date of coming into effect of the present Federal Law the following is recognized invalid:

1) articles 1 – 3, indentions 1 – 25 of part 1 of article 4, parts II – VII of the RSFSR law of March 22, 1991 № 948-1 "On competition and restriction of the monopolistic activities in the commodity markets" (Vedomosti of the Congress of People's Deputies of the RSFSR and the Supreme Soviet of the RSFSR 1991, № 16, p. 499);

2) The federal law of June 23, 1999 № 117-FZ "On protection of competition in the financial services market" (The RF Code of Laws 1999, № 26, p. 3174);

3) items 1 – 4, 6 – 26, 30 – 34 of article 1 of the Federal Law of May 25, 1995 № 83-FZ "On Introduction of changes and additions to the RSFSR law "On competition and restriction of the monopolistic activities in the commodity markets" (The RF Code of Laws, 1995, № 22, p. 1977);

4) the Federal Law of May 6, 1998 № 70-FZ "On Introduction of changes and additions to the RSFSR law "On competition and restriction of the monopolistic activities in the commodity markets" (The RF Code of Laws, 1998, № 19, p. 2066);

5) the Federal Law of January 2, 2000 № 3-FZ "On Introduction of changes and additions to article 18 of the RSFSR law "On competition and restriction of the monopolistic activities in the commodity markets" (The RF Code of Laws, 2000, № 2, art. 124);

6) indentions 2 – 5, 38 – 42 of article 3 of the Federal Law of December 30, 2001 № 196-FZ "On coming into effect of the RF Code of Administrative Infringements" (The RF Code of Laws, 2002, № 1, art. 2);

7) item 2 of article 2 of the Federal Law of March 21, 2002 № 31-FZ "On bring of the statutory acts in accord wit the Federal Law "On state registration of legal persons" (The RF Code of Laws, 2002, № 12, art. 1093);

8) items 1 – 4, 6 – 33 of the Federal Law of October 9, 2002 № 122-FZ "On introduction of changes and additions in the RSFSR law "On competition and restriction of the monopolistic activities in the commodity markets" (The RF Code of Laws, 2002, № 41, art. 3969);

9) the Federal Law of March 7, 2005 № 13-FZ "On Introduction of changes and additions to articles 17 and 18 of the RSFSR law "On competition and restriction of the monopolistic activities in the commodity markets" (The RF Code of Laws, 2005, № 10, art. 761);

10) articles 2 and 21 of the Federal Law of February 2, 2006 № 19-ФЗ "On introduction of changes in some statutory acts of the Russian Federation and recognizing invalid separate provisions of the statutory acts of the Russian Federation in connection with adoption of the Federal Law "On placement of orders for goods, works and services for state and municipal needs" (The RF Code of Laws, 2006, № 6, art. 636).

2. Starting from the date of coming into effect of the present Federal Law and till bring into line with the present Federal Law of other laws and other statutory legal acts of the Russian Federation regulating relations connected with protection of competition in the Russian Federation, prevention and restriction of the monopolistic activity and unfair competition the mentioned above laws and other statutory acts are applied in the part which does not contradict with the present Federal Law.

Article 54. Coming into Effect of the Present Federal Law

The present federal law will come into effect after a lapse of ninety days from the date of its official publication.

President of the Russian Federation
V.PUTIN

Moscow, Kremlin
July 26, 2006
N 135-FZ