

Antimonopoly Regulation within the Eurasian Economic Union (EAEU)

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Introduction

Globalization is a trend that determines the development of the world's economy at present and, as a result, substantially affects competition policy. To address new challenges in global markets, different states cooperate more closely with each other on competition law matters. Considered international cooperation is required for both practical (conduction of joint investigations of anticompetitive agreements, abuse of dominance cases and cases on other antitrust violations, merger control issues, etc.) and methodological purposes (issuing joint clarifications, ensuring information exchange and sharing expertise, etc.). Such cooperation is carried out through the joint activities of competition authorities based on bilateral or multilateral treaties, while participating in various international organizations or regional supranational associations like the EAEU.

Due to the increasing role of the EAEU throughout recent years, it is essential for all the practitioners to be aware of the peculiarities and specific features of the competition regulation within the EAEU. This brochure provides a practical overview of the structure and powers of the EAEU bodies in the sphere of competition, as well as description of regulation and recent law enforcement practice.

1 Background information

1.1 Regional Background

The EAEU is an integrated, supranational association of the five member states (Armenia, Belarus, Kazakhstan, Kyrgyzstan and Russia) in Eurasia, solidifying their regional presence and jointly developing the reunified single market in the post-Soviet space.

The EAEU was launched as an international organization on May 29, 2014, when political leaders of its founding member states attended a summit in Astana and signed the Treaty on the EAEU (Treaty), which unified other relevant integration organizations, such as the Eurasian Economic Community, the Customs Union and the Single Economic Space into a sole structure called the "EAEU".

Notably, the EAEU was created in order to make domestic markets more transparent and predictable for business, to enhance the investment climate and to ensure socially-stable development of each member state, by improving the living standards in the region generally.

Today, the EAEU is an emerging market with a rising population of more than 180 million consumers, living within five cognate jurisdictions, with common customs and technical regulation regimes.

Though the EAEU comprises five neighboring member states, the EAEU regardless of its geographic boundaries is gradually strengthening its market power overseas. To enhance its presence worldwide, the EAEU recently concluded a Free Trade Agreement (FTA) with Vietnam, other trade agreements with Iran and China and is conducting negotiations with Egypt, Thailand, Mongolia, Serbia, India and Singapore to ensure cooperation between the countries in future. In parallel, the EAEU negotiates, with other countries, the terms of signing the FTA, which implies the potential expansion of the EAEU markets.

1.2 Organization Structure

The EAEU is composed of the following bodies:

- 1) **Supreme Eurasian Economic Council (Supreme Council)** is the EAEU's highest political body, co-chaired by the Presidents of each member state. It is responsible for vital issues on strategy, direction and prospects of further integration and harmonization of legislation of member states.
- 2) **Eurasian Intergovernmental Council (Intergovernmental Council)** consists of the Prime Ministers of each member state. It executes, and supervises, international agreements concluded within the EAEU, including, but not limited to, the Treaty, as well as the decisions rendered by the Supreme Council. The meetings within the Intergovernmental Council are convened on a regular basis, no less than twice a year to ensure the development and integration processes.
- 3) **Eurasian Economic Commission (EEC)** is a permanent regulatory authority responsible for all the decisions on customs policy, macro-economy, competition rules and fiscal policy of the EAEU. Such decisions are obligatory for execution in the territory of all member states, not requiring additional approval at national level. EEC comprises from two subordinate bodies: the **Council** and the **Board**.
 - i. The **Council** consists of the Deputy Prime Ministers representing each member state and is vested with the authorities to monitor and oversee the functioning of the Board.
 - ii. The **Board** consists of ten commissioners (each member state appoints two commissioners to represent interests of the state). Decisions are taken by a qualified majority, or by consensus. The Board is an executive body of the EEC, convened at least once a week, that resolves the operational questions of the EEC.
- (D) **The Court of the EAEU (Court)** consists of ten judges appointed by each member state proportionally (two judges from one member state). The Court ensures the uniform application of the Treaty and other international agreements reached within the EAEU.



2 EEC as the Control Tower over the cross-border markets

2.1 Legal Grounds

Under Annex 19 to the Treaty, called the "Protocol on General Principles and Rules of Competition" (Protocol), the EEC is authorized to oversee and ensure the compliance with the competition rules of the EAEU in cross-border markets, covering territories of two or more member states.

2.2 Vested Powers

Article 10 of the Protocol lists the legal instruments that the EEC is authorized to use against competition violations in cross-border markets of the EAEU:

1) **Right to analyze and consider petitions/claims (materials).**

The EEC may accept petitions/claims (materials) on possible infringement of competition rules and assess whether there is a negative impact on competition in cross-border markets as the result of the actions committed.

2) **Right to initiate and conduct investigations on violations of the general rules of competition in the EAEU.**

The EEC may initiate and conduct investigations at any stage, when it discovers the signs of competition violation in cross-border markets. In such cases, the EEC should carry out a

thorough preliminary analysis of the respective cross-border markets to reveal the violation on the markets considered.

3) **Right to issue rulings, decisions and elaborate proposals to potential violators on the voluntary elimination of the violations and restoration of competition in the markets.**

The EEC may issue rulings or render instructive decisions, binding for determined market players accused of breaching the competition rules, in cross-border markets.

Moreover, just recently the Treaty has been amended by vesting the EEC with the right to elaborate jointly with the potential violators proposals on elimination of the harm from violation and securing competition in the markets instead of bringing companies to liability in accordance with the EAEU legislation. The proposed measure could serve as a sign that the EEC currently does not want to be a punitive authority and tries to build up a proper dialogue between the business community and the regulator to prevent violations in future.

4) **Right to request information and to initiate inspections on a national levels.**

The EEC is entitled to request from the government authorities, local government bodies, and companies, any information (including confidential) that is required for the EEC to exercise its powers and to apply with the requests to conduct any procedural measures by the national regulators, including but not limited to conducting unscheduled inspections of the companies.

In addition, the EEC has a number of reporting obligations, in particular, to submit an annual report on the state of competition in cross-border markets to the Supreme Council, as well as to disclose decisions on the considered cases on the official website of the EAEU. Please note that the list of legal instruments and rights of the EEC listed above is not exhaustive.

3 Competition Regulation in the EAEU

3.1 Principles of Competition Regulation in the EAEU

The underlying principles of competition regulation stipulated by the Treaty are as follows:

- 1) Prohibition of anti-competitive agreements leading to prevention, restriction, or elimination of competition, as well as granting state and municipal preferences;
- 2) Using effective measures for prevention, restriction, or elimination of actions (omissions) specified above;
- 3) Ensuring efficient merger control systems, to the extent necessary for the development and protection of competition of the EAEU member states (there is no separate unified merger control procedure in the EAEU legislation, however, competition authorities of the member states could ensure exchange of information, conduct market researches jointly using waivers enabling them to conduct more complex market assessments and to issue correlating decisions in the end);

- 4) Existence of competition authorities, capable of implementing competition policy determined by the Treaty;
- 5) Formalized systems of sanctions for the violations (such as fines) in the EAEU member states;
- 6) Transparent competition policy, driven by the competition authorities of the EAEU member states;
- 7) Cooperation between the competition authorities of the EAEU member states.

3.2 Main Spheres of Competition Regulation in the EAEU

3.2.1 Abuse of Dominance

According to the Protocol, dominant position means the status of an economic entity (-ies) having the possibility to influence the terms and conditions of product circulation in the respective market, and/or to exclude other economic entities, competitors from the market, and/or to impede entrance to this market for other market players.

The most important question of whether the market player is holding a dominant position in the cross-border market, or not, is determined by the EEC, in accordance with its internally approved methodology of assessment of cross-border markets.

Moreover, Part 1 Article 76 of the Treaty sets forth the following actions, which could be considered as abuse of dominance:

- (A) Fixing and/or maintaining monopolistically high/low prices;
- (B) Withdrawal of a product from circulation, if that caused increase in prices for the related products;
- (C) Imposing on a counterparty, terms and conditions of a contract that are unfavorable for such a company, or not relating to the subject of the contract (tying);
- (D) Reduction or termination of production of a product, which is neither economically nor technologically justified, if this product is in demand, or orders for its supply are placed and it is possible to manufacture it on a profitable basis, and if such a termination of a product manufacturing is not directly established by the Treaty and (or) other international treaties between the member states;
- (E) Refusal to enter into a contract with some purchasers (customers), if such a refusal is neither economically nor technologically justified, taking into account provisions of this Treaty and (or) other international treaties between the member states;
- (F) Economically, technologically or other unjustified fixing of different prices (tariffs) for the same product or creating other discriminatory conditions that are neither economically, technologically nor in some other way justified;
- (G) Impeding access to the market for other companies, or their withdrawal from the market.

Penalty: Subject to a fine in the amount for up to RUB 150,000 for officials and individual entrepreneurs, and for companies- turnover fines from 1% to 15%, but not less than RUB

100,000.

3.2.2 Anticompetitive Agreements

There are two major types of anticompetitive agreements – horizontal and vertical. A separate group of agreements that might also fall within the EEC scope of interest are “other anticompetitive agreements” that are not prohibited *per se* and shall be analyzed by the *rule of reason*.

- (A) **Prohibited horizontal agreements** are agreements concluded between the companies-competitors operating in the same markets, if such agreements lead, or may lead, to:
- (i) fixing or maintaining prices (tariffs), discounts, markups (surcharges), extra charges;
 - (ii) bid rigging;
 - (iii) allocation of the market;
 - (iv) decreasing, or ceasing, production of a product if there is a demand for such a product; and
 - (v) refusing to enter into a contract with certain sellers, or buyers (boycott).
- (B) **Vertical agreements** are agreements between companies, where one party is a buyer (potential buyer) of a product and another party is a seller (potential seller) of the same product. Vertical agreements may be prohibited, if they result, or may result, in:
- (i) Resale price maintenance (excluding setting maximum (*price ceiling*) or recommended prices);
 - (ii) Obligation not to sell products of a legal entity, who is a seller’s competitor.
- (C) **Other anti-competitive agreements** cover the agreements between companies that lead, or may lead, to restriction of competition, but do not fall within the list of prohibitions described above.

Penalty: Subject to a fine in the amount for up to RUB 150,000 for officials and individual entrepreneurs, and for companies– turnover fines from 1% to 15%, but not less than RUB 100,000.

3.2.3 Prohibited Coordination of Economic Activities

According to the Protocol, coordination is the harmonized actions of economic entities, by a third person, that does not belong to the same group of persons with any of such economic entities and does not operate in the market, where such coordination is taking place. Such coordination is prohibited in cases when it leads to prevention, restriction or elimination of competition.

Penalty: Subject to a fine in the amount for up to RUB 75,000 for individuals, for officials and individual entrepreneurs – up to RUB 150,000, for companies– up to RUB 5,000,000.

3.2.4 Unfair Competition

The Protocol stipulates that unfair competition constitutes any actions of a company (-ies) (groups of persons) that is aimed at obtaining business advantages in violation of the legislation, business practices, requirements of integrity, reasonableness and fairness, if such actions caused, or may cause, economic, or reputational, damage to the rivals.

Pursuant to Article 75 of the Treaty, unfair competition is forbidden, together with other types of competition violations. In particular, Part 2 of Article 76 of the Treaty explicitly prohibits the following types of unfair competition:

- (A) **Defamation.** Disclosure of false, incorrect or misleading information that may result in economic or reputational harm for the competitors.
- (B) **Misrepresentation.** Misleading information about the nature, mode and place of manufacture, consumer properties, quality and quantity of products, or about their manufacturers.
- (C) **Incorrect comparison.** Incorrect comparison by one company of products manufactured or sold by other legal entities.

Penalty: Subject to a fine in the amount for up to RUB 110,000 for officials and individual entrepreneurs, and up to RUB 1,000,000 for companies.

4 Court's Review of the Commission's Decisions

The Court of the EAEU is entitled to assess whether the EEC has rendered its decisions in strict compliance with the Treaty and other related international agreements between the member states. In particular, the Court is vested with the powers to invalidate decisions, previously rendered by the EEC, if it finds them contradicting the general rules of competition.

However, prior to the Court's review of the EEC decision, the claimant has to appeal firstly to the EEC and resort to mandatory pre-trial measures. Consequently, the Court's review may start after 3 months has passed from the date when the disputing parties fail to take such pre-trial measures.

The right for a fair trial before the Court is given to all member states of the EAEU, companies, or individual entrepreneurs. The general rule is that the Court shall render a decision within 90 days, from the date of commencement. However, in exceptional cases Annex 2 to the Treaty allows the Court to extend the review period.

5 First Law Enforcement Practice

5.1 Caterpillar case (2016)

Caterpillar is one of the largest manufacturers of the specialized machinery used in the mining industry. The main customers of these products are the industrial enterprises of Russia and Kazakhstan.

The EEC conducted analysis of the respective cross-border market and discovered that the Russian dealer of Caterpillar refused to sell products to Kazakhstan companies, whereas the price for Caterpillar products fixed by the official dealer in Kazakhstan was higher than that set by the official dealer in Russia.

According to Article 76 of the Treaty, agreements between companies are prohibited, if such agreements lead, or might lead, to the restriction of competition. The EEC concluded that Caterpillar and its distributors had established unequal access to the products, within member states of the EAEU. The difference in prices, in the markets of Russia and Kazakhstan, exceeded 40%.

As a result of joint work of the EEC and the Federal Antimonopoly Service (FAS Russia), the main international contracts between Caterpillar and its dealers, as well as promotional materials in the dealers' service areas, were amended to meet the requirements of the EAEU competition regulation.

Moreover, in the territory of the EAEU, Caterpillar's dealers stopped the practice of refraining from concluding agreements for the sale of machinery and spare parts, manufactured by Caterpillar, with companies operating outside the dealer's service area.

From the competition law perspective, this case introduced new approaches to defining geographic boundaries of distributorship exclusivity in the cross-border market. In particular, the EEC confirmed that exclusive agreements between the suppliers and their distributors on market division within the cross-border market might violate competition legislation.

5.2 NLMK case (2017)

In September 2017, the EEC held Novolipetskiy Metallurgicheskiy Kombinat (NLMK), unique Russian producer of special steel for transformers, liable for violation of the Treaty, in the form of economically, technologically, or otherwise unjustified, fixing different prices (tariffs) for the same products and creation of discriminatory conditions. The EEC concluded that NLMK, holding 99.99% of the EAEU market for steel for transformers, used different prices for steel supplied to Kazakh (up to 23% higher) and Russian customers.

NLMK and its group of senior executives received a total fine in the amount for RUB 217,000,000 (approx. USD 3,700,000) for committing the violation. However, in November 2017, the Russian Prime Minister, Mr. Dmitry Medvedev, asked to suspend the decision and to bring it for reconsideration by the Eurasian Intergovernmental Council, in order to cancel the fine for NLMK.

5.3 Other Investigations

In the period 2018-2019, the EEC conducted about fifteen antimonopoly investigations. These were in the markets for industrial equipment, components and raw materials, medicines and medical equipment, air transportation services, consumer goods etc. Based on the results of these investigations, the EEC initiated more than five cases involving violations of the EAEU competition legislation, including abuse of dominant position and unfair competition. As we see, the law enforcement practice of the EEC is actively developing and new investigations might be expected in the nearest future.

6 Initiatives on Modernization of the EAEU Competition Legislation

The EEC enforcement practice on competition matters is not broad, but it has already helped to define the directions for further improvement of the EAEU competition legislation. Currently, the EEC is working on the following initiatives:

- (A) Introduction of preventive measures into the EAEU competition legislation to provide the EEC with more tools for ensuring competition (warnings and prescriptions to eliminate competition restrictions in the markets);
- (B) More detailed elaboration of leniency program and harmonization of its major provisions with the national competition authorities to investigate cartels more efficiently;
- (C) Introducing more efficient liability system for failure to provide information upon requests of the EEC (several options are debated, including bringing to liability via national competition authorities);
- (D) Introducing higher fines for non-compliance with the EEC decisions;
- (E) Improvement of the system used for submission of complaints on signs of competition violations to the EEC (directly to the EEC, or via national competition authorities);
- (F) Introducing the powers for EEC to prepare and publish in the open sources regular reports on competition environment in the EAEU cross-border markets etc.

Conclusion

The EEC is currently becoming an important supranational competition regulator. We see that the quality and quantity of antimonopoly investigations, conducted by this authority, is gradually increasing. Moreover, the EEC is establishing closer cooperation with market players and the expert community, which helps the regulator to address practical problems more efficiently, including by improvement to the antimonopoly legislation of the EAEU.

Taking into account the above, we recommend companies active in transnational markets within the EAEU to consider carefully all the restrictions established by the EAEU antimonopoly legislation. To prevent the risks of potential violation, we assume that the relevant provisions of the EAEU antimonopoly legislation should be included into the compliance training programs of such companies.

In addition, it might be helpful to conduct regular audits of compliance of the current business activities of such companies and their subsidiaries in the relevant jurisdictions with the EAEU antimonopoly legislation, in order to define the risks and elaborate on the most efficient ways for their mitigation.

ALRUD Competition/ Antitrust Practice has an expertise in various aspects of the EAEU antimonopoly legislation and closely cooperates with the EEC within different working groups and professional events, receiving the most valuable updates on the developments in the EAEU legislation and enforcement practice directly from the regulator.

Thus, if you have any questions in connection with the above, please do not hesitate to contact us.

Key contacts



Vassily Rudomino

Senior Partner

Practices: Competition/Antitrust, White Collar Crime, Compliance and Investigations, Capital & Equity Markets, Corporate/M&A



E: VRudomino@alrud.com




German Zakharov

Partner

Practice: Competition/Antitrust, White Collar Crime, Compliance and Investigations




E: GZakharov@alrud.com



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ALRUD Law firm
Skakovaya st., 17, bld. 2, 6th fl.
Moscow, Russia, 125040

T: +7 495 234 96 92
+7 495 926 16 48
F: +7 495 956 37 18
E: info@alrud.com



ALRUD