

# 25th Anniversary of the Eurasian Economic Project: First Steps in Regulation of Cross-Border Competition

Kluwer Competition Law Blog  
March 25, 2020

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Please refer to this post as: Ksenia Tarkhova, Anastasia Kayukova, '25th Anniversary of the Eurasian Economic Project: First Steps in Regulation of Cross-Border Competition', Kluwer Competition Law Blog, March 25, 2020, <http://competitionlawblog.kluwercompetitionlaw.com/2020/03/25/25th-anniversary-of-the-eurasian-economic-project-first-steps-in-regulation-of-cross-border-competition/>

Globalization and regional integration processes are trends that determine the development of the world's economy at present and, as a result, substantially affect 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 (conduct of joint investigations of anticompetitive agreements, abuse of dominance cases and cases on other antitrust violations, consideration of high-profile merger control cases, 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 Eurasian Economic Union ("EAEU")<sup>[1]</sup>.

The EAEU is an economic union of five member-states, located in central and northern Asia and Eastern Europe, which includes Armenia, Belarus, Kazakhstan, Kyrgyzstan and Russia, solidifying the regional presence and jointly developing the reunified single market, in the post-Soviet space.

The Treaty on establishment of the EAEU ("EAEU Treaty")<sup>[2]</sup> came into force on January 1st 2015. Notably, the EAEU was founded 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 living standards in the region.

Today, the EAEU is an emerging market with a rising population of more than 180 million consumers, common customs and technical-regulation regimes. Though the EAEU comprises five neighboring member states, the EAEU with its own regulatory authorities, regardless of its geographic boundaries, is gradually strengthening its market power overseas.

The Eurasian Economic Commission (EEC), a permanent regulatory authority responsible for all the decisions on customs policy, macro-economy, competition rules and fiscal policy of the EAEU, is one of the most important and powerful bodies within the EAEU. Decisions taken by the EEC are obligatory for execution in the territory of all member states, not requiring additional approval at national level. In 2019, the EEC celebrated its 25 years' anniversary from the date of approval of the Eurasian project and five-year jubilee - from the date of the EAEU Treaty coming into force.

Analysis of the current changes and developments in the EAEU antimonopoly regulation, as well as description of law enforcement practice of the EEC, are provided below.

## 1. Recent amendments to the EAEU Treaty

### 1.1. Developments in consideration process of the EEC antimonopoly cases

According to the Decision of the EEC Council, as of September 9th 2019, the procedure for consideration of applications relating to violation of the general principles of the competition, in the EAEU cross-border markets, was amended. In particular, there were some changes to the form of communication between the participants of the EEC meetings (including usage of the video-conferences), as well as to some other procedural changes made.

Moreover, the recent changes introduced the right of the member of the EEC Chamber responsible for competition and antimonopoly regulation matters (currently - Mr. S.M. Zhumangarin) to prolong the term for execution of the provisions, according to the EEC proposal on implementation of the actions, aimed at elimination of the violation of the general principles of the competition and supporting the competition, in the EAEU cross-border markets ("EEC Proposal"), as a result of consideration of reasonable application.

The relevant changes were also reflected in the EAEU Treaty as of May 29th 2014, when on September 30th 2019, the Heads of the Member-States of the EAEU signed the Minutes, amending it during the Meeting of the High EAEU in Yerevan, the Republic of Armenia. In particular, the Minutes amended the EAEU Treaty (and Annexes thereto) with more clear and precise wording of the relevant Articles, in order to simplify the enforcement practice of the EAEU antimonopoly legislation.

These amendments will come into force after execution of the required national procedures. In the light of the foregoing, further investigations might be expected to be initiated by the EEC, in the EAEU cross-border markets, as soon as above-mentioned amendments come into force.

### 1.2. New instruments in the EAEU antimonopoly legislation: the EEC Precautions and the EEC Warnings

The introduced amendments to the EAEU Treaty also establish the following legal instruments to prevent antimonopoly violations in the EAEU cross-border markets, in addition to the EEC Proposals:

(A) Precautions on inadmissibility of actions, which may lead to violation of the general principles of the competition on cross-border markets ("EEC Precautions"); AND

(B) Warnings on the necessity of cessation of the actions (inaction), which contain of the signs of violation of the general principles of the competition on cross-border markets ("EEC Warnings").

Moreover, amendments to the EAEU Treaty establish the legal grounds and procedure for issuance of both EEC Precautions and Warnings.

### 1.3. Introduction of the leniency program in the EAEU antimonopoly legislation

In accordance with the recent amendments to the EAEU Treaty, the EEC is also empowered with the right to establish the procedure for releasing business entities from liability, if such business entities have voluntarily reported on conclusion and participation in the anticompetitive agreements (including cartels, prohibited vertical agreements and other anticompetitive agreements).

## 2. Delimitation of authorities between the EEC and local competition authorities

On June 18th 2019, the EAEU Court issued the Advisory Opinion<sup>[3]</sup> on delimitation of jurisdictions between the EEC and national antimonopoly authorities of the EAEU member-states. In particular, the Advisory Opinion provides the following:

### (A) General principles of applicability of the EAEU competition legislation

The EAEU legislation prevails over the national legislation of the EAEU member-states. In particular, the EAEU general principles of competition have a direct application, as established in an international agreement.

Any actions of the relevant authorities of the EAEU member-states, in the field of competition, shall be the EAEU-law compatible. All contradictions between provisions of the EAEU law and national competition rules are to be resolved in favour of the EAEU law.<sup>[4]</sup>

### (B) Simultaneous antimonopoly violations committed on national and cross-border markets create a single violation in the cross-border market

The EAEU has a two-tier system of regional and national jurisdiction, in respect of the competition issues subject to the market affected by the antimonopoly violation.

The EAEU Court established that negative impact on cross-border markets and, at the same time, on national markets of the EAEU member-state, should be considered as a single antimonopoly violation of the general principles of the competition at the EAEU level.<sup>[5]</sup>

### (C) Absence of overlapping powers of the EEC and antimonopoly authorities of the EAEU member-states to consider the same antimonopoly violation simultaneously

Violations of the national legislation and general principals of competition set out in the EAEU Treaty, if such violations have, or may have, a negative effect on competition in cross-border markets, shall be considered by the EEC, excluding double-liability for the violator on a country level. Therefore, the EEC should ensure suspension of the antimonopoly violation in the cross-border market that exclude implementation of the liability, according to the nation legislation of the EAEU member-states.<sup>[6]</sup>

### (D) Procedural warranties of priority of the EAEU antimonopoly regulation

Annex No. 19 to the EAEU Treaty "The Protocol on General Principles and Rules of Competition" ("Protocol") contains procedural guarantees that exclude the possibility of conducting a simultaneous consideration, investigation and prosecution of the same antimonopoly violation by the EEC and antimonopoly authorities of the EAEU member-states.

Mechanisms of interactions between the EEC and national antimonopoly authorities, during the process of monitoring compliance with the Protocol in cross-border markets, including transfer of antimonopoly cases within the relevant jurisdiction, are aimed at eliminating possible suppression of the cross-border antimonopoly violations by national authorities, which are not authorized to consider such cases.<sup>[7]</sup>

### (E) Peremptory nature of Paragraph 59 of the Protocol

Termination of the EEC antimonopoly investigation, or transfer of an application (materials) between jurisdictions to the relevant national authorities, do not depend on the discretion of the national authorities.<sup>[8]</sup>

### (F) Principle of non bis in idem

The principle of *non bis in idem* means that the offender cannot be punished twice for the same violation. Thus, in case of simultaneous issuance of the decision by the EEC and national antimonopoly authority, the decision violating rules of competence should be cancelled.<sup>[9]</sup>

One of the most famous examples of the competence delimitation is the *Phillips* case. In 2017, The Federal Antimonopoly Service (FAS Russia) transferred materials of the case, which had signs of possible anticompetitive coordination of economic activity of resellers of Philips smartphones to the EEC. In its turn, the EEC, after having analyzed such materials, concluded that the case should be considered on a national level because the market should have been considered as local. Consequently, in 2019, FAS Russia considered the case and issued the decision against Sangfei CEC Electronics Rus. <sup>[10][11]</sup> The company was judged to have been involved with illegal coordination of economic activity.

## 3. Recent EEC practice on cartel cases in the EAEU cross-border markets

During the meeting of the Heads of the antimonopoly authorities of the EAEU member-states, held in September, officials announced the latest practice of the EEC on cartel cases conducted in the EAEU cross-border markets and specifically mentioned the two cases described below:

### 3.1 FibroScan case

Decision on FibroScan case<sup>[12]</sup> was the first decision on cartel in the trans-border markets made by the EEC. The EEC revealed a cartel in the market for the services on calibration of ultra-sound sensors involving the medical device FibroScan, manufactured by Echosens (France). The considered cartel agreement was concluded between ZAO Delrus (Russia) and TOO Delrus (Kazakhstan) and was aimed at allocation of the EAEU market by territorial principle.

As reported, the Russian company ZAO Delrus refused to provide services to a customer, registered in Kazakhstan, and referred that customer to its Kazakh competitor. That behavior gave the EEC grounds to investigate whether these two competitors had agreed upon the unlawful allocation of the territories, for supplies within the EAEU market.

The EAEU Court also confirmed legitimacy of the case decision<sup>[13]</sup>.

### 3.2 Cochlear Limited case

The second case concerned the cross-border, wholesale market for distribution of speech processors of cochlear implantation systems, manufactured by Cochlear Limited<sup>[14]</sup>.

Investigation of the case was initiated after consideration of the materials received from the Ministry of National Economy of Kazakhstan, in relation to activities of Pharm LLP Express (Republic of Kazakhstan) and Euromax LLC (the Russian Federation).

Circumstances of the case, in the hearing aids market, were quite similar to the *FibroScan* case (i.e. allocation of territories for supplies). However, actions committed were qualified as conclusion of prohibited vertical agreement and other anticompetitive agreements.

Having analyzed the materials (documents, information) available and presented during the investigation, the EEC revealed that distribution agreements concluded between Cochlear Europe limited, Euromax LLC, Pharm Express LLP, SPP VEK LLP, LLC Assomedika provided for the exclusive right of distributors to import and resell products, including speech processors manufactured by Cochlear Limited, in the territories specified in the agreements, as well as prohibiting the buyer from selling competitive products.

### 3.3 Ongoing antimonopoly investigations of the ECC

According to the draft EEC Annual Report, on competition in cross-border markets and measures taken to prevent violations of the Protocol for 2019, the EEC considered 17 applications (materials), including 8 applications (materials) on signs of abuse of dominance, plus another 8 - on signs of unfair competition, and, 1 - against actions of the state authorities. As a result, the EEC issued 7 Proposals and decided to conduct 6 formal investigations of the cases in detail.

Moreover, currently the EEC is planning to initiate seven new investigations in the EAEU cross-border markets for pharmaceuticals and medical devices (in particular, markets for medical x-ray films, medical equipment for hemodialysis and its consumables, supplies for Ulrich angiographic injectors, medicinal product with the international nonproprietary name *Glatiramer acetate*, wholesale of ophthalmic equipment manufactured by Alcon Pharmaceuticals Ltd and x-ray machines manufactured by GE Healthcare). In addition, the EEC has officially announced conduct of the investigation in the market for digital search services, as well as posting and viewing video content on the Internet. Due to the fact that investigations are ongoing, other circumstances of the cases are not available yet.

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

Taking into account the above, companies active in cross-border markets within the EAEU are highly recommended to consider carefully all the restrictions, established by the EAEU antimonopoly legislation, to exclude, or at least mitigate, risks of committing violations on a cross-border level.

[1] The EAEU official web-site: <http://www.eaeunion.org/?lang=en>

[2] The EAEU official web-site: the EAEU Treaty [https://docs.eaeunion.org/docs/en-us/0017353/itia\\_05062014\\_doc.pdf](https://docs.eaeunion.org/docs/en-us/0017353/itia_05062014_doc.pdf)

[3] Advisory Opinion of the EAEU Court No. CE-2-1/2-19-5K as of June 18, 2019 (available in official languages of the EAEU member-states) - <http://courteurasian.org/page-26361>

[4] See Para. 3, 6 Point 1 Section III "The Court's findings"

[5] See Para. 1 Point 5 Section III "The Court's findings"

[6] See Para. 2 Point 5 Section III "The Court's findings"

[7] See Para. 1 Point 6, Para. 4 Point 6.1, Para. 1 Point 6.2 Section III "The Court's findings"

[8] See Para. 3 Point 6.2 Section III "The Court's findings"

[9] See Para. 1, 5 Point 7 Section III "The Court's findings"

[10] FAS Russia official web-site: FAS Russia opened a case against an official importer of Philips products (June 06, 2019) - <http://en.fas.gov.ru/press-center/news/detail.html?id=54113>

[11] FAS Russia official web-site: FAS Russia revealed that Sangfei CEC Electronics Rus coordinated prices for Philips smartphones (September 04, 2019) - <http://en.fas.gov.ru/press-center/news/detail.html?id=54336>

[12] FAS Russia official web-site: the first cartel on the EAEU market has been exposed (September 27, 2019) - <http://en.fas.gov.ru/press-center/news/detail.html?id=54393>

[13] Decision No. 165 as of September 17, 2019 - <https://fas.gov.ru/news/29439>

[14] The EEC materials - <https://matt.gov.by/files/live/sites/matt/files/documents/%D0%9F%D1%80%D0%B5%D0%B7%D0%B5%D0%BD%D1%82%D0%B0%D1%86%D0%B8%D0%B8/26.07.2019%20%D0%91%D0%B8%D1%80%D0%B8%D1%87%20%D0%96%D0%AD..pdf>