

Summary

Violation of antimonopoly legislation in the Russian Federation entails the liability stipulated by the legislation of the Russian Federation. The specific characteristic of the Russian antimonopoly legislation is that a fact of an antimonopoly violation is established at the stage of the investigation in accordance with the Chapter 9 of the Law on Protection of Competition, and the guilt - at the stage of the proceedings on an administrative offense/criminal proceedings. In fact, there is a situation when a violation element (a fact) and the element of composition of the same violation (guilt) are the results of different procedures.

Because of the specific characteristics of the Russian legislation mentioned above, the institution of relief from liability under the agreement of the parties at the stage of initiation of a case on violation of antimonopoly legislation is not existed in Russia. Russian competition authority is not empowered to make any commitment agreements with an economic entity on the stage of considering materials on violation of antimonopoly legislation.

At the same time, in the process of appealing of a decision of an antimonopoly authority the settlement procedure exists.

The procedure and conditions of the settlement agreements, as well as requirements for its content and execution are provided by Chapter 15 of the Arbitration Procedure Code of the Russian Federation.

In case of conclusion of the settlement agreement, an economic entity and the FAS Russia make an agreement in the court on the compromise conditions to settle their dispute upon competition legislation.

In practice, settlement agreements are usually concluded upon cases of abuse of dominant position by establishing and maintaining monopolistically high prices. However, they are allowed in almost any antitrust disputes. The relevance and effectiveness of such agreements are proved by the fact that they usually are concluded on large or socially important matters.

The settlement agreement, approved by the court, is compulsory for execution. This is also a guarantee of protection of rights of the Parties of the agreement. At the same time, the settlement agreement is possible to challenge if it violates the rights and interests of other persons or considers to be contradictive to the law.

The FAS Russia suppose that the settlement agreements are an effective tool for compromise resolution of disputes between economic entities and the FAS Russia on the stage of the court appeal. The FAS Russia believes that the development of the institution of settlement agreements is necessary because this is one of the effective tools to exercise its public functions. At the same time, settlement agreements are an effective way of ensuring the rights and legitimate interests of participants of the case, including the right to judicial protection.

In accordance with the Federal Law No. 135-FZ dated July 26, 2006 "On Protection of Competition" (hereinafter - the Law on Protection of Competition), economic entities are required to execute the decisions and regulations of the antimonopoly authority within the period established in such decisions and regulations.

Violation of antimonopoly legislation in the Russian Federation entails the liability stipulated by the legislation of the Russian Federation. Forms of liability are established in the Code of Administrative Violations of the Russian Federation (hereinafter - the Administrative Code) and the Criminal Code of the Russian Federation (hereinafter - the Criminal Code).

Thus, the specific characteristic of the Russian antimonopoly legislation is that a fact of an antimonopoly violation is established at the stage of the investigation in accordance with the Chapter 9 of the Law on Protection of Competition, and the guilt - at the stage of the proceedings on an administrative offense/criminal proceedings.

In fact, there is a situation when a violation element (a fact) and the element of composition of the same violation (guilt) are the results of different procedures.

Stages of consideration of a case on violation of antimonopoly legislation

Because of the specific characteristics of the Russian legislation mentioned above, the institution of relief from liability under the agreement of the parties at the stage of initiation of a case on violation of antimonopoly legislation is not existed in Russia. In addition, an analysis of the provisions of the Law on Protection of Competition shows that a case on violation of antimonopoly legislation has certain stages and at each of them the antimonopoly authority is required to take appropriate action.

Thus, Article 44 of the Law on Protection of Competition establishes the procedure for consideration of the application and the documents on violation of the antimonopoly legislation. This stage may be called "the stage of an investigation".

At this stage, in accordance with Paragraph 8 of Article 44 of the Law on Protection of Competition the antimonopoly authority after consideration of an application and the documents is obliged to make one of the following decisions:

- 1) to initiate a case of violation of the antimonopoly legislation;
- 2) to refuse to initiate a case on violation of the antimonopoly legislation;
- 3) to issue a warning in accordance with Article 39.1 of the Law on Protection of Competition.

Part 9 of the mentioned Article establishes the closed list of instances in the presence of which the antimonopoly authority shall make a decision to refuse to initiate a case:

- 1) the issues outlined in an application and documents do not fall within the scope of reference of the antimonopoly authority;
- 2) there are no signs of violation of the antimonopoly legislation;

3) a case was initiated earlier upon the fact that constituted the grounds for filing an application;

4) a decision of the antimonopoly authority came into force upon the fact that constituted the grounds for filing the application, documents, except if there is a decision of the antimonopoly authority to refuse to initiate a case on violating the antimonopoly legislation or a decision to terminate case consideration and the applicant presents evidence of violating the antimonopoly legislation unknown to the antimonopoly authority as of the date of making the decision;

5) the period of limitation expired for the fact that constituted the grounds for filing an application and documents;

6) absence of violation of the antimonopoly legislation in the actions of a person, against whom an application, documents were filed, is established by a court judgment or a judgment of an arbitration court that has come into force;

7) signs of violation of the antimonopoly legislation are eliminated as a result of executing a warning issued in accordance with the procedures specified in Article 39.1 of the Law on Protection of Competition.

Thus, Russian competition authority is not empowered to make any commitment agreements with an economic entity on the stage of considering materials on violation of antimonopoly legislation.

At the same time, in the process of appealing of a decision of an antimonopoly authority the settlement procedure exists.

Procedure of conclusion of settlement agreement with the antimonopoly authority

The procedure and conditions of the settlement agreements, as well as requirements for its content and execution are provided by Chapter 15 of the Arbitration Procedure Code of the Russian Federation (hereinafter - the APC).

In case of conclusion of the settlement agreement, an economic entity and the FAS Russia make an agreement in the court on the compromise conditions to settle their dispute upon competition legislation.

The ability to conclude the settlement agreement with the FAS Russia exists since 2002. By means of that, economic entities could significantly reduce the amount of fines and other material sanctions or to obtain a delay in their payment.

For example, the FAS Russia imposes a fine on the company for abuse of its dominant position in the commodity market, the company appeals the decision in the arbitration court, and in the course of the court proceedings the Parties sign a settlement agreement in which the company recognizes the legitimacy of the fine, and the antimonopoly authority reduces its amount. The agreement is approved by the court, and the proceedings are terminated.

In practice, settlement agreements are usually concluded upon cases of abuse of dominant position by establishing and maintaining monopolistically high prices. However, they are allowed in almost any antitrust disputes.

The relevance and effectiveness of such agreements are proved by the fact that they usually are concluded on large or socially important matters.

Features of settlement agreements with the FAS Russia

Settlement agreements on competition cases have certain specific features. Thus, the settlement agreements in civil disputes are based on the equality of participants. In a settlement agreement with the Federal Antimonopoly Service of the Russian Federation, the parties are not equal, because the FAS Russia is a federal executive authority.

In addition, in the conclusion of settlement agreements the mandatory provisions of the Russian legislation must be taken into account. For example, one cannot include the provision in the settlement agreement in accordance with which a company would pay a fine below the minimum fine amount set in the Administrative Code.

The ability to refuse a part of requirements to violators allows the competition authority to exercise its functions effectively. It is proved by the court's practice. For example, by making an indulgence the FAS Russia gains the recognition by an economic entities of its violations, the adoption of additional commitments to address them, and voluntary compliance with the requirements of the legislation. In this context, reduction of the amount of fines is not a budget loss but an achievement: the reduced amount of fine is guaranteed to be paid and it will not be challenged in courts in the future.

The Moscow District Arbitration Court approved a settlement agreement between the FAS Russia and JSC "Caustic" in accordance with which the company recognized the fact of setting monopolistically high prices and committed to transfer the amount of illegal profit to the budget. In its turn, the FAS Russia committed not to fill the complaints, claims, or require additional compensation in excess of that stipulated in the agreement (http://www.fas.gov.ru/fas-news/fas-news_1923.html).

The settlement agreements often contain provisions on certain obligations of economic entities, for example, to inform the FAS Russia on price changes, to ensure non-discriminatory conditions in contracts.

For example, the settlement agreement between the FAS Russia and JSC "Uralkaly" stipulated a mechanism for calculating a base price for potassium chloride for Russian industrial consumers and the validity of this mechanism for the period of the next five years (Resolution of the Ninth Arbitration Court of Appeal from March 13, 2008 No. 09AP -17 191/07-AK).

Thus, by concluding settlement agreement between an economic entity and the FAS Russia, the Parties agree on compromise conditions to settle the dispute upon competition legislation.

Execution and appealing of settlement agreements

In accordance with the Article 142 of the APC the settlement agreement is executed by persons, it concluded, voluntarily in order of and within the timeframes provided in this agreement. Otherwise it will be enforced for execution on the basis of order of procedure issued by the arbitration court at the request of a person who has concluded a settlement agreement.

Thus, the settlement agreement, approved by the court, is compulsory for execution. This is also a guarantee of protection of rights of the Parties of the agreement.

The settlement agreements are possible to challenge. In accordance with Part 4 of Article 139 of the APC, the settlement agreement, approved by the arbitration court, can not violate the rights and legitimate interests of other persons or contravene the law.

In addition, a court may refuse to approve the settlement agreement if it violates the rights and interests of other persons or considers to be contradictive to the law.

There is an example when the court did not approve the settlement agreement because it violated the rights and legitimate interests of other persons:

The FAS Russia concluded a settlement agreement with OJSC "AK" Sibur "and Ltd. "Sibur-Gazservis" in the Moscow Arbitration Court when considering a case on abuse of dominance by mentioned companies. The companies reached an agreement with the competition authority on reduction of amount of profit gained as a result of violation of antimonopoly legislation, that should be transferred to the budget. That amount was established in the Regulation of the FAS Russia on that case. The Regulation established total amount of income for the whole group of persons, and thus, the companies which were not parties of the settlement agreement, had to pay to the budget not only their own illegal profit but also the difference between the total income of the groups' entities and the agreed discounted amount.

One of the companies, which was not the party of the settlement agreement, did not agree with the decision of the Court on approving the settlement agreement and appealed it in the cassation instance. Because of this "redistribution" of income the cassation court denied the decision of the lower-instance court on the approval of the settlement agreement (Resolution of the Moscow District Arbitration Court from June 21, 2007, June 28, 2007 No. KA-A40 / 4126-07).

Because of the contradiction with the legislation, the settlement agreement was not approved in the case on challenging the inclusion of information about the company in the register of unfair suppliers (Resolution of the Moscow District Arbitration Court dated October 10, 2011 No. A40-146004 / 10-146-974). The Court pointed out the absence of mutual concessions of rights and obligations as the FAS Russia, in fact, had recognized the request. Accordingly, such a provision may cause a further challenge of the settlement agreement if it is signed.

Thus, the settlement agreements are an effective tool for compromise resolution of disputes between economic entities and the FAS Russia on the stage of the court appeal. The FAS Russia believes that the development of the institution of settlement agreements is necessary because this is one of the effective tools to exercise its public functions. At the same time, settlement agreements are an effective way of ensuring the rights and legitimate interests of participants of the case, including the right to judicial protection.