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Interactions between Courts and Competition Authorities

Interactions between Russian Competition Authority – Federal Antimonopoly Service (the FAS Russia) - and courts are exercised both in public and private competition enforcement. It should be noted that depending on kind of enforcement, the Competition Authority plays different roles and has different functions in course of judicial system. The main goal of antimonopoly legislation in the Russian Federation is protection of public interests. It means that liability of the Competition Authority to fill claims to courts arises only if the issue of protection is a public interest, i.e. competition. The purpose of complain to courts is to restore competition but not protect individual interests. Protection of individual interests in such a system occurs indirectly.

In this regard, in addition to public antitrust enforcement, an important role in the whole system of antimonopoly enforcement plays economic entities which complain to courts on compensation for damages caused by violation of antimonopoly legislation. Moreover if violation of antimonopoly legislation simultaneously led to violation of individual rights, such individuals are able to protect their rights using other tools of civil protection, in particular, requirement of cancellation of contracting or restoration of the situation which existed prior to the violation of a right.

Private antimonopoly enforcement in the Russian Federation

Violation of competition legislation by one person could lead to negative consequences for another one.

If abuse of dominance, unfair competition, cartels or other violations caused damage to someone, such a person(s) has a right to fill a claim to the court for its compensation.

The purpose of private enforcement is to provide society with effective tools for self-protection of their violated rights in addition to public protection of competition exercised by competition authority.

It is known that international enforcement practice developed two models of private antitrust enforcement:

1) follow-on – claims based on the facts already proved by competition authority;

2) stand-alone – independent claims under consideration of which the fact of existence or absence of competition violation is established

Aiming at effective fight against violations of antimonopoly legislation, it should be noted that the standalone claims gain much importance because violations of antimonopoly legislation could be identified as by competition authority as by economic entities themselves.

In accordance with the Russian legislation private disputes are considered by general jurisdiction courts or arbitration courts depending on who stands as a plaintiff before the court (individual or legal entity). Private claims are filled to courts in accordance with rules of jurisdiction.

Thus, the right to choose judicial or administrative procedure of protection of rights belongs to the subject of legal dispute.

Competition authority has a right to participate in judicial consideration of cases on violation of antimonopoly legislation, opened on the basis of claims of other persons. That is why when considering such cases the court should inform competition authority on consideration of such a case in order to ensure its participation. The procedural status of competition authority is determined in accordance with the nature of a dispute.

At the same time, initiation and consideration of such cases are connected with certain problems, the main of them is definition of amount of damage.

Protection of the rights of persons affected by the violation of the antimonopoly legislation is exercised under the general rules of civil law. Consequently, the affected person has the right to use any means of protecting his property rights, which are stipulated in Article 12 of the Civil Code of the Russian Federation (hereinafter - the Civil Code).

One of the main means of such protection is to compensate the losses of the person who was affected by the violation of the antimonopoly legislation.

A claim for damages caused by the anticompetitive action (inaction), the

conclusion of an agreement violating the competition legislation or participation in it, the adoption of an anticompetitive act by the public authority can be filled by any person who supposes he or she was damaged as a result of such actions (inaction), agreements or acts.

This is also indicated in the special provisions of the antimonopoly legislation: persons whose rights and interests are violated as a result of violation of the antimonopoly legislation are entitled to apply to the court, the arbitration court with claims, including claims for restoring violated rights, compensation for damages, including loss of benefit, compensation for harm caused to property (part 3 of the Article 37 of the Federal Law of 26.07.2006 N 135-FZ "On Protection of Competition" (hereinafter - the Law on Protection of Competition).

Damage is understood as expenses that a person whose right has been violated, incurred or will have to incur to restore the violated right, loss or damage to his or her property (real damage), as well as unearned incomes that this person would have received under normal conditions of civil turnover, if his or her right would not be violated (loss of profit) (paragraph 2 of the Article 15 of the Civil Code).

In accordance with paragraph 12 of the Resolution of the Plenum of the Supreme Court of the Russian Federation (hereinafter – the Supreme Court) of June 23, 2015, No. 25 "On the Application by the Courts of Certain Provisions of Section I of Part One of the Civil Code of the Russian Federation" (hereinafter - the Resolution No. 25) in cases of compensation for damages, the plaintiff must prove that the defendant is a person, as a result of actions (inaction) of which the damage occurred, as well as the facts of violation of the obligation or causing harm, the presence of damages (clause 2 of Article 15 of the Civil Code).

Taking into account the requirements of Article 15 of the Civil Code and specificity of cases of compensation for damages caused by violation of the antimonopoly legislation, the subject of proof includes the following facts for the plaintiff:

- commission by concrete person(s) of any actions (inaction), agreement, act contrary to competition legislation;

- existence and amount of damage;

- cause-effect relations between violation of a right of a plaintiff and his or her damages.

Failure to prove one of these circumstances leads to a rejection of a claim.

The plaintiff shall prove that the violator committed a certain anticompetitive action or did not commission the action required in accordance with the antimonopoly law (admitted inaction), concluded an agreement or approved an act contrary to the legislation on the protection of competition.

The existence of a decision of the antimonopoly authority that confirms the violation of the antimonopoly legislation is not a compulsory requirement to satisfy the claim for compensation of damages. However, the analysis of enforcement practice shows that in almost all cases claims for compensation of damages (as well as for recovery of unreasonable earnings) are initiated after a decision on violation of the antimonopoly legislation made by the antimonopoly authority.

Certainly this approach strengthens the legal position of the plaintiff, since the fact of violation of competition legislation will be confirmed by a decision of the competent authority.

Decisions on cases of violation of the antimonopoly legislation, as well as other documents containing written positions of the antimonopoly authorities, are taken by courts as an important evidence in cases of compensation for damages.

In case if the legality of the decision of the competition authority has already been confirmed by the arbitration court, the courts also apply clause 2 of the Article 69 of the Arbitration Procedure Code of the Russian Federation (hereinafter – the Arbitration Procedure Code) and consider the fact of violation of the antimonopoly legislation as a pre-established circumstance if the same persons participate.

For example, when considering one of the cases on compensation for damages caused by violation of clauses 10 (3) 10) of Article 10 of the Law on Protection of Competition (Abuse of Dominance), an illegal claim for payment of 10,000,000 rubles at the time of concluding the contract and improper termination of heat supply, the courts indicated that the fact of violation of the antimonopoly legislation (unlawfulness of actions) by the defendant was established by the decision of the antimonopoly authority and that the decision of the antimonopoly authority was recognized as legitimate and justified by judicial acts entered into legal force. Guided by this circumstance and paragraph 2 of Article 69 of the Arbitration Procedure Code, the courts released the plaintiff from the need for additional proof of the unlawfulness of the defendant's actions.

The complexity of competition cases, the specificity of a number of commodity markets, the limited access to information often allow one to establish the fact of

violation of the competition law and the rights and legitimate interests of individuals only after a lengthy antimonopoly investigation.

At the same time, in course of the consideration of a case on violation of the antimonopoly legislation, it may be established that there are no violations of the antimonopoly legislation in the actions (inaction) of the defendant as well as adverse consequences in the form of prevention, restriction, elimination of competition and (or) infringement of the interests of other persons (economic entities) in the field of entrepreneurship or an indefinite number of consumers, that will keep the parties from further litigation.

In this regard, in many cases, the preliminary application to the antimonopoly authority is the preferred step for potential plaintiffs in cases of compensation for damages (as well as unreasonable earnings).

For example, when considering a case for compensation for damages caused by violation of the provisions of paragraphs 6 and 8 of Part 1 of Article 10 of the Law on Protection of Competition in the course of selling the goods, the courts denied the claim because, in its opinion, the plaintiff did not prove the fact of the defendant's abuse of the dominant position. The FAS Russia, involved in the case as a third party, did not found violation of the antimonopoly legislation in the defendant’s actions.

It is important to note that with the timely application to the antimonopoly authority by a person who considers himself or herself potentially damaged, the existing procedural terms for the consideration of antimonopoly cases make it possible to fully comply with the deadline for applying to the court in the future.

In international practice, especially in European countries, the compensation for damages on the basis of violation of competition law, confirmed by the decision of the antimonopoly body, is referred to as "follow-on".

At the same time, the legislation does not prevent the affected person from applying to the court with a claim for damages before or without decision of the antimonopoly body (the so-called "stand-alone" claims, according to foreign legal terminology).

In such cases, the competition authority shall be notified by the court on the beginning of the process, and in the future the status of the antimonopoly body as a party to the process shall be determined (paragraph 21 of the Resolution of the Plenum of the Supreme Arbitration Court of the Russian Federation of June 30, 2008

No. 30 "On certain issues arising in connection with application of the antimonopoly legislation by arbitration courts").

Article 15 of the Civil Code and part 3 of Article 37 of the Law on Protection of Competition allow a person who was affected by violation of the antimonopoly legislation to compensate both actual damage and loss of profit.

As it is noted in paragraph 13 of the Resolution No. 25, in resolving disputes related to compensation for damages, it is necessary to bear in mind that the actual damage includes not only actually incurred expenses, but also expenses which this person will have to incur to restore the violated right.

For example, in the case of compensation for damages based on violation of paragraph 4 of part 1 of Article 10 of the Law on Protection of Competition, courts enforced the railway company that unreasonably refused to provide for the plaintiff with loading gondola cars to compensate the actual damage. This damage was expressed in the additional expenses of the plaintiff due to the forced use of the services of other counterparties. Thus, in justifying the amount of actual damage by the affected person, it is necessary to present not only mathematical calculations, but also relevant proofs, which may include: the difference between the price actually paid by the plaintiff as a result of the violation and the price that could be set in the absence of violation, and etc.

It should also be noted that courts recognize the importance of the decision of the antimonopoly authority in considering cases of compensation for damages in a different manner. Some courts consider it as a sufficient proof of the unlawfulness of the defendant's actions. In other cases, courts proceed from the fact that the violation of the antimonopoly legislation is not in itself a civil violation and, therefore, can not be the basis for repayment of the amounts paid as part of the obligation as damages.

Nowadays in the Russian Federation economic entities and courts are not ready for enforcement of antimonopoly legislation without participation of competition authority. In particular, if the arbitration court found out that a person complained both to the court and competition authority, the court usually postpones the consideration of a case until the decision of competition authority is made. This situation happens because in case of private enforcement, arbitration courts must consider a claim as a civil dispute and as a violation of antimonopoly legislation. Arbitration procedural Code does not contain a basis for refusing to accept or return

the claim related to antimonopoly legislation, because it means civil dispute between the Parties.

Moreover in practice plaintiffs often face a problem of creation of evidence base. It should be noted that in Russian procedure law a person, involved in a case and not able to collect evidence from the person it has, has a right to appeal to arbitration court for disclosure of such evidences.

That is why major of claims on compensation for damages for violation of antimonopoly legislation are filled on the basis of the excisting decision of competition authority.

Judicial practice shows that often claims for compensation for damages are dismissed because of lack of proving of cause-effect relations between actions of defendant and damages of plaintiff. This cause-effect relation must be direct.

One of the key issues in relation to private antimonopoly enforcement is a question of calculation of damages. The basis for calculation of damages is determined in Article 15 of the Civil Code, establishing the following procedure of calculation: actual damage is expenses which a person incurred or will have to incur to restore a violated right plus the size of loss or property damage plus loss of profit is unearned income which a person would receive under ordinary conditions of civil turnover.

Despite of the fact that there are certain methods of calculation of damage, the Russian legislation has no unified approach to their calculation. That is why a plaintiff has a right to use any method of calculation. However, it seems reasonable to calculate damage depending on type and nature of violation of antimonopoly legislation.

On October 16, 2017 the Presidium of the FAS Russia adopted Instructions No. 11 “On calculation of amount of damages, incurred as a result of violation of antimonopoly legislation”. The aim of the Instructions is to help the affected persons and violators as well as Competition Authorities to define damages, incurred by violation of antimonopoly legislation, in its compensation through judicial proceedings or settlement without litigation. The Instructions generalizes existing methods of calculations of damages both of Russian and foreign enforcement practice, including of USA and EU.

The Instructions was prepared by the FAS Russia jointly with Association of Antimonopoly Experts through establishing of a special Working Group that was

working for more than 2 years. Text of the Instructions was discussed on the meeting of Methodological Council of the FAS Russia and was adopted by the Presidium of the FAS Russia. A special Session on the III International Scientific and Practical Conference “Antimonopoly Policy: Science, Practice, Education” (December 5-6, 2017, Moscow) will be devoted to this topic.

The main obstacle of private enforcement system is absence of common guidelines of proving the damage, incurred as a result of violation of antimonopoly legislation. That is why proving the damage should be made in one or several of the following ways:

- providing with formal evidenced of actual damage or loss of profit (incl. through the amount of profit of defendant);

- providing with calculation (analysis, conclusion) of changing of economic situation, occurred as a result of violation, reflecting possible results under ordinary conditions and under conditions of violation of antimonopoly legislation. Such evidence is indirect, because does not confirm or deny directly the existence of proving the facts of the case.

- providing with evidences of negative results of violation for a plaintiff (steady decline of demand, failure by counterparties to meet the contract, assessment of damage for goodwill, etc.).