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RELATIONSHIP BETWEEN PUBLIC AND PRIVATE ANTITRUST ENFORCEMENT

-- Russian Federation --

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More documents related to this discussion can be found at: http://www.oecd.org/daf/competition/antitrust-enforcement-in-competition.htm

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-- The Russian Federation --

1. Introduction

1. The main goal of antimonopoly legislation in the Russian Federation is protection of public interests. It means that liability of the competition authority, Federal Antimonopoly Service of the Russian Federation (the FAS Russia), 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.

2. Moreover, despite of the fact that competition authority has a power to issue orders on contracting, changing of contracts' conditions or cancellation of contracts, it has no function to settle civil disputes of economic entities and protect civil rights through issuing orders on compensation for damages.

3. 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.

2. Private antimonopoly enforcement in the Russian Federation

4. 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.

5. The general legal framework for enabling individuals to restore their rights and recover damages in courts is established in the Article 15 of the Civil Code of the Russian Federation in accordance with which a person whose rights were violated is able to demand full compensation for damages.

6. Part 3, Article 37 of the Federal law dated July 26, 2006 No. 135-FZ "On Protection of Competition" (hereinafter – Law on Protection of Competition) establishes special provisions on possibility of compensation for damages caused by violation of antimonopoly legislation. In accordance with this that persons whose rights and interests were violated as a result of violation of antimonopoly legislation, can complain to courts, arbitration courts, including claims on denied profit and compensation for damages.

7. 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. standalone – independent claims under consideration of which the fact of existence or absence of competition violation is established.

8. 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 government as by economic entities themselves.

9. 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. If a claim concerns a cartel agreement, every member of a cartel is liable to a victim solidary, so in accordance with Article 1800 of the Civil Code of the Russian Federation, a claim can be filled to a local court of any member of a cartel.

10. Thus, the right to choose judicial or administrative procedure of protection of rights belongs to the subject of legal dispute. Law on Protection of Competition does not include directions that administrative protection of civil rights (through investigation of violation of antimonopoly legislation by the FAS Russia) is excluded if there is an opportunity to complain to arbitration court or, on the contrary, is the mandatory condition for complaining to courts.

11. Competition authority has a right to participate in judicial consideration of cases on violation of antimonopoly legislation. That is why 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.

12. If a claim is not based on decision of the FAS Russia, the burden of proving of violation of antimonopoly legislation lies on a plaintiff who should collect evidences, develop legal strategy, and provide evidences confirming the fact of damages as well as to carry out their exact calculation.

13. The subject of proof in claims for damages caused by violation of antimonopoly legislation consists of the following:

- illegal actions (inactions) of defendant (fact of violation of antimonopoly legislation);
- existence and amount of damage;
- cause-effect relations between illegal actions (inactions) and damage.

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

3. Class actions

15. One of the tools of improvement of private antimonopoly enforcement is class actions. This issue is very important for the Russian Federation. Private claims could arise from violation of antimonopoly legislation which affects interests of significant number of complainants. It also concerns actions of participants of cartel agreements (e.g. setting unfair mobile tariffs or high prices for petroleum). Thus, consideration of every claim in courts is very difficult and inefficient. Moreover, there are cases when damage of any complainant is not significant and he or she does not complain to courts.

16. In this case class actions become an important tool of increase of effectiveness of protection of civil rights damaged from violation of antimonopoly legislation. Class actions allow to compensate damage for every complainant (protect private interest) as well as punish an offender (protect public interest).

17. Russian procedural legislation provides a mechanism for class actions enforcement (Part 28.3 of the Arbitration Procedure Code of the Russian Federation), including on cases on violation of antimonopoly legislation. At the same time, as it goes from judicial practice, it is often used only in corporate relations and disputes on securities market.

18. According to the legislation of the Russian Federation, arbitration court could consider cases on class actions if the following two requirements are met:

1. a person who complains to court for protection of rights of group of persons and that group of persons must be participants of the same legal relationship, i.e. within the consideration on class actions, the united requirement is considered from a group of persons which are participants of the same legal relationship;

2. a group of persons including those who fills a claim to arbitration court should consist of not less than 6 individuals or organizations. Adherence to requirement for protection of rights and interests of a group should be by submitting a written request by a person or group of persons which are participants of a considered legal relationship.

19. Thus, the development of class actions guarantees realization of civil liability of violator simultaneously with administrative and/or criminal liability. It can help to strengthen the rule of law in the sphere of economic competition and becomes an additional incentive for law-abiding behavior on the market. It allows complainant from violation of antimonopoly legislation to resolve their issues of compensation for damage in more effective way and protect their rights more actively.

4. Private antimonopoly enforcement practice in Russia

20. The FAS Russia has a successful example of private enforcement on standalone model. "Fuel Company" LLC filled a claim against "Kemerovo electric transport company" LLC to Kemerovo Arbitration Court for the collection of 417 910 rubles (about 8 300 USD) of unjustifiable enrichment. The first-instance court satisfied the plaintiff's claims in full. It was upheld by the decision of Appellate court. The court pointed out that "Kemerovo electric transport company" LLC violated Clause 10 Part 1 Article 10 of the Law on Protection of Competition when charged "Fuel Company" LLC for compensation of costs for maintenance (service) of utility network.

21. It should be noted that the importance of decisions of competition authority in cases for compensation for damages is different for the courts. Some courts consider it to be sufficient evidence of illegal actions of defendant. Thus, in March 2013 Moscow Arbitration Court upheld the decision of appellation and cassation courts and satisfied requirements of "Energoprom-Novez" CJSC (plaintiff) to lay at "Russian railways" JSC (defendant) damage of 579 278 rubles (about 11 500 USD). Courts established that a plaintiff produced goods carriage of which on the territory of the Russian Federation was carried out in open wagons through public railways. In August and September 2010 a plaintiff sent to the West Siberian branch of "Russian Railways" JSC electronic claims for freight by "Russian Railways" JSC wagons. In August 2010 the West Siberian branch of "Russian Railways" JSC sent a telegram to a plaintiff notifying prohibition on loading on wagons of any other types of cargo except coal for housing needs and needs of energy companies. Thus a plaintiff was not provided with wagons on the basis of the mentioned telegram. Court established the fact of abuse of dominant position by "Russian Railways" JSC and infliction of damage found out by competition authority.

22. In other cases courts presume that violation of antimonopoly legislation is not by its nature a violation of civil law, and, therefore, cannot be the basis for compensation for damages. Such a position is included to the decision of cassation from August 2012. "Novosibirskenergosbit" (plaintiff) filed a claim against Non-Commercial Partnership "Market Council" (defendant) on compensation for damages in the amount of 4 mln. rubles. Plaintiff paid an entrance fee as a member of "Market Council" in the amount of 5 mln. rubles. Later in accordance with an order of the FAS Russia an entrance fee was decreased to 1 mln. rubles. The first-instance court and appellation court satisfied the claim in full. The courts pointed out the establishment by the FAS Russia of facts of abuse of dominant position by "Market Council" which led to

creation of barriers to entrance to the wholesale market of electricity through establishing of high entrance fees. Later cassation court decided to cancel the previous decisions and dismissed the claim based on the mentioned position that violation of antimonopoly legislation is not a violation of civil law.

5. Problems of private antimonopoly enforcement

23. 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 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 of the Russian Federation 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.

24. Moreover in practice plaintiffs often face a problem of creation of evidence base. It should be noted that 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.

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

26. Judicial practice shows that major 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.

27. One of the topical 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 of the Russian Federation establishing the following procedure of calculation: actual damage is expenses which a person incurred or should incur to restore a violated right, the size of loss or property damage; denied profit is unrecieved income which a person would receive under ordinary conditions of civil commerce.

28. 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.

29. The main disadvantage of private antimonopoly enforcement system is a lack of unified methods of proving damage from violation of antimonopoly legislation. That is why proving the damage should be made in one of the following ways:

- providing with formal evidenced of actual damage or denied 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.).

6. Conclusion

30. Problems described represent the main directions for future development of private antimonopoly enforcement system in Russia. The primary purpose is development of guidelines on calculation of damages caused by violation of antimonopoly legislation and development of class actions institution.

31. Currently, the FAS Russia proposed an amendment to Article 37 of the Law on Protection of Competition in accordance with which a person whose rights were violated as a result of violation of antimonopoly legislation has a right to claim from a violator (for his or her choice) compensation for damage or payment of compensation in amount of 1 to 15 % of cost of goods sold during the period of violation of antimonopoly legislation. It means that proposed provision propose an alternative method of calculation of compensation for damage caused by violation of antimonopoly legislation.