

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE****Working Party No. 3 on Co-operation and Enforcement****The standard of review by courts in competition cases – Note by the Russian Federation****4 June 2019**

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More documents related to this discussion can be found at

<http://www.oecd.org/daf/competition/standard-of-review-by-courts-in-competition-cases.htm>

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1. Introduction

1. In accordance with the Federal Law of July 26, 2006 No. 135-FZ “On Protection of Competition” (hereinafter referred to as the Law on Protection of Competition)¹, from the moment of initiation of a case on violation of the antimonopoly legislation, persons participating in the case have the right to familiarize themselves with the materials of the case, make extracts from them, get acquainted with the evidence, ask questions to other persons participating in the case, file petitions, give explanations in written or oral form to the FAS Commission on consideration of the case on violation of the antimonopoly legislation, present their arguments on all issues arising in the course of the proceedings, get acquainted with the petitions of other persons involved in the case, object to the petitions, arguments of other parties involved in the case².
2. Cases on violating the antimonopoly law are heard in open session³.

2. Procedure for judicial appeal of decisions, rulings, actions (inaction) of antimonopoly authorities of the FAS and their officials

3. According to the general rule of jurisdiction, an application to appeal the decisions and rulings of the antimonopoly body is submitted to the arbitration court at the location of the antimonopoly body that issued these documents.
4. There is one significant exception from this rule concerning decisions and rulings in cases on unfair competition.
5. Cases of challenging the decisions of the antimonopoly body on recognition of actions of economic entities related to the acquisition and use of exclusive rights to the means of individualization of a legal entity, goods, works or services as an unfair

¹ <http://en.fas.gov.ru/documents/documentdetails.html?id=14737>

² Part 1 of Article 43 (The Rights and Obligations of Persons Participating in a Case on Violating the Antimonopoly Legislation) of the Law on Protection of Competition

³ Part 3.1 of Article 45 (Examining a Case on Violating the Antimonopoly Legislation) of the Law on Protection of Competition. Closed sessions for considering antimonopoly cases are allowed if hearing the case in open session can lead to disclosing state secrets or if it is necessary to protect trade secrets, official secrets or other legally protected secrets, particularly, satisfying a petition filed by a party to an antimonopoly case that referred to such a necessity. The federal antimonopoly body, in coordination with the federal executive body responsible for security enforcement, establishes the specifics of hearing an antimonopoly case in closed session when the case materials contain information that constitutes state secrets. The Commission must issue a determination to consider a case on violating the antimonopoly law in closed session.

competition act are subject to consideration by the Court of Intellectual Rights of the Russian Federation as a court of first instance⁴.

6. The decision or ruling of the antimonopoly authority may be appealed within three months from the date of the decision or issuance of the ruling⁵. If an application is submitted to a court or arbitration court, the execution of the ruling of the antimonopoly body is suspended until the court decision enters into legal force.

7. The date of making a decision in full is considered the date of its issuance. In this case, the decision must be made in full within a period not exceeding ten working days from the date of the announcement of the operative part of the decision. The decision on the case of violation of the antimonopoly legislation, considered by the commission, shall be announced upon termination of the consideration of the case.

8. Copies of such a decision are immediately sent or handed to the persons participating in the case.

9. The ruling in the case of violation of the antimonopoly legislation is made simultaneously with the decision. A copy of the ruling is immediately sent or handed to the person who is prescribed to perform the actions determined by the decision.

10. According to Article 198 of the Arbitration Procedure Code of the Russian Federation, citizens, organizations and other persons have the right to apply to the arbitration court to declare invalid non-regulatory legal acts, illegal decisions and actions (inaction) of authorities exercising public powers, officials if it is considered that the disputed non-regulatory legal act, decision and action (inaction) do not comply with the law or other regulatory legal act and violate their rights and legitimate interests in the field of business and other economic activity, illegally impose on them any obligations, create certain obstacles for entrepreneurial and other economic activities.

11. The application may be filed with the arbitration court within three months from the day when the citizen, the organization became aware of the violation of their rights and legitimate interests, unless otherwise established by federal law. A deadline missed due to a valid reason may be restored by the court.

3. The Arbitration Court

12. Judicial proceedings in the arbitration court are carried out on the basis of the principle of equality of the parties. The parties enjoy equal rights to file appeals and motions, present evidence, participate in research, speak in court hearings, present their arguments and explanations to the arbitration court, exercise other procedural rights and obligations provided for by this Code. The arbitration court does not have the right to place any of the parties in a preferential position, nor diminish the rights of one of the parties⁶.

⁴ Article 43.4 of the Federal Constitutional Law of 28.04.1995 № 1-FKZ «On arbitration courts in the Russian Federation»

⁵ Article 52 (The procedures for appealing decisions and determinations of the antimonopoly authority) of the Law on Protection of Competition

⁶ Article 8 (Equality of participants) of the Arbitration Procedural Code of the Russian Federation of 24.07.2002 No. 95-FZ

13. Judicial proceedings in the arbitration court are based on the adversarial principle. Persons participating in the case are entitled to know about each other's arguments before the start of the trial. Each person participating in the case is guaranteed the right to submit evidence to the arbitration court and the other party to the case, the right to make petitions, to express their arguments and considerations, to give explanations on all issues arising during the consideration of the case related to the presentation of evidence. Persons involved in the case bear the risk of the consequences of committing or not committing legal proceedings⁷.

14. Cases of challenging non-regulatory legal acts, decisions and actions (inaction) of authorities exercising public powers, officials are considered by the judge individually for a period not exceeding three months from the date of receipt of the relevant application to the arbitration court, including the period for preparing the case for trial and adoption decisions in the case, unless a different period is established by federal law. This period may be extended on the basis of a reasoned statement by the judge considering the case, the chairman of the arbitration court up to six months due to the particular complexity of the case, with a significant number of participants in the arbitration process.

15. In cases of challenging non-regulatory legal acts, decisions and actions (inaction) of authorities exercising public power, officials, the arbitration court examines the questioned act or its individual provisions, disputed decisions and actions (inaction) in court and establishes the powers of the authority or person who adopted the questioned act, decision or committed the contested actions (inaction), and also establishes whether the challenged act, decision and actions (inaction) violate the rights and legitimate interests of the applicant in the field of entrepreneurial and other economic activities.

16. The duty of proving the compliance of the contested non-regulatory legal act with the law or other regulatory legal act, the legality of the contested decision, the performance of the contested action (inaction), the authority or person has the appropriate powers to take the contested act, decision, the contested action (inaction), as well as circumstances which served as the basis for the adoption of the contested act, decision, commission of the contested actions (inaction), is imposed on the authority or person who took act, decision or committed actions (inaction). In case of failure of the authority or person who took the contested act, decision or made the contested actions (inaction) to provide evidence necessary for the consideration of the case and issuance of the decision, the arbitration court can claim them on its own initiative⁸.

17. In accordance with paragraph 1 of Article 13 (Invalidation of an act of a government authority or local self-government) of the Civil Code of the Russian Federation (hereinafter - the Civil Code)⁹ a non-regulatory act of a government authority that does not comply with the law or other legal acts and violates civil rights and legally protected interests of a citizen or legal entity may be invalidated by the court

18. If the court finds that the contested act does not comply with the law or other legal acts and restricts civil rights and legally protected interests of a citizen or legal entity, then

⁷ Article 9 (Adversariality) of the Arbitration Procedural Code of the Russian Federation

⁸ Article 200 (Judicial proceedings in cases of challenging non-regulatory legal acts, decisions and actions (inaction) of authorities exercising public powers, public officials) of the Arbitration Procedural Code of the Russian Federation

⁹ <https://www.zakonrf.info/gk/> (Russian version only)

in accordance with article 13 of the Civil Code of the Russian Federation he may invalidate such act.¹⁰

19. Citizens, organizations and other persons have the right to apply to the arbitration court to declare invalid non-regulatory legal acts, illegal decisions and actions (inaction) of authorities exercising public power, officials if they believe that the disputed non-regulatory legal act, decision and actions (inaction) do not comply with the law or other regulatory legal act and violate their rights and legitimate interests in the field of business and other economic activities, illegally impose obligations on them, create other barriers to business and other economic activities.¹¹

20. The arbitration court, having established that the contested non-regulatory legal act, decision and actions (inaction) of authorities exercising public power, officials do not comply with the law or other regulatory legal act and violate the rights and legitimate interests of the applicant in the field of entrepreneurial and other economic activities, decides on recognition of a non-regulatory legal act as invalid, decisions and actions (inaction) as illegal. Therefore, in order to invalidate a non-regulatory legal act, it is necessary to have two mandatory conditions, namely, the non-compliance of the act being appealed with the law and the existence of a violation of the applicant's rights¹².

4. Period for appeal of the FAS decisions

21. The decision and (or) ruling of the antimonopoly authority may be appealed to the arbitration court within three months from the date of issuance of the decision or ruling. Cases on appeal of the decision and (or) rulings of the antimonopoly body are within the jurisdiction of the arbitration court. The decision and/or ruling of the FAS Regional Offices may also be appealed to the FAS collegial body.

22. If the decision and (or) ruling of the antimonopoly body is appealed to the FAS collegial body, the acts adopted in the case on violation of the antimonopoly legislation may be appealed to the arbitration court within one month from the moment the decision of the FAS collegial body comes into force.

23. In the event of accepting a statement of appeal against the ruling of the arbitration court, the execution of the ruling of the antimonopoly body is suspended until the day when the arbitration court decision enters into legal force¹³.

24. The average duration of the consideration of the case in three courts is 6-7 months.

¹⁰ Paragraph 1 of the Joint Resolution of the Plenum of the Supreme Court of the Russian Federation and the Plenum of the Supreme Arbitration Court of the Russian Federation of 01.07.1996 No. 6/8 "On some issues related to the application of the first part of the Civil Code of the Russian Federation"

¹¹ Part 1 of Article 198 of the Arbitration Procedural Code of the Russian Federation

¹² Part 2 of Article 201 of the Arbitration Procedural Code of the Russian Federation

¹³ Article 52 (The procedures for appealing decisions and determinations of the antimonopoly authority) of the Law on Protection of Competition

5. Appeal of administrative cases

25. Cases of bringing to administrative responsibility of business entities and individual entrepreneurs in connection with the implementation of entrepreneurial and other economic activities, referred by the federal law to the jurisdiction of arbitration courts, are considered according to the general rules of action proceedings¹⁴.

6. The Supreme Court

26. All decisions adopted by the court on appealed cases are published on the official website of the FAS. In accordance with the Arbitration Procedure Code, the Supreme Court has the power to review decisions taken by courts of lower instances.

27. In August 2014, the Supreme Court became the only supreme judicial body for civil, criminal and administrative cases, as well as economic disputes. Before the establishment of the Supreme Court, there was the Supreme Arbitration Court.

28. The Supreme Arbitration Court was able to consider economic disputes, but now such cases are carried out by a Panel of Judges on economic disputes of the Supreme Court, comprising 30 judges.

29. The Panel of Judges is the second cassation instance on economic disputes. First, the cassation claim is considered by one Supreme Court judge personally, and then he or she makes a decision as to whether it is necessary to forward this claim to the Panel of Judges.

30. The decision of the Panel of Judges can be appealed to the Presidium of the Supreme Court. Supervisory and cassation claims are considered by one Supreme Court judge and then forwarded, if necessary, to the Presidium of the Supreme Court¹⁵. On 14 October 2010, the Supreme Commercial (Arbitration) Court adopted Resolution No. 52¹⁶, which introduced amendments to its 30 June 2008 Resolution No. 30 ‘On some questions arising during enforcement antimonopoly legislation by arbitration courts’, aimed at the specification of certain provisions of the antimonopoly legislation for the purpose of ensuring a common judicial approach during the consideration of cases on antimonopoly violations. It was kept in force.

7. The Constitutional Court

31. In accordance with the Constitution of the Russian Federation, everyone is guaranteed judicial protection of his rights and freedoms; decisions and actions (or inaction) of state authorities, local governments, public associations and officials may be appealed in court. As was repeatedly stated in the decisions of the Constitutional Court of

¹⁴ Article 202 (The procedure for consideration of cases of bringing to administrative responsibility) of the Arbitration Procedural Code of the Russian Federation

¹⁵ The Federal Law of 28 June 2014 No. 186-FZ “On Making Amendments to the Arbitration Procedure Code of the Russian Federation”

¹⁶ http://www.arbitr.ru/as/pract/post_plenum/30745.html (Russian version only)

the Russian Federation, neither the Constitution of the Russian Federation nor the legislation of the Russian Federation allow any exceptions to this constitutional principle.

32. In a state governed by the rule of law, the court controls the legality of administrative procedures and this control, as a general rule, applies to all cases where the rights and legitimate interests of citizens and their associations can be violated as a result of law enforcement activities of authorities with public powers.

33. The Constitutional Court is responsible for considering issues regarding the conformity of standards of the legislation of the Russian Federation to the Constitution. For the entire existence of the FAS, there have been five cases related to the Constitutional Court.

8. Conciliation

34. The arbitration court takes measures for conciliation, assists the parties in resolving the dispute. The parties may settle the dispute by entering into a settlement agreement or applying other conciliation procedures, including the mediation procedure, if this is not contrary to federal law¹⁷.

35. The settlement agreement can be concluded by the parties at any stage of the arbitration process and in the execution of a judicial act. The settlement agreement can be concluded in any case, unless otherwise provided by the Code and other federal law. The settlement agreement can not violate the rights and legitimate interests of other persons and be contrary to the law. The settlement agreement is approved by the arbitration court¹⁸.

36. The abovementioned provisions are fully applicable as well to the acts of antimonopoly authorities.

9. Evaluation of evidence by the court

37. When considering a case of violation of antimonopoly legislation, the antimonopoly authority analyzes the state of competition to the extent necessary to make a decision on the presence or absence of a violation of antimonopoly legislation.

38. The written evidence also includes the results of the analysis of the state of competition, conducted in the manner established by the federal antimonopoly authority.

39. Each person involved in the case must prove the circumstances to which they refer as the basis of their claims and objections. The duty of proving the circumstances that served as the basis for adoption of the contested acts, decisions, actions (inaction) by state authorities, local governments, other authorities, officials, is assigned to the relevant authority.

40. The arbitration court evaluates the evidence according to its inner conviction, based on a comprehensive, complete, objective and direct investigation of the evidence. The arbitration court assesses the relevance, admissibility, reliability of each evidence

¹⁷ Article 138 (Conciliation) of the Arbitration Procedural Code of the Russian Federation

¹⁸ Article 139 (Conclusion of the Settlement Agreement) of the Arbitration Procedural Code of the Russian Federation

separately, as well as the sufficiency and mutual connection of the evidence in their totality. Each evidence is subject to evaluation by the arbitration court along with other evidence. No evidence is pre-determined for the arbitration court. The results of the evaluation of evidence the arbitration court reflects in the judicial act, containing the motives for accepting or refusing the evidence submitted by the persons participating in the case in support of their claims and objections.

10. Forensic examination

41. In order to clarify the issues arising during the consideration of a case that require special knowledge, the Arbitration court appoints a forensic examination at the request of the person participating in the case, or with the consent of the persons participating in the case¹⁹. Expert opinions are one of the evidence in the case and are evaluated along with other evidence²⁰.

42. Thus, a forensic examination is appointed by the court in cases where questions of law cannot be resolved without evaluating the facts, for the establishment of which special knowledge is required. The appointment of an examination by the court is a way of obtaining evidence in the case aimed at a comprehensive, full and objective consideration of it, and is within the competence of the court resolving the case.

43. Determining the circumstances relevant to the proper consideration of the case (the subject of proof) is one of the tasks of the arbitration court, which is subject to resolution at the stage of preparing the case for trial. At the same time, the court must proceed from the subject of the stated requirements and the legislation of the Russian Federation applicable to the legal relationship²¹.

11. Judicial practice

44. As an example of the Russian judicial practice in 2018, one can cite the regulation of the Tatarstan Regional Office of the FAS issued to the Russian Association of Motor Insurers (RAMI)²² on termination of actions containing signs of violation of Part 1 of Article 10 of the Law on Protection of Competition, which resulted in the abuse of a dominant position while compiling handbooks and ignoring the fact of the economic situation of the region and, as a consequence, neglecting the possibility of a difference between the cost of spare parts or works in a particular subject of the Russian Federation and average cost in the region where the car repair service is provided.

45. According to these handbooks, the cost of spare parts is calculated, which is used in determining the amount of payments under insurance contracts throughout Russia.

¹⁹ Part 1 of Article 82 (Commissioning of expert evidence) of the Arbitration Procedural Code of the Russian Federation

²⁰ Part 2 of Article 64 (Evidence), Part 3 of Article 86 (Expert opinion) of the Arbitration Procedural Code of the Russian Federation

²¹ Part 3 of Article 9 (Competitiveness), Article 133 (Objectives of preparing a case for trial) of the Arbitration Procedural Code of the Russian Federation

²² <https://fas.gov.ru/news/24510>

Handbooks do not take into account the specificity of each region and prices operating in its territory.

46. The case was initiated in 2015, and in March 2016, the Commission of the Tatarstan Regional Office of the FAS found the RAMI to have violated the antimonopoly legislation and issued a ruling to RAMI to bring handbooks into line with the legislation.

47. Having disagreed with the ruling, the RAMI appealed to the arbitration court of first instance, which supported the conclusion of the Tatarstan Regional Office of the FAS.

48. The courts of appeal and cassation canceled the decision and ruling of the antimonopoly authority, indicating that the RAMI is a non-profit organization, which prepares and forms handbooks free of charge. Therefore, in this case there are no goods and a commodity market.

49. Nevertheless, insisting on the existence of violations, the Tatarstan Regional Office of the FAS appealed to the Supreme Court of the Russian Federation. On March 14, 2018, the judicial panel on economic disputes of the Supreme Court reviewed the cassation complaint of the Tatarstan Regional Office of the FAS regarding the correctness of the preparation and formation of handbooks by the RAMI and did not support the conclusions of the courts of appeal and cassation, stating²³ that in accordance to the Law on Protection of Competition, business entities include, among other things, non-profit organizations that carry out income generating activities.

12. The FAS internal appeal

50. In January 2016, the Federal Law of 5 October 2015 No. 275-FZ came into force, which amended and supplemented the Law on Protection of Competition and certain legislative acts of the Russian Federation, i.e. the so-called “fourth antimonopoly package”. One of the most important novelties of these amendments was the procedure for appealing decisions and rulings of the FAS Regional Offices to the FAS collegial body - an internal appeal.

51. The procedure for reviewing the decisions and rulings of the FAS Regional Offices by the FAS collegial body is determined by Article 23 of the Law on Protection of Competition. Depending on the specifics of the cases under consideration, 14 Appeal Boards were formed by areas of activity: cartels, unfair competition, etc. In addition, the right to review the decisions and rulings of the FAS Regional Offices is vested in the FAS Presidium²⁴.

52. The decision and (or) ruling of the FAS Regional Offices may be appealed within one month from the date of their issuance. The review should be carried out within a period

²³ The Ruling of 16.03.2018 on the case No. A65-16238/2016: <https://sudact.ru/vsrf/doc/MVSM6PKscs12/> (Russian version only)

²⁴ The FAS Presidium is a collegial body, which examines the materials on generalizing the practice of applying antimonopoly legislation and gives explanations on its application, as well as reviews decisions and (or) rulings of the FAS Regional Offices on cases of violation of the antimonopoly legislation if such decisions and (or) rulings violate the uniformity in the application of antimonopoly legislation.

not exceeding two months from the date of receipt of the complaint by the FAS. However, it may be extended to obtain the necessary documents, but not more than for 30 days.

53. The meetings of the Appel Board are often held through videoconference.

54. All questions are predominantly submitted to the Appeal Board, the FAS Presidium reviews only those cases that are important for formation of the future practice.

55. The main task of the FAS internal appeal is to provide model solutions for antimonopoly cases. Incomplete clarification of the circumstances relevant to the case of violation of the antimonopoly legislation, failure to prove the circumstances that the FAS Regional Office found to be established, discrepancy of the conclusions set out in the decision, the circumstances of the case - all these facts reveal violation of uniformity of application of the antimonopoly legislation.

56. In accordance with Article 52 of the Law on Protection of Competition, in case of an appeal against the decision and (or) ruling of the FAS Regional Office in the FAS collegial body, actions in the case of violation of the antimonopoly legislation can be appealed to the arbitration court within one month from the moment the decision of the FAS collegial body came into force.

57. Simultaneously with the process of consideration of a complaint against a decision of the FAS Regional Office by the FAS collegial body the decision of the FAS Regional Office can be appealed in a court.

13. Procedure for judicial appeal of decisions, rulings, actions (inaction) of antimonopoly authorities of the FAS and their officials

58. According to the general rule of jurisdiction, an application to appeal the decisions and rulings of the antimonopoly body is submitted to the arbitration court at the location of the antimonopoly body that issued these documents.

59. There is one significant exception from this rule concerning decisions and rulings in cases on unfair competition.

60. Cases of challenging the decisions of the antimonopoly body on recognition of actions of economic entities related to the acquisition and use of exclusive rights to the means of individualization of a legal entity, goods, works or services as an unfair competition act are subject to consideration by the Court of Intellectual Rights of the Russian Federation as a court of first instance²⁵.

61. The decision or ruling of the antimonopoly authority may be appealed within three months from the date of the decision or issuance of the ruling²⁶. If an application is submitted to a court or arbitration court, the execution of the ruling of the antimonopoly body is suspended until the court decision enters into legal force.

62. The date of making a decision in full is considered the date of its issuance. In this case, the decision must be made in full within a period not exceeding ten working days

²⁵ Article 43.4 of the Federal Constitutional Law of 28.04.1995 № 1-FKZ «On arbitration courts in the Russian Federation»

²⁶ Article 52 (The procedures for appealing decisions and determinations of the antimonopoly authority) of the Law on Protection of Competition

from the date of the announcement of the operative part of the decision. The decision on the case of violation of the antimonopoly legislation, considered by the commission, shall be announced upon termination of the consideration of the case.

63. Copies of such a decision are immediately sent or handed to the persons participating in the case.

64. The ruling in the case of violation of the antimonopoly legislation is made simultaneously with the decision. A copy of the ruling is immediately sent or handed to the person who is prescribed to perform the actions determined by the decision.

65. According to Article 198 of the Arbitration Procedure Code of the Russian Federation, citizens, organizations and other persons have the right to apply to the arbitration court to declare invalid non-regulatory legal acts, illegal decisions and actions (inaction) of authorities exercising public powers, officials if it is considered that the disputed non-regulatory legal act, decision and action (inaction) do not comply with the law or other regulatory legal act and violate their rights and legitimate interests in the field of business and other economic activity, illegally impose on them any obligations, create certain obstacles for entrepreneurial and other economic activities.

66. The application may be filed with the arbitration court within three months from the day when the citizen, the organization became aware of the violation of their rights and legitimate interests, unless otherwise established by federal law. A deadline missed due to a valid reason may be restored by the court.