

The first competition case in the Presidium of the Supreme Court of the Russian Federation – resolution of the dispute between the FAS and the largest stevedore

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Background and main problems

Novorossiysk Commercial Sea Port PJSC ("NCSP") is one of the Europe's largest port operator in terms of cargo turnover and the leader in the Russian market.

The Federal Antimonopoly Service (the "FAS") found that NCSP abused its dominant position, by fixing and maintaining monopolistically high prices in 2015 for transshipment services of ore, fertilizers, containers, ferrous and non-ferrous metals, oil and petrochemicals in Novorossiysk seaport.

Tariffs for the services were fixed in USD. It was alleged that RUB devaluation in 2014-2015 led to serious increase of tariffs by NCSP, while market conditions did not fundamentally change.

Generally, the antitrust investigation in respect of stevedores began in June 2016, when the FAS initiated cases, on antitrust law violation, in respect of nine companies that provided services for the loading, unloading and storage of cargo in seaports of the Russian Federation. However, the NCSP case could be deemed as the most notable one.

The case raised two main problems.

- **Appropriate type and size of a sanction.** After a number of complicated hearings, the FAS issued its decision and the prescription demanding, *inter alia*, that NCSP is obliged to transfer its unlawfully-gained income to the federal budget (approx. RUB 9.7 billion – around EUR 130 million, one of the largest sanctions in history of the FAS) instead of imposing a much smaller administrative turnover fine.

The problem is that, according to the law, the FAS can impose an administrative fine of up to 15% of a company's annual turnover in the market where the violation occurred. At the same time, the law empowers the FAS to issue a prescription, obliging the transfer of unlawfully-gained income, resulting from violations, to the federal budget of Russia. According to the law, the FAS cannot do both. However, the latter may be much higher in terms of amount of payments and the appropriate size of the sanction is of primarily importance for companies.

Earlier, on July 08, 2016, the FAS issued clarifications stating that the FAS shall impose an administrative turnover fine, if it can be calculated, rather than issue an alternative prescription. However, this case, as well as some other similar ones, raised this question once more.

- **Market analysis.** Narrow geographical boundaries were established (within the particular port) despite of some evidence on the contrary (if the market had been defined within the boundaries of sea basin). The accusatory decision was based on the presumption that NCSP is formally a natural monopoly and prices for the services on comparable markets were not analyzed.

The courts' decisions

NCSP judicially appealed the decision and the prescription of the antimonopoly authority. Courts of three instances confirmed the illegitimacy of the FAS acts.

Nevertheless, the Judicial Chamber on Economic Disputes of Russia's Supreme Court decided to unwind all of the courts' decisions and sent the case, for new consideration, to the court of the first instance.

The Supreme Court's decision confirmed that the company is subject to the special natural monopoly regulation and abuses its dominant position in the market, by raising tariffs for its services. In particular, the point was that the essence of the stevedore service is access to the special technological equipment and infrastructure of the particular port. Therefore, geographical boundaries were determined by the antimonopoly authority correctly. It was also mentioned that being a natural monopoly presumes absence of competitive environment in this market.

Shortly afterwards, the decision of the Judicial Chamber on Economic Disputes was appealed to the Presidium of Russia's Supreme Court (the highest supervising instance in Russia), which finally, on December 26, 2018, supported the NCSP.

In particular, the Supreme Court mentioned that the FAS improperly determined the sanction. The Supreme Court clarified the findings of the courts, which recognized that the FAS, by demanding that the company is obliged to transfer income to the federal budget instead of imposing a smaller administrative fine, "improperly determined the sanction for the administrative offense, without clearly defining its application in a regulatory document". This is very important because incorrect determination of sanctions, which could lead to a several-times higher liability, may seriously affect activities of companies operating in the Russian market.

Separately, the Supreme Court confirmed mistakes in the market analysis in terms of using narrower definition of geographical boundaries. The court also confirmed that being a natural monopoly does not exclude the necessity to duly conduct market analysis in terms of analyzing prices in comparable markets, when it comes to monopolistically high prices allegations.

This above-mentioned case is the first competition case revised by the Presidium of Russia's Supreme Court, since the merger of the Supreme Court and the High Arbitration Court in 2014 and is the first economic dispute reviewed by the Presidium of Russia's Supreme Court over the past two years.

Conclusion

The case showed that an economic approach should prevail over the formal one while determining dominant position and its abuse. Also, it confirmed that type and size of a sanction should be reasonably chosen and calculated.

The case will standardise administrative and court practice and we see that it has already started affecting similar cases involving large stevedores by applying the same approaches. Moreover, more careful approaches to market analysis could be expected as a result.