

Kluwer Competition Law Blog

The Supreme Court of Russia Issues First Guidance For Courts Regarding Competition Law

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On March 4, 2021, the Supreme Court of the Russian Federation (the Court) issued its first Guidance for Courts, the so-called **Plenum**, which specifically concerned competition law. The guidance wants to ensure uniformity of practice in the application of Russia's competition law, the so-called **Antimonopoly Law**. Already in 2008, the former Supreme Commercial Court of the Russian Federation passed Plenum No. 30, where the most important legal aspects of the competition legislation were considered. Not long after this, in 2014, the Supreme Commercial Court was abolished and replaced by the Court. Therefore, a new Plenum was needed.

Except for some points, the Court's new clarifications will almost completely replace the Plenum of the Supreme Commercial Court. The creation of the document was preceded by a great deal of work by the Court, which conducted not only a whole study of judicial practice but also an assessment of the critical aspects of law enforcement on the part of the scientific, legal and business communities.

Quite a lot of attention in the Supreme Court's new Plenum is paid to the procedural aspects of considering competition cases and their subsequent judicial review. The Court also clarified a plethora of important aspects, some of which are to be reviewed in this post.

How to avoid becoming a cartel

One of the most controversial categories of competition disputes has been cartel collusion between market participants in recent years. When investigating cartels, both the courts and the Federal Antimonopoly Service (FAS) in most cases adhere to the approach whereby two or three indirect signs are sufficient for an accusation of a cartel without clarifying the economic essence of the issue.

The Court pointed out that the similarity of several economic entities' behaviour is not a basis for concluding that there is an agreement between them limiting competition. It is necessary to consider whether there are other reasons for the behaviour chosen by economic entities, e.g. if it corresponds to the conditions of activity that have been formed or already changed in the market, due to the same assessment of the situation in the market by economic entities.

The Court drew attention to the need to assess the causal relationship between bidders' actions and

the increase, decrease or maintenance of prices at the auction. The Court also pointed out that the participation in the auction of several economic entities, aimed at recognising the auction as valid and not associated with an increase, decrease or maintenance of prices, does not constitute a violation of competition law.

Thus, the Court sought to change the formal approach and recommended that the lower courts pay more attention to issues such as the existence of objective economic reasons for a particular behaviour of market participants. Moreover, the courts are obliged to assess the exact nature of the agreement between the alleged participants in the cartel, assess the possibility of deriving benefits for them, and establish a causal relationship between the agreement and the illegal consequences.

In essence, the Plenum raises the standard of proof of cartel collusion, which should, in theory, make it easier for market participants to confirm the absence of collusion.

Dominant position on the market

The Court recalled that, as a general rule, an economic entity is assumed to have a dominant position in the market if its share exceeds 50%. In cases where the company's share is less than 50%, the lower courts should take into account other criteria for determining the position of an economic entity in the market.

The Court has the right to take into account the arguments about the presence or absence of administrative barriers to market access for potential competitors. For example, they may include the need to obtain licences and permits to conduct certain activities and the obligation to obtain the copyright holder's consent to use the results of intellectual activity. Another important aspect is the presence of significant economic advantages for an economic entity (access to natural resources, production technologies, capital markets, etc.). Moreover, a significant amount of the costs that the counterparties of an economic entity must incur in the event of a transition to the purchase of goods from other suppliers should be taken into account. Simultaneously, the fact that no new competitors appeared on the market during the period under study does not in itself indicate dominance in the market.

To some extent, the Court admits that non-profit organisation, such as professional associations, can hold dominant positions. In general, these non-profit organisations' decisions can affect the general conditions for the circulation of goods on the market and allow members of a non-profit organisation to extract income from the supply of goods on the market. Thus, the rules of law are applicable to them, but economic entities cannot recognise simultaneously commercial organisations in terms of their activities that are not related to competition in the product market. This relates to the situations where they participate in charity work or provide social assistance to citizens and voluntarily participate in other generally useful activities that are not related to profiting from the circulation of goods on the market.

Concerning collective dominance, the Court emphasised the importance of assessing the possibility of the cumulative influence of all subjects of collective dominance on the conditions of circulation of goods in the commodity market as a whole. If the general conditions for the circulation of goods on the market are influenced by only one economic entity, then the provisions of the law do not apply to the relations between the market participants. The Court did not give a definite position in relation to the possibility of recognising in the same product market simultaneously the collective

dominance of several entities and the sole dominance of one economic entity. Moreover, the Court explained that referring an economic entity to the number of persons dominating the market collectively with other entities in the agreement does not exclude the possibility of establishing the relevant entity's individual dominance in other commodity markets.

An interpretation of the category “group of persons”

Usually, the basis for proving it, according to the position of the FAS, is the formal affiliation of several persons to one group. The FAS often does not find out whether the members of the holding had the opportunity to influence the actions of other members of the group unilaterally.

Now the Court has pointed to the possibility of proving that the persons who formally belong to the group are acting each in their own economic interest. This will provide entities with protection against claims by the FAS, which in practice identify a group member's actions with the entire group.

The question of what it means to refer several legal entities to a group is one of the most controversial throughout the entire existence of modern Russian competition legislation. The previous version of the law stated that a group of persons is a single economic entity. The current law has different wording: it extends the prohibitions of competition legislation to a group of persons. From this, the courts conclude that it is possible for economic entities to compete, including those related to corporate relations, i.e. included in the same group. But neither of these extreme approaches – competition within a group of individuals is always possible or always impossible – take into account the structure of market relations. The guidance that the Court gives in this paragraph is a balanced version. The Plenum developers proceed from the presumption of the absence of competition within a group of persons and the actions of all its members in a single economic interest.

Conclusion

The Plenum of the Supreme Court is highly significant to forming a uniform practice of application in competition matters since the overwhelming majority of acute and controversial issues were reflected in it. Obviously, all clarifications set forth by the Court will help the market participants correlate their behaviour to the established position of the highest judicial instance of Russia. Hopefully, the Plenum will not be the last, and the Court's attention to the issues of antitrust proceedings will not end up with its release.

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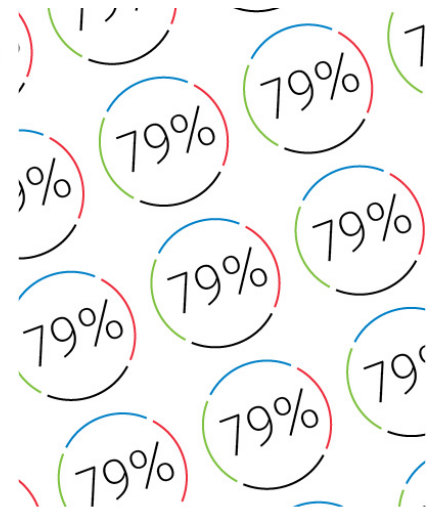
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