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Possible Changes to the Limits of Evidence in Antitrust Disputes in Russia

Konstantin Voropaev (Elbert, Nazaretsky, Rakov & Co) · Monday, November 8th, 2021

On 9th November 2021, the Commercial Court of Moscow will decide an antitrust case between Russian insurance companies (PJSC Rosgosstrakh and LLC Capital Insurance of Life) and the Federal Antimonopoly Services (FAS). The FAS had previously declared an agreement between the two insurance companies invalid. The case concerns the blurring lines between cartels and other agreements in Russian antitrust law. Particularly the standard of proof concerning "other agreements restricting competition" needs to be critically assessed.

Background of the case

The case appears ordinary, but the situation is not as simple as it may seem.

Two insurance companies, competitors today but previously part of the same group active in the voluntary personal insurance market, entered into an agency agreement. The contracts contained conditions on the minimum collection of insurance premiums by one insurance company favouring a competing company and penalties for improper performance of the obligation to collect insurance premiums or for early termination of such obligations.

FAS position

In the opinion of the FAS, the agency relations between these companies do not themselves violate the Federal law On Protection of Competition (hereinafter – the Antimonopoly Law). However, conditions stipulating a minimum number of insurance premiums collected by a competitor in favour of another competitor, as well as designated penalties, have led to restrictions on competition in the markets in question. According to the FAS, such conditions of the agency agreement may entail the refusal of one insurance company to undertake independent actions in the named markets in the interests of a competing economic entity.

Unsurprisingly, the FAS prohibited the agreement for an antitrust violation on the grounds of Article 11 of the Antimonopoly Law (Prohibition of agreements restricting competition between economic entities). The real icing on the cake is the FAS reasoning and grounds for prohibiting the agreement. Article 11 of the Antimonopoly Law comprises various grounds for prohibiting

agreements restricting competition between economic entities. Point 1 of article 11 sets forth that the agreements between competing economic entities (between economic entities selling goods on the same commodity market, or between economic entities purchasing goods on the same commodity market) are recognized as a cartel and prohibited if such agreements lead or may lead to:

1) establishment or maintenance of prices (tariffs), discounts, surcharges (surcharges) and (or) markups;

2) increase, decrease or maintenance of prices at the auctions;

3) the division of the commodity market according to the territorial principle, the volume of sale or purchase of goods, the range of goods sold or the composition of sellers or buyers (customers);

4) reduction or termination of the production of goods;

5) refusal to conclude contracts with certain sellers or buyers (customers).

In the view of the FAS, the agreement does not constitute a cartel in the sense of point 1 Article 11 of the Antimonopoly Law. Instead, the FAS used point 4 Article 11 of the Antimonopoly Law, the "other agreement" prong of the prohibition provision.

According to the FAS, a cartel needs to create financial benefits for the cartelists. The FAS, absolutely correctly, noted that agency services are not the main type of activity for an insurance business, and the profit from this activity cannot act as an alternative to the profit from the provision of insurance services. After analysing the nature and structure of legal relations between two competitors, the FAS stated that agency fees are deliberately unattainable and unprofitable. Thus, the agency agreement does not bring economic benefits to the insurance companies. Since the benefits of agency activities are incomparable with the benefits of independent insurance activities, the FAS could not recognise the agreement as a cartel agreement (point 1 Article 11 of the Antimonopoly Law).

However, other agreements between business entities are prohibited if it is established that such agreements lead, or may lead, to restriction of competition (point 4 Article 11 of the Antimonopoly Law).

The FAS stated that the companies did not enter into agency agreements with similar conditions with other counterparties. This circumstance indicates that the nature of such agency agreements is not generally accepted in business practice. According to the request of the FAS, the company presented an agency agreement with an identical subject matter of the agreement concluded with another business entity. Remarkably, the penalties are not provided for by the considered agency agreement. According to the provisions of this agency agreement, its termination is possible at the initiative of either party without the occurrence of any negative consequences, including financial ones. Quite another situation can be observed as to the agency agreement between PJSC Rosgosstrakh and LLC Capital Insurance of Life. In particular, in case of early termination of the agency agreement on the initiative of one of the parties, the initiating party pays the other party a substantial monetary fine. In addition, the agency agreement imposes predeterminedly infeasible terms: the minimum amount of fees under the agency agreement is 2.4% of the total annual fees of insurers in the markets of voluntary accident insurance and voluntary life insurance. Only about ten market participants overcome the threshold of 1–2% of the market share. The FAS market analysis

confirms that the implementation of the agreements could lead to an unjustified and significant redistribution of income between competitors. Generally, this could be achieved by means of forcing a player with a large-scale branch network and a better-known brand to abandon actions in favour of another player in the market. Accordingly, the agency agreement can be interpreted as an "other agreement" and subsequently will be recognised as anti-competitive.

How can the standards of evidence be changed in antitrust cases?

As the Supreme Court of the Russian Federation issued its first Guidance for Courts, the so-called Plenum, several milestones are essential to consider for disputing parties within the antitrust litigations.

Inter alia, the Supreme Court stated that the agreements of economic entities not specified in point 1 Article 11 of the Antimonopoly Law, including between competing economic entities, may be deemed unacceptable if the antimonopoly body proves that the result of the implementation or the purpose of the agreements was to prevent (restrict, eliminate) competition in the product market.

Thus, the Supreme Court thereby permitted an application to the rest of the grounds for recognition of restrictive agreements outlined in Article 11 of the Antimonopoly Law. With this case, we are witnesses to such an attempt by the FAS.

At the same time, the case law as to point 4 Article 11 of the Antimonopoly Law primarily concerns agreements concluded by non-competing parties on the same product market to reduce the number of persons able to compete with one of them. However, it is now becoming clear that the case under review indicates that the practice will expand to other types of agreements.

Of course, the burden of proof is on the FAS but the standard of proof is unclear. The mere presence in the agreement of conditions that determine the behaviour of the parties to the agreement in relations with each other and with third parties does not mean that the parties to the agreement pursued the goal of restricting competition. Here, it is necessary to consider the expected state of the market and the position of its participants, as well as whether there was an agreement, and, if implemented, its actual impact on the state of competition in the relevant product market.

This case is also interesting in that it will conclude the reasonableness of the actions of economic entities that previously constituted one group of persons but later became competitors. From a practical point of view, this is a crucial aspect since the argumentation and conclusion of the court may affect the further decisions of companies regarding the implementation of such schemes in their business.

If the court agrees with the validity of the FAS' conclusions and refuses to satisfy the plaintiff's application, the company will face a turnover fine, which can amount to as much as 5% of the company's annual revenue in the relevant markets. In the case of the plaintiff, the turnover fine may amount to several hundred million rubles.

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