THE CONCEPT AND TYPES OF ABUSE OF DOMINANCE IN THE ANTITRUST LAWS OF THE UNITED STATES AND RUSSIA

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Abstract

The issues of legal regulation of relations related to competition and monopoly are considered in many courses taught at the Law Institute of Peoples' Friendship University of Russia. Of particular interest to students are questions of qualifying the actions of entrepreneurs, which can be qualified as abuse of dominance in the commodity market. This interest is explained by the fact that at present, it is the abuse of dominance that is one of the most common violations of antitrust laws in the Russian Federation.

Teachers of Peoples' Friendship University of Russia see their task in training highly qualified lawyers; therefore they conduct scientific research not only in the field of Russian law but also in the law and law enforcement practice of foreign countries. This approach allows students to familiarize with the variety of approaches to legal regulation of various relations and a variety of law enforcement practices.

The main objective of the work is to study the patterns and types of abuse of dominance in the framework of comparative analysis in the named two countries belonging to the early system of justice. This article discusses current issues of competition and monopoly law - signs of abuse by an entrepreneur his/her dominant position in the commodity market, and some specific types of abuse.

The authors use the comparative legal research method, which allows to identify the features of the approach in the law of two countries - Russia and the United States to identify signs of abuse of dominance, as well as to qualify specific actions (inaction) as a type of abuse of dominance.

As a result of the study, the authors identify differences in the legal approaches to the problem of abuse of dominance in Russia and monopolization in the US law; establish differences in the legal assessment of certain types of abuse of dominance in the United States and Russia, and also suggest ways to improve Russian legislation in the studied area.

Keywords: competition, dominance, abuse, monopoly, monopoly prices .

1 INTRODUCTION

Turning to the study of the concept of abuse of the dominant position of a monopolist in Russia and the United States and the types of such abuse, the authors note that despite the existence of sufficiently detailed legal regulation and significant judicial practice, this issue cannot be seen simplistic, primarily because competition is, first of all, rivalry in which the goal of each participant is to become the winner. Moreover, victory in the “competition” is not always an antitrust offense, even if it leads to the ousting the competitors from the commodity market and the complete cessation of their business.

In the judgment of U.S. v. United Shoe Machinery Corp., one of the proposed approaches to determining the

unlawful behavior of a monopolist was the fact that a monopolist always limits competition by carrying out its commercial activities. This concept of abuse of dominance (monopolization) has not been adopted by any court in the United States, but there have been cases when the courts were close enough to it in their decisions. Over time, U.S. courts have increasingly begun to depart from the per se rule regarding certain types of monopolization and adhered more and more to the rule of reason, thereby significantly narrowing the scope of the monopolist's actions that are recognized as unlawful.

The utilitarian definition of unlawful actions of a monopolist from the point of view of the rule of reason boils down to the following: 1) it can be reasonably assumed that such actions can create, increase or extend the effect of monopoly power, reducing the capabilities of competitors; and 2) that they (a) either do not create any benefits for consumers at all, (b) either create unnecessary benefits for consumers, (c) or the benefits for consumers that they create are disproportionately small in comparison with the damage that they cause competition. It is essential to understand that in this definition, both conditions must be fulfilled simultaneously; otherwise the actions of the monopolist cannot be considered as violating Art. 2 of the Sherman Act.

In the aforementioned case U.S. v. United Shoe Machinery Corp. the following possible approaches to abuse of a dominant position were proposed: (1) the dominant entity violates Art. 2 of the Sherman Act, if it takes part in the unreasonable restriction of competition, prohibited by Art. 1 of the Law; (2) the dominant entity carries out unlawful monopolization if it (a) has sufficient economic power to eliminate competition, (b) its actions have entailed or may entail such consequences; (3) an entity with an overwhelming market share always monopolizes, carrying out his commercial activities [...] obviously, even if there is no evidence that his activities include actions to oust competitors from the commodity market.

In the Russian Federation, the prohibition of abuse of a dominant position is regulated by both general and special laws. According to Part 1 of Art. 2 of the Law on Protection of Competition, antitrust laws are based on the Constitution of the Russian Federation and the Civil Code of the Russian Federation. Art. 8 of the Constitution of the Russian Federation guarantees support in competition and freedom of economic activity, while following Art. 34 of the Constitution, economic activity aimed at monopolization and unfair competition is not allowed. Art. 1 of the Civil Code of the Russian Federation establishes a ban on the restriction of civil rights and freedom of movement of goods, except in cases where such a restriction is introduced by Federal law, and Art. 10 of the Civil Code of the Russian Federation, containing a general prohibition of abuse of rights, indicates the inadmissibility of the use of civil rights in order to limit competition, as well as the abuse of a dominant position in the market.

2 METHODOLOGY

This research study has been conducted and prepared for educational purposes and is student-centered. The authors of the publication presented the material in the most accessible form, allowing students to master the information independently and use it when writing reports, essays, final qualification works in undergraduate and graduate programs.

In the current social and economic conditions, the educational environment should be developed, blurring the boundaries between countries in the academic environment, as indicated by law scholars in such works as M. Dudin, N. Ivashchenko, E. Frolova, A. Abashidze (2017), M. Dudin, E. Frolova, O. Protopopova, Yu. Artemieva, A. Abashidze (2016), M. Dudin, E. Frolova, S. Kovalev, E. Ermakova, A. Kirsanov (2017).

General information on the determination of signs and types of abuse of dominant position can be obtained referring to works of such authors as Ph. Areeda, J. Bronsteen, J.M. Cohen, H. Hovenkamp, E. Hovenkamp, A. Jones, R.J. Lipscomb, J. McGee, A.D. Melamed, R. O'Donoghue, A.J. Padilla, H.A. Shelanski, B. Sufrin, T.E. Sullivan, J.O. Von Kalinowski, G. Werden.

3 RESULTS

3.1 Signs of Abuse of Dominance

In the Russian Federation, the concept of abuse of dominant position is based on Art. 10 of the Law on Protection of Competition, according to which an abuse of dominant position is: actions (inaction) of a dominant business entity, which resulted or may result in the prevention, limitation, elimination of competition and (or) infringement the interests of others and the causal relationship between actions (inaction) and consequences.

The actions (inaction) of the dominant business entities fall within the scope of Art. 10 of the Law on the Protection of Competition, only when they entail consequences in the form of preventing, restricting,

eliminating competition and (or) infringing on the interests of others. Moreover, based on an interpretation of the provisions of Art. 10 of the Civil Code of the Russian Federation and Art. 3 and 10 of the Law on Protection of Competition, for the qualification of actions (inaction) as abuse of a dominant position, it is sufficient the presence (or threat of occurrence) any of the listed consequences. At first glance, the consequences listed in Part 1 of Art. 10 of the Law are designed to limit actions (inaction) that can be recognized as illegal only when they entail these consequences. The consequences as a qualifying sign of abuse of a dominant position are formulated in the article in such a way as to expand the scope of the ban as much as possible.

The critical problem of the consequences as a qualifying sign of abuse of a dominant position is that the Law equals the consequences for competition and the consequences for private individuals (weak side). Accordingly, based on the current wording of Part 1 of Art. 10, actions (inaction) of the monopolist do not necessarily have to limit competition in order to be recognized as contradicting the law. Such wording of the norm leads to an overly broad interpretation of the prohibition of abuse of dominant position, making it possible to recognize as such any actions that are not harmful to competition. Moreover, based on the general principles of antitrust laws, actions that do not prejudice competition, cannot violate antitrust laws.

Abuse of a dominant position may be manifested by various actions on the part of a person with monopoly power in the commodity market, provided that such actions lead to corresponding anticompetitive consequences. Therefore, it is not possible to compile an exhaustive list of actions that could be considered an abuse of a dominant position. So, Art. 2 of the Sherman Antitrust Act contains only a general formula for determining monopolization and attempts to monopolize without specifying which actions fall within the scope of this article.

A detailed definition of the unlawful actions of a monopolist, based on the rule of reason, was given in the decision of U.S. v. Microsoft Corp. in which the court concluded as follows:

Firstly, in order to be considered unlawful, the actions of a monopolist must have anti-competitive consequences. It means that these actions should harm the competitive process and, as a result, harm consumers. Moreover, on the contrary, damage to competitors will not be enough to talk about anti-competitive consequences.

Secondly, the plaintiff, on whom the burden of proof rests, must demonstrate that these actions had the required anticompetitive consequences.

Thirdly, if the plaintiff successfully creates a rebuttable presumption of a violation of Art. 2 of the Sherman Act, having demonstrated the existence of anti-competitive consequences, the defendant has the right to offer a competitive justification for his actions, stating that his actions, in fact, were mainly a form of competition, because they led, for example, to higher economic efficiency or increased the attractiveness of the product for consumers. In the case the defendant offers a competitive justification, the plaintiff has to refute it.

Fourthly, if the plaintiff fails to refute the defendant’s pro-competitive rationale, he must prove that the competitive advantages of the defendant’s actions are disproportionately small in comparison with their anticompetitive consequences.

Fifthly, if it is proved that when comparing the competitive and anti-competitive consequences, the actions of a monopolist are more harmful to competition and, accordingly, are considered illegal in accordance with Art. 2 of the Sherman Act, the court should base its findings precisely on the consequences, and not on the intentions that stood behind the actions in question.

3.2 Types of Dominance Abuse

Illegal actions under Art. 2 of Sherman’s Laws are often described as actions that have no other economic meaning, rather than limiting or eliminating competition (“no economic sense” test). For example, in Aspen Skiing, the monopolist terminated the joint venture agreement with its competitor, according to which consumers in this product market had equal access to the goods and services of both participants. The joint activity was beneficial to both competitors and also brought significant benefits to consumers. At the same time, such a joint activity was much more beneficial to a weaker participant than a monopolist. Having terminated the agreement on joint activities, the monopolist lured a large part of consumers, which, on the one hand, caused significant damage to the competitor, and on the other hand, limited its consumers' access to the goods and services of the competitor, which caused damage to the commodity market.

As an alternative way to verify violation of Art. 2 of the Sherman Act in the actions of a monopolist a “profit

sacrifice test" test is suggested. The basis of this test is the idea that a monopolist is ready in the short term to abandon profits or even incur losses if he is confident that in the future he will be able to recover his losses and make big profits by maintaining, increasing or prolonging his monopoly authorities. In the aforementioned case, Aspen Skiing, the monopoly, pursuant to the opinion of the US Supreme Court, wished in the short term to give up its benefit and sacrifice the favor of its consumers in the long term to oust its weaker competitor from the product market, buy out the latter's property and occupy the entire product market, starting to provide the same goods and services that were competitively provided under a joint venture agreement individually.

While the main sign of the illegality of the actions of a monopolist who monopolizes the commodity market is the negative consequences for competition, and, as a consequence, for consumers, then such an offense as an attempt to monopolize, cannot be determined by its consequences, since in the vast majority of cases the consequences of such an offense never occur.

3.2.1 Refusal to Conclude a Contract

The main problem of enforcement of the antitrust prohibition of refusal to conclude an agreement (a refusal to deal, refusal to supply) is the problem of the ratio of the freedom of the monopoly agreement to the antitrust ban itself.

Russian antitrust legislation and law enforcement practice proceeds from the maximum possible restriction on the freedom to conclude an agreement by a monopolist, and this step is justified by protecting the interests of an economically weak party. At the same time, the US practice proceeds from the fact that the requirement of antitrust laws to the monopolist to conclude agreements with its competitors should be considered more like a strict exception rather than a rule. Modern US judicial practice establishes that the obligation to conclude a contract can be assigned to a monopolist only in respect of those goods of which it can reasonably be assumed that the commodity market will not be able to produce them independently.

As it can be seen, when assessing the legitimacy of a monopolist's refusal to conclude a contract in the USA, the rule of reason is applied, per which both negative and positive consequences for competition in the commodity market are assessed in total. Accordingly, the obligation of a monopolist to conclude a contract arises only when a refusal to conclude a contract can seriously damage competition in the corresponding lower product market of the final product.

At the same time, the Russian legislation does not provide for the possibility of presenting evidence that the refusal to conclude a contract by a monopolist has any competitive effects, while they may be even more important for the commodity market than anti-competitive. A systematic analysis of the norms of domestic legislation and judicial practice shows that in order to justify its right to refuse to conclude an agreement, the monopolist must prove that the conclusion of such an agreement will entail adverse consequences for it or is directly contrary to the law. In the United States, monopolistic defendants have the right to justify their refusal to conclude a contract not by the presence of negative consequences for themselves, but by the absence of negative consequences for the commodity market of the final product, which significantly expands their freedom of contract.

While Russian antitrust laws, as already mentioned, put protection of private interests on a par with the protection of competition, in the US antitrust law the protection of competitors' economic interests is not the goal of protecting competition. The purpose of protecting competition is to maintain consumer welfare, i.e., maintaining real competition in the commodity market. Thus, the presence of significant positive consequences for the product market and the end consumer can often be essential for competition in the commodity market than the loss of individual market participants. Moreover, if the refusal to conclude an agreement does not create significant positive consequences for the commodity market and at the same time unreasonably increases the monopoly power of the entity in the market, such actions will be considered as anti-competitive.

3.2.2 Imposing Unfavorable or Non-Subject Terms of the Contract on the Counterparty

An entity that abuses a dominant position by imposing unfavorable or not related to the subject matter terms on a counterparty, in fact, operates simultaneously on two product markets: the market for the main product (main service) and the market for the imposed product (imposed service). This led to the first and main question regarding this type of abuse: in which product market should the abusive entity dominate?

In the Decree of the Presidium of the Supreme Arbitration Court of the Russian Federation dated on July 30, 2012, No. 991/12, the court indicated that in order to qualify a violation of the prohibition of abuse, it is necessary to prove the dominance in the market of that service that the customers are applying for, i.e., the

main service, not the one that is being imposed on them. The court also noted that the imposition could have a negative impact on competition in the market of imposed services due to the relationship with the main service.

The letter of the Federal Antimonopoly Service (FAS) Russia dated on 12.11.2008 No. AG / 29484 “On Clarification of Law Enforcement Practices” gave an interpretation of this provision, according to which imposing on the counterparty the terms of the contract that are unfavorable for him means such behavior of the dominant business entity in which the rights of the counterparty are infringed or forced to enter into legal relations on unfavorable conditions.

The US Supreme Court found that many contracts under which one product is imposed upon the acquisition of another are fully compliant with the law. After this decision is made, courts in the USA practically do not apply the rule of “illegality in essence” to cases of imposition, considering them according to the rule of reason. Thus, the number of decisions on the illegality of the imposition tactics used by the monopolist has decreased significantly.

3.2.3 Establishment of a Monopoly Low Price

The establishment of a monopoly low price as an abuse of dominant position takes two forms: the establishment of a monopoly low price by the seller (predatory pricing) and the establishment of a monopoly low price by the buyer (predatory buying). In both domestic and foreign antitrust practice, establishing a monopoly low price does not apply to common anti-competitive actions, but this type is of interest because of the difficulty of identifying and proving.

The Russian antitrust legislation provides for the legal determination of a monopoly low price. Art. 7 of the Law on Protection of Competition stipulates that “the monopoly low price of a product is the price set by a dominant business entity if this price is lower than the number of expenses and profit necessary for the production and sale of such goods and lower than the price that was formed in a competitive environment at a comparable commodity market, if there is such a market on the territory of the Russian Federation or outside it [...]". As can be seen from the above concept, in order to determine the price as monopoly low, it is necessary to fulfill simultaneously three conditions:

• The dominant position of the business entity;

• The price is lower than the number of necessary expenses and profit; and

• It is lower than the price that has developed in a competitive environment in a comparable product market.

US law does not contain a legal definition of the establishment of monopolistic low prices by the seller or "predatory pricing," however, since the mid-70s of the twentieth century a common understanding of what this abuse consists of has developed in the judicial practice. According to this understanding, “predatory pricing” is an offense aimed at ousting competitors from the commodity market by selling goods at a price lower than their own costs, with the purpose that in the future, when competitors are forced out of the commodity market, they will be able to cover their losses by setting a monopolistic high price.

Today, courts in the United States are inclined to believe that most of the actions of monopolists to establish low prices are not anti-competitive, and ousting competitors from the commodity market as a result of lower prices by monopolists is a result of competition. Since 1975, only a few claims, filed in connection with predatory pricing, have been satisfied. This is due to the fact that since 1975, courts in the United States began to use the “Areeda-Turner test” to evaluate “predatory pricing."

This test suggests that pricing be considered “predatory” only if the price, set by the monopolist, is lower than its average variable costs, i.e., costs per unit of production during the implementation of this ousting strategy. Besides, "predatory" pricing, according to the US jurisprudence, has several other essential elements. Firstly, "predatory" pricing is a costly strategy for a monopolist; therefore, the market share of the applying entity must be significant, not less than 70%. Secondly, in order to prove the illegality of selling goods below its costs, the plaintiff must prove a high probability that the defendant could recover its costs and make a profit in the future. Proving all the above elements of the illegality of "predatory" pricing is a very difficult task, which is why most ousting tactics, including selling goods at or below their costs, are considered quite competitive today, especially in light of the fact that the use of such tactics by monopolists brings significant benefits to the consumer.

3.2.4 Establishing and Maintaining a Monopolistic High Price

The establishment and maintenance of monopolistic high prices as an abuse of a dominant position,

provided for in Part 1 of Art. 10 of the Competition Law is of relatively high comparative legal interest since the US law does not prohibit a legitimate monopolist from setting prices at the level it wishes. According to the US judicial practice, "the size and power of a monopolist do not violate the law, only the way they are achieved and the purpose for which they are used." Also, related phenomena, including the monopoly price established as a result of lawful actions, do not violate the law. In the Russian antitrust law, the establishment and maintenance of a monopoly high price in itself are recognized as an abuse of a dominant position.

According to Art. 6 of the Law on Protection of Competition contains three qualifying attributes of a monopoly high price that must exist simultaneously: (1) the price is set by a dominant business entity; (2) the price exceeds the amount necessary for the production and sale of the goods' costs and profits; and (3) the price exceeds the price that was formed in a competitive environment in a comparable product market. Based on the fact that we have already established the features of a dominant position earlier, the remaining two features are of interest

A monopolistic high price exceeds the amount necessary for the production and sale of goods' costs and profits. Firstly, it is difficult to calculate the real costs of the sale of goods, especially in the case when the company produces several different goods using the same material base. Secondly, it is unclear how "monopoly high" profits in the commodity market should be determined.

In most cases, the use of a monopolistic high price is possible only if the goods cannot be purchased from an alternative seller (i.e., a monopoly high price can only be set in conditions of absolute monopoly on the goods market).

B. Monopolistic high price exceeds the price that has been formed in a comparable competitive product market. From the economic analysis, a comparison of the costs of a monopolist and a supplier operating in a competitive product market is mostly not indicative. On the one hand, in some sectors, the costs of large companies are lower due to the economies of scale and scope. On the other hand, the monopoly position of the company weakens incentives to reduce costs, and, accordingly, the costs of the seller in the monopoly market may be higher than they would be in a competitive environment. Besides, it is impossible to ignore the impact on the price of potential competition. Potential competition has the same effect on the price as real competition. With intense potential competition and low entry costs, high profits can only be the result of cost advantages.

Economic theory suggests that high prices themselves, all other things being equal, attract new sellers to the industry, while limiting prices by authorities objectively limits entry. Therefore, the prohibition against charging high prices as a way to combat the manifestation of monopoly power may limit not so much market power but competition. At the same time, intervention from the entities of antitrust policy may impede the reduction of prices to a competitive level. In light of the preceding, the approach of US law to monopoly high prices seems to be most justified.

4 FINDINGS

Abuse of a dominant position may be manifested by various actions on the part of a person with monopoly power in the commodity market, provided that such actions lead to corresponding anticompetitive consequences. Therefore, it is impossible to make an exhaustive list of actions that can be considered as abuse of a dominant position, and, hence, in the law of the Russian Federation and the USA, there is a uniform approach.

At the same time, the considered examples of assessing specific types of abuse of a dominant position in the antitrust laws of Russia and the United States demonstrate a significant difference in the approaches used.

As has been shown, in the modern United States the vast majority of the rule of reason is applied in the assessment abuses, according to which the actions of a monopolist in the commodity market can only be considered unlawful when it can reasonably be assumed that such actions can create, increase or extend the effect of monopoly power, reducing the capabilities of competitors; nor do they create any benefits for consumers at all, or the benefits for consumers that they create are disproportionately small compared to the damage they cause to competition. That is, the critical goal of the antitrust laws of the United States is to protect competition, not competitors since only a commodity market with working competition can ensure the rights and legitimate interests of its participants and maintain consumer welfare.

The Russian antitrust legislation and law enforcement practice, based on the refutable presumptions established by law, is based on the application of the "illegality in essence" rule concerning the abuse of a

dominant position in general and to its individual types in particular. Moreover, provided for by Art. 13 of the Law on the Protection of Competition, the criteria for the admissibility of actions considered per se to be an abuse of a dominant position are rather conditional, because, firstly, they cover only a small part of the abuses, and secondly, they reveal the absence of actions considered per se as an abuse, and not to their admissibility. Together with the ambiguous approach to the goals of antitrust law, which causes discrepancies not only with world practice but also within the domestic antitrust law, all these factors indicate that the Russian antitrust law is applied more for the sake of enforcement rather than for protecting competition and consumer welfare.

Thus, it seems necessary to change the existing approach of domestic antitrust legislation and law enforcement practice to the abuse the dominant position, clearly define the purpose of the application of antitrust legislation as protection of competition and not competitors.

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