THE CONCEPT AND PROCEDURE FOR DETERMINING THE DOMINANT POSITION IN RUSSIA AND THE USA

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Abstract

At Peoples' Friendship University of Russia, where the authors work, great attention is paid to studying foreign law, in particular civil and commercial law. Teachers and students conduct scientific research not only of Russian law, but also in the law and law enforcement practice of foreign countries.

Antitrust law should effectively ensure the unity of the economic space, the free movement of goods, the freedom of economic activity, the protection of competition, including the prevention and suppression of monopolistic activity. That is why the authors study the concepts of dominance (monopoly), the procedure for its establishment, as well as various types of dominance that can be found on the commodity markets of countries such as the Russian Federation and the USA.

Based on the analysis of legislative norms and law enforcement practice, the authors determine the attributes, indicating that the business entity is a monopolist - dominant in the commodity market; reveal differences in the content of this concept in two countries belonging to different legal systems. The authors of the article use the comparative legal research method, which allows identifying the features of the approach in the law of the two countries to determine the dominance of several persons.

Keywords: dominant position, monopoly, corporate dominance, dominance of a group of people

1. INTRODUCTION

In the modern, globalized world, in which many commodity markets seek economic concentration, antitrust laws are designed to effectively ensure the unity of the economic space, the free movement of goods, the freedom of economic activity, the protection of competition, including the prevention and suppression of monopolistic activity, as well as the creation of conditions for the effective functioning of commodity markets. The prohibition of abuse of a dominant position or monopoly power is one of the leading institutions of antitrust laws of any state. We believe that the analysis of the concept of the dominant position, the procedure for determining it, is necessary to establish measures that will help companies to comply with antitrust laws.

The concept of dominance is formulated in Russian law in Art. 5 of the Law on Protection of Competition. A dominant position is understood as "[...] a position of an economic entity (group of persons) or several economic entities (groups of persons) in the market for a particular product, giving such an economic entity (group of persons) or such economic entities (groups of persons) the opportunity to exert a decisive influence on the general conditions for the circulation of goods on the relevant product market, and (or) eliminate other business entities from this product market, and (or) impede access to other business entities on this product market."

The US law takes an excellent approach, based on determining the position of an economic entity as having monopolistic power (dominant position) in a particular product market. The criteria for determining the position of an economic entity as a monopoly are based on judicial practice. Moreover, the concept of monopoly in the antitrust laws of the United States is far from the literal definition of monopoly adopted in the economy.

2. METHODOLOGY

This research study has been conducted and prepared for educational purposes and is and 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 qualifying works in undergraduate and graduate programs.

In modern social and economic conditions, the educational environment should be developed, blurring the boundaries between countries in the academic environment, as indicated by jurists 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 features and types of abuse of dominant position can be obtained by refering the works of such authors as: Blair, R. D., Harrison, J. L., Hovenkamp, H, Hovenkamp, E.; O'Donoghue, R., Padilla, A.J.; Sullivan, T. E., Shelanski H. A.

3. RESULTS

3.1. Dominant Position

In practice, when determining the dominant position, the main importance is the share of the business entity in the market, and not the ability to have a decisive influence on the general conditions of circulation of goods, since the current legislation presumes the possibility of exerting such influence in cases where the market share of the business entity exceeds the threshold value prescribed by law .

In this context, it is also necessary to consider the rules that allow establishing the dominant position of an entity whose market share is less than 50%. Pursuant to with para. 2 h. Part 1 of Art. 5 of the Law on protection of competition, the position of an entity may be recognized as dominant, whose share in the market of a particular product is less than 50%, but exceeds 35% if the dominant position of such an entity is established by the antimonopoly authority, based on the market share of the entity that is unchanged or subject to minor changes, the relative size of shares in this product market belonging to competitors, the possibility of access to this product market for new competitors or based on other criteria, characterizing the commodity market. There are few cases of recognition by the antimonopoly authority of a dominant position with a share of less than 50%; this seems to be due, first of all, to the fact that antitrust authorities suffer problems with determining and proving a dominant position with a share of less than 50%.

At the same time, the Russian antimonopoly legislation establishes a rebuttable presumption of a dominant position for business entities with a market share of more than 50%. The wording of the norms of Art. 5 of the Law on Protection of Competition "if only when considering a case of violation of antitrust laws it is not established that, despite exceeding the indicated value, the position of a business entity in the product market is not dominant" actually means "if [business entities] do not prove that they do not have the ability to unilaterally influence the general conditions for the circulation of goods in the relevant product market."

In 2009, the Law on Protection of Competition included cases in which the position of an entity whose market share is less than 35% can be recognized as dominant. In particular, the position of a business entity, whose share in the market of a specific product is less than 35%, but at the same time exceeds the shares of other business entities in the corresponding product market, can be recognized as dominant based on the results of an analysis of the state of competition by the antimonopoly authority if this business entity can provide a decisive influence on the general conditions for the circulation of goods on the commodity market, and in the aggregate the following conditions are observed: 1) the business entity is ableto unilaterally determine the level of commodity prices and have a decisive influence on the general conditions of sale of goods on the relevant market; 2) access to the relevant product market of new competitors is difficult, including due to the presence of economic, technological, administrative or other restrictions; 3) goods sold or acquired by a business entity cannot be replaced by other goods when consumed (including when consumed for industrial purposes); 4) a change in the price of the goods does not cause a decrease in demand for the goods corresponding to such a change.

From the foregoing, it can be seen that the norms of Art. 5 of the Law on Protection of Competition are designed in such a way as to facilitate the formal establishment of a dominant position on the basis of a set of criteria.

3.2. Monopoly

US antitrust laws adhere to economic terminology as much as possible, using concepts such as "monopoly," "monopolist," "monopoly position," "monopoly power," and others. An act similar to the abuse of a dominant position in Russia is called monopolization in the USA. Moreover, when qualifying the actions of a business entity as monopolization, the main qualifying attribute is not the position of the entity in the product market, but the possession of monopoly power in the relevant product market.

Thus, in order to answer the question whether the person's actions are illegal pursuant to Art. 2 of Sherman Act which prohibits monopolization or an attempt to monopolize, it is necessary first of all to assess whether a person has sufficient power in the market to monopolize it. The legitimacy of the judgment on whether the actions of this subject have negative consequences for competition in the commodity market and whether they can be considered a violation of antitrust law largely depends on the criteria that are used to assess the power of an entity in the commodity market.

In U. S. v. EI du Pont de Nemours & Co. the monopoly power was defined by the US Supreme Court as a power to control prices or eliminate competition. As can be seen, this definition is quite general and does not give a clear idea of the content of the concept of monopoly power. Besides, the existence of monopoly power by an entity is not in itself equal to eliminating competition and ousting competitors from the commodity market. On the contrary, selling goods at inflated prices, as a rule, attracts other sellers to the product market who are ready to offer the same (interchangeable) product at a lower price. The ousting of competitors is not monopoly power; however, it is an essential tool for gaining market power. Thus, in this context, it would be correct to speak not of monopoly power, but rather, of market power. Market power is the ability to earn higher profits and sell at higher prices, while monopoly power is just a large amount of market power. For the assessment of the market power of a particular business entity in the product market, it is necessary to determine the boundaries of the relevant product market, the share of the business entity in the relevant product market, as well as barriers to entry in this product market. As can be seen, despite the use of economic terminology, the concept of monopoly in the antitrust laws of the United States is far from the literal definition of monopoly adopted in the economy. The company may be the sole seller of the goods, but not be a monopolist in the sense of Art. 2 of the Sherman Act. On the contrary, another company may be one of many market participants and have a market share significantly lower than 100%, and yet have sufficient market power to monopolize the market. That is why the concept of a monopolist, implied in Art. 2 of the Law mentioned above, is not the market share, but precisely the opportunity, without significant negative consequences for economic activity, to reduce production and set prices above a competitive level, and thus make a profit.

3.3 Dominating Position of Groups Of Persons (Collective Domination) In The Russian Federation

Following the European legislation, the Russian antitrust legislation indicates the dominant position of several business entities (groups of individuals), thus allowing the possibility of collective (joint) dominance.

The main goal of the concept of collective dominance is to prevent anti-competitive actions in commodity markets that differ in oligopolistic structure.

The possibility of the existence of collective dominance is indicated both in the concept of a dominant position provided for in part 1 of Art. 5 of the Law on Protection of Competition, and in part 3 of Art. 5 of the Law, according to which the position of any business entity of several business entities (with the exception of a financial organization) is recognized as dominant, in relation to which the following conditions are fulfilled in aggregate: 1) the aggregate share of no more than 3 business entities, the share of each of which is larger than the shares of other business entities in the relevant product market, and exceeds 50%, or the total share of not more than 5 business entities, the share of each of which is higher than the shares of other entities in the relevant market and exceeds 70% (this does not apply if the proportion of at least one of said business entities in less than 8%); 2) for an extended period (for at least one year or, if such a period is less than one year, during the period of existence of the relevant product market), the relative sizes of the shares of business entities are unchanged or subject to minor changes, as well as access to the relevant product market for new competitors is difficult; 3) the goods sold or acquired by business entities cannot be replaced by other goods when consumed (including when consumed for industrial purposes), the increase in the price of the goods does not cause a corresponding decrease in demand for this product, the information on the price, conditions of sale or acquisition of this product in the relevant product market is available to an indefinite number of persons.

Thus it can be concluded that the wording of part 3 of Art. 5 of the Law on Protection of Competition, as in the case of a sole dominant position, contains a presumption of collective dominance subject to the conditions contained in the specified norm. Moreover, practice shows that the presumption of the ability of an individual oligopoly participant to independently and individually abuse their “collective dominant” position does not allow the affected entities to try to challenge its application with legal and economic arguments, in contrast to the provisions of part 1 of Art. 5 of the Law on Protection of Competition on the dominance of one company. According to some experts, a company accused of individual abuse of a collective dominant position cannot really take advantage even of the provisions of part 4 of Art. 5 of the Law on Protection of Competition, since it cannot provide evidence for other participants in an allegedly collective dominance.

The collective dominance of groups of individuals should be distinguished from the dominance of a group of individuals. The critical difference is that collective dominance is recognized as the joint dominant position of several business entities, while a group of individuals is considered as a single business entity. Despite the fact that the law does not define the group of persons, the conclusion that the group of persons is considered as a single business entity can be drawn from an analysis of the characteristics of the group of persons listed in Art. 9 of the Law on Protection of Competition. Based on these signs, a group of persons can be defined as a combination of legal entities and individuals who, as a result of the methods of control and influence defined by law, are considered as a single market entity.

3.4. Monopoly of Several Entities

The antitrust laws of the United States, unlike the laws of Russia and the EU, only partially relate to the problem of monopolization of the market by several entities. In Art. 2 of the Sherman Act, among other things, it is forbidden to "unite or conspire with another person or persons to monopolize" the commodity market. Moreover, as shown above, a person whose actions fall under the scope of Art. 2 of the Sherman Act, should have monopoly power in the commodity market. That is, for the application of Art. 2 of Sherman Act in cases where several business entities monopolize or try to monopolize the product market, it is required that at least one of these persons has monopoly power in the relevant product market, i.e., was a monopolist or there was a severe threat that it could become one. Thus, the Sherman Act regulates only such an option of monopolizing the market by several business entities ("collective dominance"), in which one of the participants is a real or potential monopolist.

To date, there is little jurisprudence in the United States that examines exclusively the issue of "unification or conspiracy to monopolize", since such cases are often also subject to Art. 1 of Sherman Act, the burden of proof for which is much lower, as a result of which the plaintiffs often choose it as the basis of the claim. The general principles of establishing a conspiracy to monopolize were formulated back in the 1950s. According to these principles, to establish a conspiracy to monopolize it is necessary: 1) the existence of an association or conspiracy between two or more participants; 2) the presence of a specific intention to monopolize part of the trade; 3) any blatant acts committed as part of the conspiracy; and 4) anti-competitive effects on interstate commerce. At the same time, proving the existence of a conspiracy to monopolize does not require the plaintiff to prove the "dangerous likelihood of success" of such a conspiracy. The violation is considered proven subject to the existence of an agreement and apparent actions to implement this agreement.

Later court practice on this issue also focuses on the fact that in order to establish collusion for monopolization, it is necessary to prove precisely the fact that the conspiring people have a specific intent to monopolize the market, and not just the intention to perform the actions that these entities committed.

What distinguishes conspiracy to monopolize directly from monopolization or an attempt to monopolize is that in cases involving conspiracy to monopolize, the plaintiff is not required to analyze the relevant product market. In this context, it is interesting to consider the case of Virginia Vermiculite, ltd. V. W.R. Grace & Co., in which the US Supreme Court rejected the testimony of an expert economist on the part of the plaintiff, since it considered him inexperienced, and as a result refused the plaintiff's requirements for the defendant pursuant to Art. 1 of Sherman Act, as well as Art. 2 in terms of monopolization or attempts to monopolize, because the plaintiff could not substantiate its arguments in terms of determining the relevant product market. However, the court examined the case under Art. 2 of the Sherman Act regarding a conspiracy to monopolize.

The court indicated that the signs of collusion for monopolization are: (1) the presence of collusion; (2) the specific intent to achieve an illegal monopoly; (3) committing explicit acts to conspire; and (4) anti-competitive effects. At the same time, the court found that the plaintiff submitted significant evidence of conspiracy and obvious acts to implement it.

To the defendant's arguments that without justifying the boundaries of the relevant product market, it is impossible to prove the existence of this market, which leads to unfounded conclusions that the defendant entered into a conspiracy to monopolize a market that may not even exist, the court replied that, proceeding of their principles of Common Law, the entity is responsible for conspiracy to commit an unlawful act, regardless of the existence of a real possibility of such an act. Thus, the court ruled that even if it was virtually impossible to monopolize the relevant product market, the defendant could still be liable for conspiracy to such monopolize.

The obligation to determine the boundaries of the relevant product market for cases provided for in Art. 2 of Sherman Act in terms of monopolization or attempts to monopolize is connected with the need to establish whether the defendant really limited competition by his actions, whether he really achieved or maintained his monopoly, or was dangerously close to possessing monopoly power. As for the cases of collusion for monopolization, although the court ruled that the product and the geography of its sales should be determined, a strict economic definition of the product market is not required.

3.5. Dominating Position of a Purchaser

The mirror reflection of a monopoly in the commodity market is monopsony. Monopsony is a monopoly on the buyer's side. Of course, the dominant position of the buyer is much rarer than the dominant position of the supplier; at the same time it can have much more severe consequences for the competition than a monopoly.

The most common example of the dominant position of the buyer is monopsony in the labor market, which is widely known in Russian realities. Monopsony in the labor market refers to a situation where a group of workers employed, usually in one sector of the economy, is opposed by one employer or group of individuals.

The authors would like to note that most of the judicial practice of the United States under Art. 2 of Sherman Act is devoted to the problem of monopoly; monopsony can have no less anti-competitive consequences for the commodity market. The main antitrust concern regarding monopsony is the potential monopsonist's ability to force sellers to lower their price compared to a competitive level, reducing demand for the goods. Several authors are skeptical of such a fear, because, in their opinion, no seller can lower the price below their average costs.

According to this point of view, if the competitive price per unit of goods is $ 100, but the monopsonist is willing to pay $ 90 per unit of goods, then sellers whose average costs are more than $ 90 will either be forced to cut production to reduce their average costs, or leave the product market. As a result, those sellers whose average costs are less than $ 90will remain in the market. Accordingly, the lower the price, the lower the offer. A diminished supply may one day not cover the demand of the monopsonist, which in turn will reduce his turnover. If the monopsonist artificially lowers the demand to reduce the price, then most likely, after some time he will again have to increase demand. To cover the increased demand, sellers will have to increase supply, which in turn will increase their costs and lead to higher prices. Thus, the main conclusion that can be drawn from the economic analysis shows that anti-competitive actions most often reduce, but not increase, the monopsonist's turnover.

This conclusion was rarely taken into account by the courts in cases against monopsonists. The courts grounded on the fact that the monopsonists, buying goods at low prices, subsequently sell their goods at lower prices. Moreover, since the primary goal of US antitrust policy is the welfare of the end consumer, the actions of the monopsonist could not be considered anti-competitive. In one of the cases, the court, rejecting the claimant against the monopsonist, referred to the fact that the US Congress, adopting Sherman Act, saw it as the goal of protecting consumers from prices that were too high, but not too low. Moreover, the court did not take into account the fact that if the commodity market in which the monopsonist sells his goods is competitive, then he will sell his goods at a competitive price, i.e., at the same price as other market participants, and not at a reduced price. Besides, his supply will be limited by his reduced turnover. Also, if the monopsonist has a significant share in the product market in which he sells his goods, then he will be able to create an artificial shortage of goods, as a result of which the market price will increase due to the mismatch between supply and demand.

From the above analysis, the following conclusions can be drawn. Firstly, monopsony is no less a severe problem of antitrust law than monopoly. One can never be sure that the low prices paid by the monopsonists to their suppliers go to the end consumers. Secondly, it is necessary to distinguish between purchase prices reduced as a result of lower transaction costs, as occurs with vertical integration, and prices reduced as a result of anti-competitive actions in the primary product market. If a buyer buys a product at purchase prices that are reduced as a result of a reduction in transaction costs, then it is highly likely that he will purchase more goods, not less, which in turn will lead to lower prices on the commodity market of the final product. The fundamental difficulty concerning monopsony is precisely the need to distinguish between procurement prices reduced as a result of lower transaction costs and procurement prices reduced as a result of the anti-competitive actions of the monopsonist.

Another problem that may arise as a result of the anti-competitive actions of the monopsonist is the so-called "predatory procurement," considered by the US Supreme Court in Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., Inc. In the case of the purchase at predatory prices, the monopsonist does not reduce the purchase price but instead increases it so that his competitors are unable to pay for the commodity and suffer significant losses, as a result of which they are ousted with product market. In the said case, the US Supreme Court ruled that such actions are prohibited by Sherman Act only if the following conditions are met: (1) the purchase prices were so high that the monopsonist had to sell his goods below its costs; (2) the monopsonist could reasonably expect that by displacing competitors from the commodity market, he would be able to reduce purchase prices to a level that would allow him to compensate for his losses in the subsequent period.

In the decision mentioned above, the court refused to recognize the actions of the defendant as purchase at predatory prices, based on the principles formulated by him. Moreover, indeed, it is rather difficult to imagine a situation in which both conditions, indicated by the court, might exist at the same time. Thus, the main problem of monopsony is considered to be the purchase at low prices in the primary product market, which leads to anti-competitive consequences for the consumer in the subsequent product market.

3. FINDINGS

In the Russian Federation, the law establishes a rebuttable presumption of a dominant position. This provision follows from the content of paragraph 4 of Art. 5 of the Law on the Protection of Competition, according to which "a business entity is entitled to submit evidence to the antimonopoly body or court that the position of this business entity on the product market cannot be recognized as dominant." Thus, if it is established that the market share of the entity exceeds 50%, the antimonopoly authority is not required to prove the ability of the entity to monopolize the market, as such an opportunity is summarized.

However, the presumption of dominance is a rather controversial legal instrument, in particular, because there is no direct relationship between market share and the ability to unilaterally influence competition in the commodity market.

In the United States, when establishing criteria for dominance (monopoly), they practically abandoned the application of the “illegality in essence” rule. When qualifying the actions of a business entity as monopolization, the main qualifying attribute is not the position of the entity on the product market, but the possession of monopoly power on the relevant product market. Market share plays a significant, but not final role in determining the market power of a business entity in the relevant product market. At the same time, an analysis of US judicial practice shows that courts most often recognize market shares of 80-90% percent as significant for determining the position of an entity as a monopoly. A market share of 50% and below is considered insignificant. Moreover, most courts refuse to recognize the monopoly of an entity whose market share does not exceed 70%. Thus, monopoly power in the market is the essence of a dominant position, while market share is only one of the criteria used to assess the entity's market power, along with the degree of market concentration, entry barriers, the ability of buyers to influence sellers and the market as a whole (buyer influence).

As it can be seen, the concept of "collective dominance," widely accepted in the antitrust laws of the European Union, and then Russia, based on the existence of a "tacit agreement" between the parties, is not reflected in the US law. To date, neither the antitrust laws of the United States nor the judicial practice has rules that directly regulate competition in oligopolistic markets, provided that there is no explicit agreement between the parties.

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