ALRUD

Newsletter

"Antimonopoly" Plenum of the Russian Supreme Court: new rules of the game

9th April 2021

Dear Sir or Madam,

On March 4th 2021, a new Resolution of the Plenum of the Supreme Court of the Russian Federation No. 2 "On certain matters related to the application of antimonopoly legislation by courts" was adopted.

This new Resolution, with the exceptions of certain procedural issues, completely replaces the Resolution of the Plenum of the Supreme Arbitrazh Court of the Russian Federation of June 30th 2008 No. 30, which was adopted more than ten years ago. In this regard, we expect that the arbitrazh courts, guided by the new rules, will reconsider their approach on a range of issues. Here are the most important issues we have identified, based on our practical experience, and expect they will be helpful in your business.

1. A group of persons

The Supreme Court of the Russian Federation (Supreme Court) clarified that, when violations of antimonopoly legislation are established, a person/entity, who/which is in fact autonomous in determining his/her/its behavior in the market, is not subject to the legal regime regulating the group of persons, even when he/she/it formally belongs to such a group.

Autonomy can be confirmed by the lack of sufficient legal (contractual, corporate) and organizational (managerial) means of influence on such person's behavior by other members of the group. The applicant must provide an appropriate proof of autonomy.

In contrast, the Supreme Court pointed out that only those individual members of the group, whose actions (inactions) directly constitute an offense, can be held liable for violating antimonopoly legislation.

2. Abuse of dominant position in the market

Abuse of a dominant position constitutes an offense that can entail serious risks and penalties for a business entity. At the same time, the presence of a dominant position *per se* is not an offense and only imposes on the monopolist additional restrictions on its freedom in respect of its economic activities. In this regard, it is important to determine the criteria helping to establish the fact of an offense.

The Supreme Court, expressing its position in relation to certain offences, also commented on the general dominance criteria. In particular, the Supreme Court noted that the fact of violation by the dominant subject of the civil law requirements, including bad-faith behavior from a private law standpoint, is not evidence of abuse of a dominant position. The Supreme Court recommended to evaluate whether the examined actions of a business entity would have been possible in the absence of a dominant position.

2.1 Establishing the dominant position

The main criterion for a dominant position is the ability of an entity to act in the market independently of competitors and consumers and to unilaterally exert a decisive influence on the market, removal of competitors from the market, or hindering their access to the market. In this regard, when checking the presence of a dominant position of a business entity in the market, its position is assessed relatively to existing competitors (achieved market share), potential competitors (ability to access the market) and consumers. The Supreme Court has clarified the criteria for this assessment.

Among the possible criteria for assessing the ability of new competitors to enter the market, the Supreme Court names:

(A) presence of administrative barriers to market access;
(B) presence of significant economic advantages for a business entity (access to natural resources, manufacturing techniques, capital markets, etc.);
(C) substantiality of the costs incurred by the entity's counterparties to change suppliers.

The Supreme Court also points out that, if new competitors did not enter the market during the period in question, then this in itself, *per se,* does not yet indicate market dominance.

As a possible criterion for assessing the seller's position with respect to consumers, the Supreme Court mentions an ability of consumers to resist the seller's market power, for example, due to the high market share of such consumers, and / or their commercial importance to the supplier.

2.2 Collective dominant position

The Supreme Court emphasized that, when establishing collective domination, the possibility of the cumulative influence of all its subjects, as a whole, on the market is assessed. In this regard, the conclusions about the collective dominance of several entities, not included in the same group, can be refuted, by proving that the market conditions are influenced by only one certain entity, but not several entities together.

2.3 Certain types of abuse of a dominant position

The Supreme Court draws attention to particular cases of abuse of a dominant position, among which are the imposition of unfavorable conditions on counterparties, price discrimination, as well as the establishment of excessive prices and predatory pricing are mentioned.

Unreasonably persistent offering

The Supreme Court confirmed the substantive approach to assessing the actions of a dominant entity as imposing, recommending the courts to recognize as 'imposed' the contractual terms that the counterparty would not accept, based on its reasonable economic interests. In addition, when assessing controversial terms, one should take into account the presence of the dominant entity's legitimate interest, as well as the degree and proportionality of the imposed restrictions to such an interest.

At the same time, the Supreme Court noted that the fact of concluding an agreement without the counterparty's objections, as well as its subsequent proper execution by the parties, in themselves cannot prove the absence of abuse.

Price competition or predatory pricing?

The Supreme Court noted that law does not contain any prohibitions on the participation of dominant entities in price competition. In order to refute the accusations of predatory pricing, a dominant entity has the right to provide a verifiable justification for the price reduction, for example, the seasonality of the activities carried out, execution of similar business practices by other market participants, or the appearance of a new entity in the market.

3. Anti-competitive agreements

Cooperation of market players for the common benefit, as a normal business practice, is not prohibited by antimonopoly legislation, as such. The Supreme Court recalled that it is the antimonopoly authority that is obliged to prove both the existence of an agreement and the fact that this agreement entails real, or potential, harm to competition. At the same time, the similarity of the economic entities' actions, in itself, is not an evidence of an agreement reached between them, and may be grounded in legitimate market factors.

The Supreme Court specifically noted that exchange of confidential information between market players, if it led to the restriction of competition, could be qualified as an anti-competitive agreement. This approach should be taken into account when interacting with counterparties, in order to avoid antimonopoly violations.

3.1 Cartels

As regarding cases on abuse of dominant position, a positive trend in the law enforcement practice regarding cartels can be observed: the Supreme Court urges the courts to assess cartels substantively, avoiding formalistic approach, and reminds them that the similarity of entities' conduct is not necessarily indicative of a cartel.

The Supreme Court specifically outlined, that reaching agreement on terms of goods' purchasing (e.g. discount rate) between several customers and sellers itself, is not necessarily indicative of reaching an agreement on setting/ maintaining prices. This reference can be helpful in the case of justification of purchasing alliances. However, the antimonopoly authority and third parties still have the right to present evidence that such an agreement is aimed at the restriction of competition, for instance, by excluding the possibility of offering similar discounts to other entities in the market.

If it turns out that the cartel agreement is highly likely concluded, it is possible to use leniency, either under Article 14.32 of the Code of Administrative Offences, or in a criminal case under Article 178 of the Criminal Code of the Russian Federation. These options allow release from either administrative, or criminal liability.

3.2 Vertical agreements and coordination of economic activities

The Supreme Court noted that, in a number of cases, providing instructions to sellers on their interaction with consumers, including if such instructions were implemented in connection with a civil contract (e.g. distribution/ supply agreement) and if there is an economic dependence of the seller on the person providing the instruction, it can be qualified as prohibited coordination of economic activities.

4. Challenging acts of the antimonopoly authority

The order to initiate the antimonopoly case can be challenged on the grounds, eliminating the possibility of initiation of an antimonopoly case.

The Supreme Court also outlined that, in the case of issuing a warning, it is necessary to verify the signs of an offence at the time of case initiation, taking into account the actions that the entity has undertaken to remedy violations. Moreover, it is permissible to remedy violations in ways different from those prescribed by the warning. What is more, the order to initiate the antimonopoly case can be challenged, on the ground that, at the time of proceedings' initiation, the dominant position of an entity has not been determined, for instance, in the case where the antimonopoly body has not carried out the necessary market analysis.

A decision and/or a prescription of the antimonopoly body, issued as a result of antimonopoly case consideration, can be reversed in the case of substantial violation of the established procedure. The Supreme Court declared the following violations as fundamental: failure of the antimonopoly body to issue a statement of objections; taking a decision by the antimonopoly body beyond the limitation period; failure to notify a person involved of the time and place of antimonopoly case hearing, etc.

The Supreme Court specifically outlined that court proceedings must not replace the established procedure for considering antimonopoly cases. Due to this reason, additional evidence can be accepted by the court, in the case where the party has justified the inability to present them at the stage of the consideration of the case by the antitrust body.

5. Private lawsuits regarding violations of antimonopoly law

The Supreme Court has paid specific attention to private lawsuits for damages caused by breach of antimonopoly legislation.

It is outlined that such private actions can be filed, regardless of the fact that the case has been considered by the antimonopoly authority. However, a decision of the antimonopoly body on the existence of a violation creates a presumption of the violation, leaving the burden of contestation to the defendant. Moreover, the limitation period for a claim for damages will be suspended for a period of considering of a case by the antimonopoly body, that will make it significantly easier to recover them for the aggrieved party.

The Supreme Court has also raised the issue of calculation of 'antimonopoly' damages. It pointed out that the amount of damages, caused by violation of the antimonopoly legislation, in particular, can be

calculated by comparing prices existing before, during and/or after the violation; analysing financial results (profitability of the industry); using new methods of market analysis, including its structure.

The Supreme Court specifically outlined that the passing-on, in whole or in part, of the costs incurred as a result of a violation, for example, an overpriced resale product, by an injured economic entity to its customers (*passing-on defense*), does not deprive the injured party of their right to have such damages compensated. Still, in this case only the difference between the overvalued price and the costs passed on the buyers is to be compensated.

In the present letter, we have pointed out only several key points that will primarily impact Russian anti-monopoly law enforcement practice. If you have any questions with regard to the written above, we will be happy to comment on them additionally.

We hope you will find the information provided useful. If any of your colleagues would also like to receive our newsletters, please send them a link to the electronic subscription form. If you would like to learn more about our Dispute Resolution Practice and Competition/Antitrust Practice, please let us know in your reply letter - we will be happy to send you our materials.

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If you have any questions, please do not hesitate to contact ALRUD partners.

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Kind regards,
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