



RUSSIA

The Supreme Court of the Russian Federation clarified some issues on applying antitrust legislation

On 4 March 2021 the Supreme Court of the Russian Federation issued Ruling No. 2 “On Certain Issues Arising in Connection with the Application of Antitrust Legislation by the Courts” (hereinafter the “Ruling”). The Ruling contains a number of important clarifications on topical issues concerning antitrust legislation that entities encounter when doing business.

Corporate groups

EXCLUDING AN ENTITY FROM THE LEGAL REGIME APPLICABLE TO CORPORATE GROUPS

The Supreme Court moved away from the formal approach when applying provisions on corporate groups. An entity which is a member of a corporate group may not be subject to the legal regime applicable to corporate groups if it is established during consideration of the case that the entity effectively acts independently when determining its conduct on a product market. For example, the other participants of the group lack the legal (contractual, corporate) and organisational (management) powers required to influence its conduct.

Abuse of dominant position

VIOLATION OF OBLIGATIONS AND MISCONDUCT OF THE DOMINANT ENTITY

The Supreme Court clarified that if a dominant entity violates the requirements of civil and other legislation when entering into contractual relations and performing contractual obligations, taken on its own this does not prove that the entity is engaging in monopoly activity. It should be established whether the dominant entity would have behaved in this way if it had not held a dominant position on the market.

IMPOSING UNFAVOURABLE PROVISIONS

Imposing unfavourable provisions may constitute one form of abuse of a dominant position. The Supreme Court cited examples of such provisions:

- The sale of a product is contingent on the purchase of a second product in cases where the first product can be used without the second product or other suppliers sell these products separately;
- Subsequently an additional product has to be bought by the buyer from a specific manufacturer or the infrastructure of a specific entity must be used;
- The seller refuses to provide a guarantee on the quality of the first product if the buyer refuses to acquire related products.

At the same time, one should consider whether a business entity dominant on the market has a legal interest in establishing unfavourable provisions in a contract and whether the restrictions imposed on counterparties are proportionate to this interest.

CURTAILING ANTITRUST VIOLATIONS

The Supreme Court clarified that the counterparty of a dominant entity may curtail an antitrust violation both before and after the conclusion of a contract. At the same time, if a counterparty concludes a contract with a dominant entity and does not issue any objections at the time of the conclusion of the contract, this does not constitute per se a factor that rules out the possible qualification of such conduct as abuse.

UNSUBSTANTIATED TERMINATION OF THE MANUFACTURING OF PRODUCTS, REFUSAL TO CONCLUDE A CONTRACT OR AVOIDANCE OF THE CONCLUSION OF A CONTRACT

The unsubstantiated termination of the manufacturing of products, refusal to conclude a contract or avoidance of the conclusion of a contract may be declared abuse of the dominant position.

When assessing whether the refusal to manufacture (sell) a good was substantiated, the following factors may be taken into account:

- at the time of the refusal to conclude a contract, it was reasonably possible to manufacture or sell the products, *inter alia*, with due account of the external environment governing the functioning of the product on the market;

- if the manufacturing of the products goods on the terms and conditions of the seller or on the terms and conditions proposed by the counterparty is economically viable, with due account of limitations on the resources at the disposal of the business entity.

UNSUBSTANTIATED PRICING OF PRODUCTS

The unsubstantiated establishment of different prices (tariffs) for the same product may be declared abuse of the dominant position of an entity. The Supreme Court clarified that the establishment of identical prices (tariffs) within different regions could also be declared an abuse.

The establishment of different prices (granting of discounts) does not constitute an abuse, depending on the volume of the products being acquired by the buyer, provided that this criterion applies to all counterparties equally.

Cartels

CARTEL AGREEMENT

The Supreme Court stated that the similar conduct of several business entities per se does not constitute grounds for concluding that they are parties to a cartel agreement. One should consider whether there were other reasons for similar conduct, for example, if it complies with the terms for doing business which have been established (changed) on the market, or the entities had assessed similarly the situation on the market.

PROVING THAT THERE IS A CARTEL

It is up to the antitrust authority to prove that there is a cartel.

The Supreme Court moved away from the formal approach to investigating cartel agreements, instructing courts to consider economic and other factors which determine the conduct of parties to such an agreement.

In particular, one should take account of the expected state of the market and the position of its participants if the contested agreement had not been concluded, and if implemented – the actual impact of the agreement on the state of competition on a corresponding product market.

Courts should duly consider the arguments of the parties to the agreement which demonstrate that there are reasonable economic reasons and/or other facts attributable to legislation for the parties to the agreement to reach corresponding understandings.

Antitrust requirements on competitive bidding

CONTESTING AGREEMENTS CONCLUDED AFTER COMPETITIVE BIDDING

The period of the statute of limitations for agreements concluded after competitive bidding conducted in violation of the requirements of antitrust legislation is one year from the date of the conclusion of the agreement or from the date of the completion of the mandatory procedure¹, competitive procurement.

The Supreme Court stressed that an agreement can be concluded based on the results of the mandatory procedure or competitive procurement if it has already been executed.

The person who should have been declared the winner is entitled to demand the reimbursement of losses, regardless of whether it filed an independent claim for the invalidation of the competitive bidding and application of the consequences of their invalidity.

Authorities of the antitrust authorities

WARNINGS AND INSTRUCTIONS OF THE ANTITRUST AUTHORITIES

The Supreme Court clarified that a warning of the antitrust authority issued to a person to terminate actions (inaction) only contains a preliminary assessment of the actions (inaction) of the person from the perspective of a violation of antitrust legislation. Such a warning may not establish violations of antitrust legislation and indicate that measures of state coercion are being imposed.

The instructions of the antitrust authority aimed at the termination of the identified violations of antitrust legislation and elimination of their consequences may in certain instances refer to a change in the prices of products, the conclusion or termination of an agreement, change in the provisions of the agreement. However, the antitrust authority may not instruct parties to include specific provisions in an agreement, for example, on the price, on the volume and terms and conditions governing the sale of products to a specific buyer.

Disputes with the antitrust authorities

MATERIAL PROCEDURAL VIOLATIONS

The Supreme Court cited examples of material procedural violations which might result in the revocation of the decisions or instructions of the antitrust authority:

¹ Mandatory procedures – procedures which must be implemented by virtue of the law and have been introduced to prevent and curtail monopoly activity, form a competitive product market, create the environment for the effective functioning of such a market, for example, competitive procedures for determining the supplier in accordance with Article 24 of the Law on the Contract System.

- A decision was adopted on establishing a violation of antitrust legislation in the respondent's actions without the previous issue of an opinion on the facts of the case;
- The statute of limitations had expired;
- The person had not been notified of the time and venue of the consideration of the case by the antitrust authority;
- A decision was adopted in a case when there was no quorum;
- The persons regarding which proceedings had been conducted had not been given an opportunity to study the materials of the case, *inter alia*, the analytical report on the state of competition on the product market;
- There was no opportunity to give any explanations on the case prior to the adoption of the decision.

PRIVATE CLAIMS

The Supreme Court clarified that aggrieved parties may file private claims with a court, bypassing the administrative procedure for filing appeals.

If a violation was established by a decision of the antitrust authority, the claimant (aggrieved party) is released from proving this fact and substantiating its legal interest in protecting its rights. The respondent may submit evidence to the court rebutting the conclusion of the antitrust authority regarding the commission of the offence.

Recovery of losses

SIZE OF THE LOSSES CAUSED BY AN ANTITRUST VIOLATION

The Supreme Court indicated ways to determine the size of losses caused by an antitrust violation:

- Comparison of the price before, in the period of and/or after the violation;
- Analysis of financial performance indicators (standard industry margin);
- Use of other tools used to analyse a market, including its structures.

If the costs of the business entity (aggrieved party), which arose as a result of the antitrust offence, were passed onto end buyers, the offender is not released from reimbursing losses. In this case, the difference between the overstated price paid by the business entity and the costs passed onto buyers should be reimbursed.

We recommend that you duly consider the indicated clarifications when doing business.

We would be delighted to answer any questions that you may have on this topic.

The full text of the Ruling is posted on the official website of the Supreme Court of the Russian Federation: <http://www.supcourt.ru/documents/own/29742/>.



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