DIZIONARIO SISTEMATICO DEL DIRITTO DELLA CONCORRENZA

a cura di

Lorenzo F. Pace

ESTRATTO

Jovene editore 2013

Private enforcement of Antitrust Law in Russia

Summary: **I.** Key features of Russian competition law: history, sources, public enforcement: structure of the FAS and types of FAS decisions. – 1. Competition law in modern Russia. – 2. Russian regulator - the Federal Antimonopoly Service. – 3. Powers of the FAS. – 3.1. Administrative Proceedings. – 3.2. Legal Effect and Challenge of FAS Decisions. – 3.3. New Tools: Notices and Warnings. – **II.** Historical legislative development of private enforcement of competition law in Russia. – **III.** Types of private enforcement actions and available remedies. – 1. Claim for damages and the "pass-on defense". – 2. Claim for unjust enrichment. – 3. Claim to compel performance by the other party. – 4. Claim for injunctive relief. – 5. Miscellaneous. – **IV.** Private enforcement actions: jurisdiction and arbitrability. – 1. General note on the Russian judicial system. – 2. Arbitrazh (Commercial) Courts. – 3. General Jurisdiction Courts. – **V.** Limitation periods for private enforcement actions. – **VI.** Public enforcement vs. private enforcement: follow-on and standalone actions, participation of competition authorities. – 1. Follow-on actions under Russian law. – 2. Standalone actions under Russian law. – 3. Conflict of actions. – 4. Liability issues. – 5. Participation of the FAS. – 6. Statistics on Russian private and public enforcement. – **VII.** Future possible trends: class actions, legal fees, etc. – 1. Class actions. – 2. Legal Fees. – 3. Competition Road Map.

I. Key features of Russian competition law: history, sources, public enforcement: structure of the FAS and types of FAS decisions

1. *Competition law in modern Russia*. – The very first Russian competition statute – the Law of the Russian Soviet Federative Socialistic Republic «On Competition and Restriction of Monopolistic Activities in Markets of Goods» – was adopted on March 22, 1991, just a few months before the dissolution of the Soviet Union in December 1991 (the «1991 Competition Law»).

Fifteen years later – in 2006 – the Russian State Duma passed the Federal Law «On the Protection of Competition» which entered into force in October 2006 (the «Russian Competition Law»). Since then, the Russian Competition Law has been amended several times. The most recent change occurred in 2011 when the Duma approved the so-called «Third Antitrust Package» introducing more detailed provisions on inadmissible agreements, concerted actions and monopolistic prices.

For a number of years the main goal of Russian antitrust authorities was the harmonization of Russian competition law with EU legislation. The head of the Federal Antimonopoly Service Igor Artemyev emphasized in a number of interviews that Russia would continue its efforts to bring its competition laws and enforcement practices in line with the best practices of the world's most reputable regulators.

According to Article 1.1 of the Russian Competition Law, the objectives of the law are «to ensure the integrity of the economic territory, free movement of goods, freedom of economic activity in the Russian Federation, protection of competition and creation of conditions for the efficient functioning of commodity markets».

The Russian Competition Law generally prohibits *i*) abuse of a dominant position, *ii*) anti-competitive agreements (cartels, certain «vertical» agreements, etc.), *iii*) concerted actions, *iv*) unfair competition, *v*) decisions/resolutions and actions (or omissions to act) by state and municipal bodies, state non-budget funds and the Central Bank which restrict competition[1].

The Russian Competition Law is also the key statute in the area of merger control in Russia. It establishes triggering

[1] Art. 10, 11, 14, 15 and 16 of the Russian Competition Law. Translation of the Russian Competition Law is available at the FAS web site, URL: *http://en.fas.gov.ru/legislation/legislation_50915.html*.

events and asset/revenue thresholds for the acquirer and the target company in Chapter 7 filings, and determines the filing procedure. Currently the scope of Russian merger control covers transactions relating to:

– assets of Russian financial organizations;

– fixed production and/or intangible assets located in Russia; and

– voting shares/interests in, or rights in respect of, *i*) Russian companies and non-profit organizations, or *ii*) foreign persons (organizations) whose supply of goods into Russia exceeded one billion Rubles in the year preceding the date of the transaction, or other transaction which is subject to state control.

Competition law is regarded as a «matter of federal jurisdiction». The constituent entities (regions) of the Russian Federation cannot adopt local competition laws, and there is no parallel regional system of enforcement.

2. *Russian regulator - the Federal Antimonopoly Service*. – The Federal Antimonopoly Service («FAS») oversees compliance with competition law in Russia. The FAS (directly or through its regional departments) clears mergers and acquisitions that trigger the relevant thresholds and combats cartels and unfair competition practices. The FAS is also in charge of a foreign strategic investment clearance, where it acts as the first-stage approval body before an investor's application goes to the Government Commission for Foreign Investments in the Russian Federation. In addition, the FAS is the authorized body responsible for oversight of state procurement, retail trade, advertising, and natural monopolies.

The FAS reports directly to the Government of Russia. The head of the FAS (Director) and his/her deputies are appointed by the Government. The Director is solely responsible for the running of the FAS.

The FAS has several divisions for different industry sectors including financial markets, electricity, transport and communications, energy, etc. The Director and his/her deputies each supervise work of several FAS divisions.

In addition, the FAS has a total of 83 departments in all regions of Russia which conduct market analysis and investigations, monitor compliance with laws relating to competition, state procurement, advertising, natural monopolies and retail trade and clear certain mergers and acquisitions. According to the FAS[2], in 2012 about 98% of the FAS decisions were issued by the FAS regional departments. Each FAS division and regional department has its own head appointed by the Director of the FAS. There is no set internal structure for regional FAS departments, but the total number of employees that can be hired is approved by the central FAS department. Usually regional FAS departments have a similar structure to that of the central FAS department (head-deputies-heads of divisions).

Since 2004, Igor Artemyev holds the office of the Director. Mr. Artemyev is highly respected in the business community for his professional experience.

According to FAS reports[3], the total headcount of the FAS (including regional departments) is around 3000 people.

3. *Powers of the FAS*. – The jurisdiction of the FAS is established by Chapter 6 of the Russian Competition Law.

As a national competition body, the FAS can investigate violations of competition law, impose fines and bring court claims to obtain orders preventing violation of competition laws.

In 2009, the powers of the FAS were significantly extended after detailed provisions on antitrust investigations were introduced into the Russian Competition Law[4]. The FAS is now able to conduct unscheduled inspections, search premises and seize documents.

The FAS is authorized to issue decisions and directives (*predpisanie*) within

[2] Main Results of work in 2012 - presentation by I. Artemyev, available at the FAS web site, URL: *http://fas.gov.ru/analytical-materials/analytical-materials_30895.html*, p. 8.

[3] See FAS web site, URL: *http://fas.gov.ru/about/overview/*.

[4] Chapter 6 of the Russian Competition Law.

the scope of its jurisdiction. This authority is exercised by FAS commissions, which decide competition law violation cases. The commission will issue decisions and directives in internal administrative proceedings relating to competition law violations which are regulated by Chapter 9 of the Russian Competition Law (see *infra* § 1.3.1 for more details).

Although the jurisdictions of the central FAS and its regional departments are distinct, the central FAS department can take the lead in investigations initiated by regional departments.

The FAS is not allowed to initiate criminal proceedings against the officers of companies involved in cartels or other violations of competition law. Currently, the FAS is lobbying for amendments to the relevant laws to obligate enforcement bodies (such as the Ministry of Interior Affairs and Investigation Committee) to initiate criminal proceedings based on FAS decisions.

3.1. *Administrative Proceedings*. – Grounds on which the FAS may initiate administrative proceedings include: discovery of evidence of violation of competition law, information provided by state bodies and mass media or evidence obtained from inspections. The limitation period is 3 years from the date of violation (or the end of violation if the violation continued for a period of time).

The FAS may initiate administrative proceedings and issue decisions or directives at the request of a party who believes that its rights have been infringed by a violation of competition law by another party. In such a case, the FAS's decision or directive may not only establish the fact of a violation, but also oblige the party responsible to undertake certain actions aimed at remedying the infringement of rights. Under such circumstances the FAS will constitute an out-of-court (administrative) venue for private enforcement.

In each particular case, the FAS forms a commission consisting of at least three FAS employees. The FAS Director, his/her deputies or the head of a FAS subdivision serves as chair of the commission.

Proceedings brought by the FAS are similar to court proceedings – the alleger infringer, as well as the party or parties who submitted information on the alleged violation, actively participate in the proceedings. The commission reviews the materials submitted by the parties, hears witnesses and experts, and can decide to consolidate or split different cases.

The commission has to take final decision within 3 months from the commencement of the proceedings. In exceptional cases this term can be extended to 6 months.

3.2. *Legal Effect and Challenge of FAS Decisions*. – If the FAS commission finds that a violation of competition law has occurred[5], it issues a decision and a directive ordering the particular person to perform certain actions.

The FAS commission is also entitled to initiate a formal administrative proceeding and impose administrative fines as envisaged by the Russian Code of Administrative Offences. Other sanctions (such as disqualification of an officer of a company) can only be imposed by the court. If the FAS believes that there are grounds for disqualification, it submits its documentation relating to the proceedings to the court.

Decisions and directives of the FAS can be challenged in the state arbitrazh (commercial) court[6] within three months of the date of issue. There is no administrative procedure to challenge FAS decisions and directives.

3.3. *New Tools: Notices and Warnings*. – Since 2011, the FAS is also able to issue notices and warnings to prevent violation of competition laws[7].

Notices. Pursuant to Article 39[1] of the Russian Competition Law: a 'notice' is «a written notice issued by the FAS to a company that holds dominant position in the

[5] Art. 39(5) of the Russian Competition Law.

[6] See Section 4 for details of the Russian judicial system and types of courts.

[7] Art. 25.7 and 39.1 of the Russian Competition Law.

market to stop certain inadmissible activities (such as economically unjustified refusal to enter into a contract or inclusion of unfavorable provisions into a contract with a counterparty). Notices are not issued in cases of monopolistic pricing or other types of abuse of a dominant position» and in cases of other violations of competition law by entities which have no dominant position.

The FAS is not allowed to initiate administrative proceedings in respect of the abovementioned inadmissible activities before it has issued a notice to the infringer and the period for voluntary cure of the breach as indicated in the notice has expired.

The form and procedure for issuance of notices was approved by FAS Order No. 874 dated December 14, 2011.

Warnings. Pursuant to Article 25[1] of the Russian Competition Law: a 'warning' is «a written notice issued by the FAS to a company's officer for the purposes of preventing violation of competition law where, based on an officer's public statement or announcement as to the company's planned actions in a commodity market, the FAS believes that such planned actions may lead to a violation of competition law, but there are as yet no grounds for initiation of formal administrative proceedings».

The form and procedure for issuance of warnings was approved by FAS Order No. 873 dated December 14, 2011.

Notices and warnings can be issued by authorized FAS officers individually (i.e. without creation of a commission). Though not expressly mentioned in the Russian Competition Law, such notices and warnings can be appealed in the state arbitration (commercial) court[8] within three months of the date of issue based on the general rule of Article 198 of the Arbitrazh (Commercial) Procedural Code of Russia as any other act of a state body.

In the last few years, the FAS has become increasingly active in enforcing the Russian Competition Law. The FAS reports that in 2012 it issued 8,173 decisions for violations of competition law[9]. The total amount of fines it imposed on companies exceeded 280m EUR. In 2012, the FAS issued 1,423 notices and 73 warnings[10] and plans to use these new instruments more actively in 2013.

II. Historical legislative development of private enforcement of competition law in Russia

The concept of private enforcement existed in Russian competition law from the very beginning. Under Article 22 of the 1991 Competition Law, a company that violated competition law was liable for damages resulting from the breach. Part 2 of Article 22 of 1991 Competition Law suggested that such damages should be determined by the court.

In 1995, the 1991 Competition Law was amended and a following special provision on private enforcement was introduced into Article 26 of the 1991 Competition Law: «If the actions (or failure to act) of a business entity in violation of competition law results in losses to another business entity or other person, such losses shall be compensated by the wrongdoer following the rules of the civil legislation.»

However, in 2002 this paragraph was excluded from Article 26 of the 1991 Competition Law[11]. It may well be that the lawmakers thought there was no need for a special provision on private enforcement in the competition law because Article 22.1 of 1991 Competition Law contained a blanket provision that companies would bear civil, administrative or criminal liability for violation of competition law.

In one of the first private enforcement cases – *NeftGazPostavka v. Gazprom* – the

[8] See Section 4 for details of the Russian judicial system and types of courts.

[9] Main Results of work in 2012 - presentation by I. Artemyev, available at the FAS web site, URL: *http://fas.gov.ru/analytical-materials/analytical-materials_30895.html*, p. 7.

[10] Main Results of work in 2012 - presentation by I. Artemyev, available at the FAS web site, URL: *http://fas.gov.ru/analytical-materials/analytical-materials_30895.html*, p. 5.

[11] Federal Law No. 122-FZ of October 9, 2002.

court upheld the claim of NeftGaz-Postavka against Russian gas giant Gazprom and its affiliates, who caused losses to NeftGazPostavka by abusing their dominant position in the market, by reference to the general provisions of Russian Civil Code on damages and torts[12].

In particular, the court referred to Article 15 of the Russian Civil Code that allows a person whose rights are violated to claim damages, and Article 1064 of the Russian Civil Code that requires a person who causes harm to another person to pay damages.

Similar to the 1991 Competition Law, Article 37 of the new Russian Competition Law adopted in 2006 contained a blanket provision that companies shall be liable for violations of competition law as envisaged under Russian legislation.

In 2011, as a part of Third Antitrust Package, Article 37 of the Competition Law was supplemented with part 3 which reads as follows[13]: «Persons whose rights and interests are violated as a result of a breach of competition law, shall have the right to bring claims in the courts following the procedure established by law, including claims for the restoration of violated rights, compensation of losses, including lost profits, and compensation for harm caused to property.»

As one can see, in addition to claims for damages the Third Antitrust Package listed other types of claims that can be brought by a private claimant. Notably, this list does not include claims for unjust enrichment, which are often brought by companies but not always upheld by the courts[14].

III. Types of private enforcement actions and available remedies

Article 37 of the Russian Competition Law quoted above lists types of claims that a private claimant can bring before the court: «(…) including claims for the restoration of violated rights, compensation of losses, including lost profits, and compensation for harm caused to property». The law uses the term «including» (in Russian «v tom chisle»), which should be interpreted as «including but not limited to». Experts agree that private enforcement can include other types of civil claims based on the general rules of the Civil Code, specifically, Articles 10(1), 11 and 12[15].

Here we will briefly cover the main types of private enforcement actions.

1. *Claim for damages and the "pass-on defense"*. – As with other types of civil claims, in a claim for damages the burden of proof rests on the claimant. The claimant has to prove *i*) a violation of competition law[16], *ii*) the existence and quantum of losses incurred and *iii*) a causal relationship[17]. The claimant can use any method for the calculation of

[12] See decision of the Moscow Circuit Arbitrazh (Commercial) Court No. KG-A40/6610-01 of November 29, 2001.

[13] Based on «Garant» translation available at URL: *http://base.garant.ru/3835911/*. Free of charge translation is also available at the FAS web site, URL: *http://en.fas.gov.ru/legislation/legislation_50915.html*.

[14] See also Section 3.4. below.

[15] Art. 12 of the Russian Civil Code provides for the following: «The civil rights shall be protected by way of: – the recognition of the right; – the restoration of the state of affairs, which existed before the given right was violated, and the suppression of the actions that violate the right or create the threat of its violation; – the recognition of the disputed deal as invalid and the implementation of the consequences of its invalidity, and the implementation of the consequences of the invalidity of an insignificant deal; – the recognition as invalid of an act of the state body or of the local self-government body; – the self-defence of the right; – the ruling on the execution of the duty in kind; – the compensation of the losses; – the exaction of the forfeit; – the compensation of the moral damage; – the termination or the amendment of the legal relationship; – the non-application by the court of an act of the state body or of the local self-government body, contradicting the law; – using the other law-stipulated methods». Translation by Garant, URL: *http://base.garant.ru/ 3812516/*.

[16] Unless there is already a court decision to that effect or an undisputed decision of FAS. See also Section 6.1. below regarding follow-on actions.

[17] Rudomino V., Numerova A. Civil claims in antitrust laws: theory and practice in Russia // Corporate Lawyer 2010, No. 5. p. 50; Report of NP «Sodeistvie Razvitiyu Konkurenzii»: Problems of private enforcement. February 3, 2012. p. 1. URL: *http://www.competitionsupport.com/news/detail.php?ID=422*.

damages as there is no specified approach. Note here that Article 37 of the Russian Competition Law expressly includes losses caused to property and lost profit.

Experts believe that high standards of proof in relation to losses are significantly impeding the development of private enforcement in Russia[18]. In a number of cases claims have been dismissed because the claimants were not able to provide sufficient evidence of a causal relationship between the defendant's actions and losses incurred by the claimant, as well as the quantum of those losses[19].

Claims for damages resulting from violation of competition law are viewed by the courts as independent of other means of protecting a party's rights under the contract or rules applicable to the relevant transaction. For instance, in *Kompaniya «Stal» v. Russian Railways* the Moscow Circuit Arbitrazh (Commercial) Court[20] found that the claim for reimbursement of losses filed by the claimant in connection with a violation by Russian Railways of competition laws was not associated with the transportation and service contract executed between the parties, and the dispute resolution procedure specified under the transportation contracts should not be applied.

The so called «pass-on defense» – i.e. the argument by a defendant that the plaintiff has (or could have) transferred the losses to its customer and thus did not incur any losses – is not widely used in Russian court practice. According to some experts, a literal interpretation of the Russian Civil Code would in theory allow any person that can provide evidence that they have incurred losses as a result of an antimonopoly law violation (regardless whether such person is a direct, intermediate or ultimate customer) to claim damages[21].

The courts appear to be applying the relevant provisions reasonably and accepting the 'pass-on defense' under relevant circumstances. For example, in *ProdImport v. the Ministry of Economic Development and the Ministry of Industry and Trade* the arbitrazh (commercial) courts at each instance dismissed the claim on the basis that the claimant had not incurred any losses because all losses had been passed onto the claimant's customers[22].

2. *Claim for unjust enrichment*. – Claims for unjust enrichment are common in the context of a transaction alleged to be null and void where the claimant seeks reimbursement of goods and funds transferred to the counterparty. In particular, under Russian law a transaction which does not comply with relevant legal requirements is deemed null, which makes any transaction executed in violation of the Russian Competition Law automatically null and void by operation of law, save for transactions which the Competition Law directly describes as voidable transactions[23].

The Plenum of the Supreme Arbitrazh (Commercial) Court in its decision «On Certain Issues Arising In Connection With Application Of Antimonopoly Laws By Arbitrazh (Commercial) Courts» No. 30 dated June 30, 2008 (hereinafter, the

---

[18] Kulik Y. Results: Civil Claims - the way to sustainable practice // Vedomosti of November 28, 2010.

[19] E.g., see Supreme Arbitrazh (Commercial) Court ruling No. VAS-6360/12 dated June 13, 2012. See also Report of NP «Sodeistvie Razvitiyu Konkurenzii»: Problems of private enforcement, p. 9.

[20] Decision No. A40-2196/11-50-19 dated October 3, 2011.

[21] For more details see Report of NP «Sodeistvie Razvitiyu Konkurenzii»: Problems of private enforcement, p. 3.

[22] Moscow Circuit Arbitrazh (Commercial) Court decision No. A40-33070/11-105-305 dated February 9, 2012, as further sustained by the Supreme Arbitrazh (Commercial) Court ruling No. VAS-6360/12 dated June 13, 2012.

[23] Art. 34 (2) of the Russian Competition Law: «Transactions, other actions stated in Articles 28 and 29 of this Federal Law, which were exercised without preliminary consent of the antimonopoly body are recognized invalid at the antimonopoly body's claim if these transactions or other actions led or can lead to restriction of competition, including such as in the result of emerging or strengthening of the dominant position». See, for example, Povolzhsky Circuit Arbitrazh (Commercial) Court decision No. A65-25267/2010 dated November 29, 2011.

«Plenum Decision») also noted that both the courts and the FAS can recognize abuse of a dominant position and antimonopoly law violations where the actions or omissions in question are not expressly specified in the relevant provisions of the Russian Competition Law, provided that the courts or the FAS find that such actions or omissions impose unreasonable restrictions or conditions on other market players[24]. Therefore, a claim for unjust enrichment can be raised in the context of a 'null and void' action even where the alleged violation of competition law is not expressly specified in the Russian Competition Law.

However, the court practice with respect to claims for unjust enrichment is not straightforward. For instance, in *Voskresensk Mineral Fertilizers v. Apatit*, the court analyzed a claim for unjust enrichment out of a null and void contract entered into between the parties where Apatit, acting as supplier, abused its dominant position and violated Article 10 of the Russian Competition Law[25]. The claim for unjust enrichment was initially denied at several instances, but was finally upheld by a decision of the 9th Arbitrazh (Commercial) Appellate Court[26] and the claimant was awarded reimbursement of the amounts paid for the supplied goods in excess of average market prices.

3. *Claim to compel performance by the other party*. – There are many instances of claims for the termination or amendment of contracts concluded under circumstances where the counterparty is abusing a dominant position, as well as claims to compel a counterparty to enter into a contract where it has unlawfully refused to do so.

The actions relating to a counterparty's refusal to enter into a contract are more common in practice. Such claims are viewed as legitimate by courts provided that the relevant counterparty is legally bound to enter into the relevant agreement pursuant to the Civil Code, other provision of law, or on account of a voluntarily-accepted obligation. The Civil Code in particular obliges the relevant vendors to enter into so called «public» agreements[27] and bank account agreements[28]. The Russian Competition Law prohibits unreasonable refusal to enter into agreement by the dominant market players[29]; similar provisions can be found in the Federal Law «On Natural Monopolies» and some other laws. Accordingly, courts dismiss such claims where no legal obligation is imposed on the defendant to enter into an agreement with the claimant[30].

4. *Claim for injunctive relief*. – Often, claimants seek to restrain a counterparty from engaging in unlawful behavior. Such claims can sometimes be raised without a claim for damages. However, in such cases the claimant must first establish that there has been a violation of competition law. If the court finds that the defendant has violated competition law or abused its rights in a way which has (or may have) resulted in a restriction of competition, the court may order an injunctive relief.

This type of claim is common against dominant market players and natural monopolies, as well as against utility providers, where customers do not have and cannot choose alternative utility providers.

5. *Miscellaneous*. – «Null and void» actions, as described above, also make up a large proportion of private enforcement actions. They quite often arise out of commercial contracts between legal entities, as well as in situations where a customer seeks the cancellation of certain burdensome provisions unlawfully imposed by

---

[24] Paragraph 2 of item 4 of the Plenum Decision.

[25] In particular, Part 1(6) of Art. 10: «fixing different prices (tariffs) of the same commodity which is not substantiated economically, technologically or in some other way, if not otherwise established by the federal laws».

[26] Decision No. 09AP-10029/2009-GK of July 29, 2009.

[27] Art. 426 of the Civil Code.

[28] Art. 846(2) of the Civil Code.

[29] Item 5 of Art. 10(1).

[30] Moscow City Court ruling No. 11-20382/2012 dated October 12, 2012.

the other contracting party, e.g., by a bank or an insurance company[31].

Further, under Article 12 of the Russian Civil Code a person whose rights are violated can claim for the restoration of the state of affairs that existed before the violation[32]. Restoration claims are generally rarely used. However, they have been widely employed lately in connection with the implementation of the state procurement legislation, where, for example, interested parties can use such restoration claims to restore their rights to participate in an auction or a bidding process from which they have been unlawfully excluded[33].

Although Russian law provides for a number of other private remedies for infringement of rights associated with violation of antimonopoly laws, the court practice available shows that these are rarely used.

For instance, the Russian Civil Code (Article 10(2)) provides that a party seeking enforcement with the aim of infringing another party's right and/or abusing its rights or dominant position and/or acting so as to restrict competition shall be refused protection in court. However, the courts do not appear to apply this rule widely in private enforcement actions[34].

Although under Russian law a variety of actions are available to a person whose rights have allegedly been infringed by a competition law violation, court practice shows that it is sometimes the unwise choice of remedy by the claimant that impedes private enforcement[35].

IV. Private enforcement actions: jurisdiction and arbitrability

1. *General note on the Russian judicial system*. – The Russian judicial system includes:

– the Constitutional Court of the Russian Federation, constitutional courts of constituent entities of the Russian Federation;

– the Supreme Court of the Russian Federation, supreme courts of the republics, provincial and regional courts, courts of cities of federal status, courts of the autonomous regions and autonomous circuits, district courts, military and specialized courts and justices of the peace who are judges of general jurisdiction of the constituent entities of the Russian Federation (collectively, the «general jurisdiction courts»)[36]; and

– the Supreme Arbitrazh (Commercial) Court of the Russian Federation, federal arbitrazh (commercial) courts of circuits (arbitrazh (commercial) cassation courts), arbitrazh (commercial) appellate courts and arbitrazh (commercial) courts of constituent entities of the Russian Federation (collectively, the «state arbitrazh (commercial) courts») that have exclusive jurisdiction over cases arising out of commercial or economic activity.

Depending on the nature of the claim and type of claimant, private enforcement actions may fall into the jurisdiction of either the federal arbitrazh (commercial) courts or the general jurisdiction courts[37], with court procedure regulated by the Civil Procedure Code or the Arbitrazh

---

[31] For example, see Moscow City Court ruling No. 33-2725 dated February 14, 2012.

[32] Such claims are similar in nature to the claims for injunctive relief but are more broad in nature, as they are aimed not only at preventing unlawful behavior by the other party, but also at actual restoration of the stand of affairs as before such unlawful behavior.

[33] The Supreme Arbitrazh (Commercial) Court ruling No. VAS-2224/13 dated March 5, 2013; The Supreme Arbitrazh (Commercial) Court ruling No. VAS-11539/11 dated November 18, 2011.

[34] Presidium of the Supreme Arbitrazh (Commercial) Court in its decision No. 2123/12 dated July 1, 2012 noted that the courts of first and appellate instances should find a balance between the freedom of contract and the abuse of rights, and take into account competition law principles. See also Report of NP «Sodeistvie Razvitiyu Konkurenzii»: Problems of private enforcement, p. 9.

[35] For example, the claimants may choose to challenge the relevant FAS decision that has denied a violation instead of protecting their rights by means of claim for damages (see appelate ruling of the Moscow City Court No. 11-31281 dated December 18, 2012).

[36] See general information available at the web site of the Supreme Court of the Russian Federation. URL: *http://www.vsrf.ru*.

[37] See also citation of Art. 37(3) of the Russian Competition Law in Section 2 above.

(Commercial) Procedure Code respectively.

2. *Arbitrazh (Commercial) Courts*. – According to the Russian Arbitrazh (Commercial) Procedure Code (Art. 27)[38]:

– «1. The scope of competence of commercial courts includes economic disputes and other cases related to the exercise of entrepreneurial and other economic activities.

– 2. Commercial courts settle economic disputes and consider other cases with the participation of organizations which are legal entities, of individuals, engaged in entrepreneurial activities without forming a legal entity and having the status of an individual entrepreneur obtained in the manner established by laws (hereinafter referred to as "individual entrepreneurs"), and in the instances provided for by this Code and other federal laws, with the participation of the Russian Federation, the constituent units of the Russian Federation, municipal formations, state bodies, local government bodies, other bodies, state officials, formations which do not have the status of a legal entity, and individuals which do not have the status of an individual entrepreneur (hereinafter referred to as "organizations and individuals"). (…)».

Therefore, should the private enforcement claim be brought by a person or an entity engaged in commercial activity, such a claim should be brought to the relevant first-instance arbitrazh (commercial) court, i.e. arbitrazh (commercial) court of the constituent entity of the Russian Federation at the defendant's location.

It is still not clear whether a contractual dispute resolution clause can or should have precedence in the choice of arbitration court by the claimant in a private enforcement action. Generally, the question of whether a party has violated antimonopoly law should fall within the public law sphere and not be covered by any contractual arrangements, but the parties may structure the dispute resolution clause quite broadly so that it covers any lawsuits between them relating to the contract. Therefore, the question of whether the claim relates to the contractual arrangements or to a competition law violation[39] must be determined on a case-by-case basis.

3. *General Jurisdiction Courts*. – Notwithstanding the above, Russian legislation does not prevent any other person or organization that does not engage in commercial activities to initiate private enforcement action based on the general rules of the Civil Code and the Russian Competition Law[40], if that person or organization believes that their rights and interests have been violated as the result of a breach of competition law by a third party. In such cases, private enforcement action should be brought in the relevant general jurisdiction court[41].

For example, private enforcement actions handled by the general jurisdiction court include claims by customers against vendors who have abused their rights and imposed unreasonable obligations on them.

However, to date this choice of venue appears to be rare for private enforce-

[38] Translation into English is available at the web site of the Supreme Arbitrazh (Commercial) Court of the Russian Federation, URL: *http://www.arbitr.ru/law/perevod_apk/*.

[39] Such ambivalence can be also illustrated by the following two cases, which did not address the choice of dispute resolution venue as such but gave consideration to the applicability of contracts to the parties' respective claims in each case. In *Kompaniya «Stal» v. Rusian Railways* case the Moscow Circuit Arbitrazh (Commercial) Court (decision No. A40-2196/11-50-19 dated October 3, 2011) found that the claim for reimbursement of damages was not associated with the transportation and service contract between the parties. In another case, *Chelyabinsk Chemical Plant «Oksid» v. Russian Railways*, claim for unjust enrichment out of a similar violation by Russian Railways was viewed by the Ural Circuit Arbitrazh (Commercial) Court as associated with the transportation and service contract between the parties (decision No. F09-835/13 dated February 25, 2013).

[40] See citation of Art. 37(3) of the Russian Competition Law in Section 2 and footnote 9 above.

[41] In accordance with the Civil Procedure Code (Art. 23, 24), Justices of Peace have competence over monetary claims valued less than RUB 50,000, otherwise a claim should be filed with a district court.

ment claims. This is quite natural, as persons and organizations that do not have contractual relations with the party which is in breach of competition law are unlikely to realize that their rights and interests have been negatively affected by the unlawful behavior of a particular third party. Moreover, the jurisdiction of the general jurisdiction courts does not contemplate that such courts have substantial expertise in economic disputes associated with competition law violations, which normally require analysis of complex financial and legal issues.

Restrictions imposed by the Russian legislation on class actions (as discussed in Section 7.1 below) make it unlikely that customers or other groups not engaged in commercial activities will be pursuing their rights by way of private enforcement actions where the general jurisdiction courts would become more actively involved.

Another issue is that the publicly available information on civil lawsuits decided by the courts of general jurisdiction is scarce and not very well organized.

V. Limitation periods for private enforcement actions

The limitation period depends on the type of particular private enforcement action.

The general limitation period under the Russian Civil Code is three years from the date when the interested party learned, or should have learned, that its rights had been violated (Art. 169, 200), unless specific rules apply. This limitation period would apply to, *inter alia*, claims for damages.

Specific rules apply, for instance, to null and voidable transactions. The Russian Civil Code distinguishes between null and voidable transactions: whereas a null transaction is null *ab initio* and does not require any court decision to be deemed as such, a voidable transaction can be challenged by an interested party in court and declared invalid by a decision of the relevant court (Art. 166 of the Civil Code).

The Civil Code provides an exhaustive list of circumstances in which a transaction is deemed null *ab initio* and when a transaction can be challenged in court as a voidable transaction. Furthermore, a claim in connection with a voidable transaction may be only filed by persons expressly specified by the Civil Code, while a claim seeking nullification of an invalid transaction may be filed by any interested person, and the court itself has the right to apply for such nullification on its own initiative.

The limitation periods for claims in connection with null and voidable transaction are different. According to the Civil Code (Art. 181)[42]:

– «1. The time limit of the statute of limitations for a claim for applying the consequences of the invalidity of a transaction deemed null is three years. The period of limitations for such a claim is counted from the day on which the performance of the transaction commenced.

– 2. The time limit of the statute of limitations for a claim for declaring a voidable transaction invalid and for the application of consequences of the invalidity thereof is one year. The period of limitations for such a claim is counted from the day of termination of the violence or duress under the influence of which the transaction has been concluded (Item 1 of Article 179) or from the day when the plaintiff learned or should have learned about other circumstances deemed a ground for declaring the transaction invalid».

Typically, claims in connection with null and voidable transactions are associated with claims for unjust enrichment.

VI. Public enforcement vs. private enforcement: follow-on and standalone actions, participation of competition authorities

Russian legislation allows for both follow-on and standalone actions.

1. *Follow-on actions under Russian law*. – Most cases studied for the purposes of the present analysis were so

[42] Translation by «Garant», URL: *http://base.garant.ru/3812516/*.

called 'follow-on' actions, where claimants acted on the basis of administrative decisions of the FAS or court decisions that established a violation of competition law by the defendant.

While it is always beneficial to a private claimant to litigate on the basis of a legally valid court decision or undisputed FAS decision, certain specifics should be noted:

– Based on the available court practice, it appears that for a follow-on action to be successful it is very important that the relevant FAS decision and/or court ruling on the violation of competition law should refer not only in general terms to unlawful actions or omissions by the relevant party, but explicitly state that the party has caused a breach of antimonopoly legislation and specify the details of the breach[43];

– If the court/FAS decision does not specifically name the claimant as a party whose rights have been infringed by the violation, the claimant must provide sufficient evidence of the infringement of its rights and, if applicable, of losses caused[44];

– At the same time, in a number of cases the higher arbitrazh (commercial) courts ruled that a violation of antimonopoly law *per se* (as established by a court/FAS decision), will automatically be deemed to be a tort, with the legal consequences that entails[45]. Therefore, the claimant must bring sufficient evidence for a tort claim in case the relevant court/FAS decision only establishes a fact of competition law violation;

– The Russian courts are generally not bound by precedent[46]. For example, a decision in connection with the similar violation would not have a binding effect on subsequent claims, including if committed by the same defendant, but in relation to another claimant[47]. In the absence of guidance issued by the Plenums of the higher courts, this can lead to controversial and inconsistent application of the law in similar cases.

2. *Standalone actions under Russian law*. – There are no restrictions on standalone actions under Russian law. The Plenum Decision (item 20) expressly states that the choice of venue in which to bring a claim is at the sole discretion of the claimant, who may initiate either administrative (public) enforcement via the FAS or private enforcement in court, or even both procedures simultaneously. However, to date standalone actions have made up a relatively smaller proportion of private enforcement claims in Russia.

Such claims are usually of a dual nature – first, a claim to establish a violation of competition law and secondly a claim for a particular remedy, e.g., a claim for damages, unjust enrichment, injunction, or restoration of violated rights, etc., as the case may be. This imposes an additional burden on the claimant, who would need to prove the violation of competition law without the benefit of the expertise of the FAS, and may need to engage an independent professional expert to give evidence in the proceedings in support of the claim[48].

For example, *Voskresensk Mineral Fertilizers v. Apatit* mentioned in Section 3.4.

---

[43] See in particular decision of the Moscow Arbitrazh (Commercial) Court No. A40-29415/11-153-220 dated July 18, 2011.

[44] Moscow Circuit Arbitrazh (Commercial) Court decision No. A40-2196/11-50-19 dated October 3, 2011.

[45] Kulik Y. Results: Civil Claims - the way to sustainable practice // Vedomosti of November 28, 2010. See also Supreme Arbitrazh (Commercial) Court ruling No. VAS-6205/12 dated May 31, 2012 and Moscow Circuit Arbitrazh (Commercial) Court decision No. A40-121970/11-23-1037 dated August 30, 2012.

[46] Other than decisions by Plenums of the higher courts on interpretation of law and final decisions that are material to the case being decided.

[47] In *ProdImport v. the Ministry of Economic Development and the Ministry of Industry and Trade* (Moscow Circuit Arbitrazh (Commercial) Court decision No. A40-2196/11-50-19 dated October 3, 2011) the claimant referred to the decision in a similar lawsuit brought by GPK Rubezh against the same defendants. The court ruled that this other decision should have no prejudicial effect.

[48] Kulik Y. Civil remedies available in case of violation of competition laws: claim for damages // Konkurenziya i Pravo, No. 3, May-June 2011, p. 38.

above was a standalone action[49] where the court came to the conclusion that there was indeed an abuse of a dominant position by Apatit acting as supplier and that Apatit had been unjustly enriched. In another case – *Baltika v. Russky Solod*[50] – the court, on the contrary, dismissed the claim even though a violation of competition laws was established by the FAS.

Interestingly, we have seen that the FAS may sometimes be unwilling to support a standalone claim. In the same case of *Voskresensk Mineral Fertilizers v. Apatit*, the FAS did not uphold the claim on the basis that the claimant had not filed any complaint on the matter with the FAS prior to filing the lawsuit, and the arrangement in question had not been declared by the FAS as violating competition law[51].

3. *Conflict of actions*. – Issues may arise from the simultaneous pursuit of administrative proceedings by the FAS and court proceedings initiated by a private claimant and/or public authority.

(*i*) *Conflict of court proceedings*. – The Arbitrazh (Commercial) Procedure Court (Art. 130(9)) enables the court to suspend proceedings if it finds that there is another court proceeding associated with the relevant claim and that the claim cannot be decided before the other proceedings have been determined. There are, however, no priority rules with respect to such conflicting proceedings. Therefore, should there be court proceedings relating to the administrative liability imposed on a party by the FAS, and a separate claim by a private claimant based on the same alleged violation of competition law, either of these proceedings may be suspended by court. Some experts believe that it would be more efficient to suspend proceedings relating to the administrative liability, as the question of the violation would be analyzed by the court in the private action and is material to the outcome of such proceedings[52]. In practice, however, it is more likely that the private enforcement proceedings would be suspended in such cases, and not the administrative proceedings brought by the FAS[53].

(*ii*) *Conflicts in relation to limitation periods*. – In the Moscow Circuit Arbitrazh (Commercial) Court decision[54] in *VUMN v. Tatneft*, a claim for damages was dismissed as a result of the expiry of the limitation period. The limitation period was calculated by the court starting from the date when the violation of competition law by Tatneft took place, and not from the date of the formal court decision which recognized the violation. Given this approach by the courts, it would be in the best interests of a claimant to initiate a private enforcement action as soon as it has found that its rights have been infringed, even though such private enforcement action could then be suspended by the court until the public enforcement proceedings are determined.

4. *Liability issues*. – Another problematic issue relates to the various forms of liability which can be imposed on a person who has violated competition law.

---

[49] Although the claimant referred to another case where Apatit was found to be abusing its dominant position against other market players, this was not accepted by the court, as the subject matter of the other case was the supply of goods over a different time period and, hence, in different market conditions.

[50] North-Western Circuit Arbitrazh (Commercial) Court decision No. A56-32803/2009 dated April 12, 2010.

[51] *Voskresensk Mineral Fertilizers v. Apatit* case, 9th Arbitrazh (Commercial) Appelate Court decision No. 09AP-10029/2009-GK of July 29, 2009.

[52] The Russian Competition Law (Art. 48(5)) envisages that administrative proceedings by FAS should be ceased in case a court decision comes into effect, which finally decided on the fact of violation of absence of violation of competition laws. See Report of NP «Sodeistvie Razvitiyu Konkurenzii»: Problems of private enforcement, p. 7.

[53] See, e.g., Moscow Circuit Arbitrazh (Commercial) Court decision No. A40-12966/10-72 dated December 20, 2011. It appears that the courts follow a broad interpretation of recommendations set out in the Plenum Decision (item 20) that suggests that the courts should suspend proceedings until final decision by FAS.

[54] Decision No. KG-A40/8152-11 dated August 8, 2011.

Generally, the following types of liability may be applicable[55]:

– tortious liability to other market participants arising in connection with private enforcement actions;

– administrative liability in the form of fixed-sum fine;

– administrative liability in the form of a turnover-based fine;

– administrative liability in the form of compliance with the decisions and directives of the FAS[56].

In this respect the wording of Art. 48(5) of the Russian Competition Law is unfortunate. It suggests that the FAS should terminate its administrative proceedings in respect of a violation of competition law where a final judgment has already been given on the question of whether that violation did or did not occur. Thus, a literal interpretation suggests that the FAS is not authorized to impose any liability on a person where it has already been established by a court that a violation has taken place. This appears to be an omission by the legislator and could lead to unequal treatment of persons that have been found to be in violation of competition laws by the FAS as opposed to by court in a private action[57].

Under such circumstances, the court reviewing the private enforcement claim is not authorized to raise the issue of administrative liability in the same proceedings in the absence of a prior FAS decision on liability[58]. Moreover, cases arising out of administrative proceedings initiated by the FAS are subject to the exclusive jurisdiction of the state arbitration courts and cannot be handled by the courts of general jurisdiction[59].

Another issue here is that the Russian Constitutional Court in one case reviewed legislation that makes it lawful to simultaneously impose both fixed-sum fines and turnover-based fines[60]. In the same case, the Constitutional Court also elaborated on the nature of turnover-based fines and came to a conclusion that such fines are a justified compensatory measure aimed at balancing private and public interests. This interpretation concerns some experts[61], who note that the compensatory measures in public enforcement actions in the form of turnover-based fines may conflict and overlap with the compensatory measures in private enforcement actions, and on a large scale this could lead to excessive punishment of the infringer.

The lack of certainty on questions of liability under Russian competition law may be further illustrated by the questionable court decision in *Baltika v. Russky Solod*[62]. Despite that the fact of violation of competition law had already been established by the FAS, the court dismissed the claim for damages on the ground that the defendant had already incurred liability for the violation in the form of turnover-based fine and no tortious liability should apply.

5. *Participation of the FAS*. – The right of the FAS to participate in court proceedings associated with antimonopoly law violations is envisaged by Art. 23 of the Russian Competition Law. There is, however, no mandatory requirement for the FAS to participate in a court proceeding arising out of a private enforcement action. The FAS may be involved as a third party in a case on the initiative of either the parties or the court. There is also a view that FAS participation is more important in standalone actions, and is unnecessary in follow-on actions[63].

According to the Plenum Decision

[55] Note that Russian law does not envisage criminal liability for legal entities. Criminal liability may be applied to officers of a company that violated competition laws. Accordingly, administrative liability in form of disqualification is only applicable to natural persons.

[56] Art. 37(2) of the Russian Competition Law.

[57] Report of NP «Sodeistvie Razvitiyu Konkurenzii»: Problems of private enforcement, p. 8.

[58] Art. 28.1 (1.2) of the Russian Code of Administrative Offences.

[59] Art. 23.1(3) of the Russian Code of Administrative Offences.

[60] Decision No. 11-P dated June 24, 2009.

[61] Report of NP «Sodeistvie Razvitiyu Konkurenzii»: Problems of private enforcement, p. 10.

[62] 13th Appellate Arbitrazh (Commercial) Court decision No. A56-32803/2009 dated April 12, 2010.

[63] Kulik Y. Civil remedies available in case of violation of competition laws: claim for damages // Konkurenziya i Pravo, No. 3, May-June 2011, p. 39.

(item 21), when handling lawsuits associated with alleged violation of competition law, the arbitrazh (commercial) courts should notify the FAS and ensure that it is given the opportunity to participate in the proceedings. The role of the FAS within the proceedings should be considered by the court based on the nature of the dispute in each particular case.

It should be noted that in some cases court decisions were overruled by the higher courts due to the fact that the FAS was not informed of the proceedings and was unable to participate[64].

6. *Statistics on Russian private and public enforcement*. – Public enforcement citizens. According to the FAS Report on competition in 2011[65], 57% of the total 11,276 administrative proceedings by the FAS in 2011 were initiated on the basis of such private complaints.

The statistics available for the general jurisdiction courts do not specify the number of cases associated with competition law violations. The statistics for arbitrazh (commercial) courts provide information on the number of cases heard with the FAS's participation, however no official data is available on the number of private enforcement cases or the number of such cases heard without the FAS's participation. As at the end of the first half of 2012[66]:

The total number of claims heard in the arbitrazh (commercial) courts of the first instance with participation of the FAS	4,464 (1,592 upheld)
including:	
– challenging decisions and other acts issued by FAS	4,241 (1,520 upheld)
– challenging results of an auction or bidding	63 (13 upheld)
– contracts alleged to be null and void	11 (6 upheld)
– claims to compel the counterparty to enter into agreement	3 (1 upheld)
– claims to compel compliance with decisions and directives by FAS	5 (3 upheld)
– imposing a turnover-based fine (brought by FAS)	2 (2 upheld)
– claims to amend or terminate an agreement	0

appears to be the principal venue for competition law violation cases. This is also due to the proactive role of the FAS, which has significantly extended its powers and capacity in the recent years.

At the same time, there is a developing trend that a large number of investigations by the FAS are initiated on the basis of notifications of unlawful behavior submitted by market participants and regular

VII. Future possible trends: class actions, legal fees, etc.

1. *Class actions*. – Currently, there is no legal basis for class actions arising out of competition law violations in Russia. As opposed to joint liability issues regulated by Art. 1080 of the Russian Civil Code, joint actions by claimants remain poorly regulated.

---

[64] Moscow Circuit Arbitrazh (Commercial) Court decision No. KG-A40/745-11 dated February 21, 2011.

[65] Available at URL: *http://fas.gov.ru/about/list-of-reports/list-of-reports_30065.html*. See pages 125-126.

[66] Available at URL: *http://www.arbitr.ru/_ upimg/B5A9B397977F5884A5D7B04070A8D03C_2.pdf*. Based on the data available in the legal databases of «Konsultant Plus» we were able to identify around 10 cases arising out of private enforcement actions heard by courts in 2012, however, such data can only be used as indicative and cannot be relied on same as on the official statistics.

Russian law doctrine distinguishes between public-sphere claims to protect the rights of an unidentified group of persons on the one hand, and private claims to protect rights of multiple persons whose rights have been infringed on the other. Unlike in some other jurisdictions, the combination of two approaches in one case is not possible, therefore, public enforcement is always separate from private enforcement.

Like in many countries with the continental system, a private claim under Russian law is admissible if it is aimed at protection of an individual right of the claimant, which breach must be proven by the claimant. In circumstances where multiple persons claim infringement of their rights by the same unlawful act of a third party, Russian courts handle such claims individually, as in each case they need to establish whether the infringement of the individual right has occurred and what negative consequences have arisen for the particular claimant.

(*i*) *Claims to protect rights of an identified group*. – Russian law envisages that, in cases governed by federal law, a civil lawsuit may be initiated by a person acting for the benefit of another person, unidentified group of persons, the state, its constituent entities (regions), or municipalities[67].

Few legal concepts available for protection of rights of an unidentified group of persons that are based on the above provision have certain deficiencies that restrict their use for enforcement actions in the area of competition law:

– Russian law allows for claims aimed at the protection of an unidentified group of persons to be made by the state prosecutor officer (*prokuror*). Such claims lie within public sphere and do not trigger consequences of private enforcement. The law expressly states that state prosecutor officers are exempt from the duty of bringing evidence of the infringement of individuals' rights when bringing a lawsuit for the benefit of an unidentified group of persons[68]. Court decisions with respect to claims raised by the state prosecutor officer may be used further by interested parties (e.g., customers), who would need to initiate individual follow-on actions on their own initiative and, like in other follow-on actions, in each case provide sufficient evidence that their rights have indeed been infringed by the violation that was the subject matter of the state prosecutor officer's claim[69];

– The Federal Law «On Protection of Customers' Rights» (Art. 46) provides that certain customer protection organizations have the right to bring lawsuits aimed at the protection of customers' rights. However, the court in such a case would similarly not be awarding private remedies to the affected customers. Subject to the court's decision, a party that was found liable for violation of the rights of an unidentified group of customers may be obliged to notify the general public of the court's decision via the mass media, which might lead to customers filing further private claims;

– The Russian Competition Law (Art. 23(6)) envisages the right of the FAS to bring claims to the arbitrazh (commercial) courts to prevent competition law violations. Interestingly, the Plenum Decision (item 6) noted that the Russian Competition Law (Art. 23(1) item 2(*i*)) envisages the right of the FAS to issue a directive (*predpisanie*) on termination or alteration of an agreement executed in violation of competition law, and if the FAS establishes that the same party has entered into agreements with similar unlawful provisions with other counterparties, the FAS may, even in the absence of requests from such counterparties, oblige it to contact them and offer to terminate or alter the relevant agreements. This can be viewed as a form of substitute for class actions, but commencement of such a claim and the issuance of relevant directives remains solely the prerogative of the FAS.

(*ii*) *Group claims under Russian law*. – While both the Civil Procedure Code[70]

[67] Art. 4(3) of the Civil Procedure Code.
[68] Art. 131(3) of the Civil Procedure Code.
[69] The Supreme Court decision No. 86-Vpr11-4 dated September 20, 2011.
[70] Art. 40.

and the Arbitrazh (Commercial) Procedure Code[71] envisage the possibility of joint actions, they impose the following criteria for such joint actions to be considered by the courts:

– the subject matter of the dispute relates to common rights and (or) duties of several plaintiffs;

– the rights and (or) duties of plaintiffs have the same legal grounds; and

– the subject matter of the dispute relates to rights and duties of the same legal nature.

Additionally, it is required that each of the plaintiffs appears in the proceedings independently, though participants in a joint action may entrust one or several participants of the joint action to represent them. Thus, it is not envisaged that a person or entity which would not itself qualify as a plaintiff (e.g., an industry association or non-governmental organization) could bring such joint private enforcement action.

Chapter 28.2 of the Arbitrazh (Commercial) Procedure Code, which regulates cases relating to the protection of rights of groups of people, is not helpful is this regard either. Its rules apply only to claims that arise out of a single legal relationship with multiple parties, and the identities of all of the parties must be established prior to the commencement of the hearing of the claim and within the time period set by court. Clearly, in cases where multiple persons' rights have been infringed by a competition law violation, the requirement of the single and common legal relationship would not be met and accordingly tort cases cannot be dealt with under this procedure[72].

The deficiencies of Russian law with regards to class actions have been raised by scholars and practitioners in the sphere of competition law on multiple occasions[73].

2. *Legal Fees*. – Generally, the amount of legal fees is subject to the freedom of contract and may be negotiated by the parties to the legal services agreement. Legal fees can be charged in the form of a flat fee, fixed fee for each hearing or based on hourly rates.

The concept of success fee is still questionable under Russian law. The available court practice, including that of the Russian Constitutional Court, does not always recognize the enforceability of success fee arrangements[74]. Accordingly, lawyers are sometimes not willing to risk the full amount of the fees and prefer to divide the remuneration under the legal services contract into two parts: one part as fixed remuneration and the other part as success fee.

The successful party may claim compensation for legal fees (along with other costs associated with the proceedings[75]) from the defeated party[76]. Until recently courts have been quite reluctant to award large sums by way of compensation of legal fees, for example, where large law firms have billed hourly rates on a case and the resultant legal fees have been significant. Often, courts have exercised their right to reduce the amount awarded by way of compensation for legal fees as

[71] Art. 46.

[72] The 9th Appellate Arbitrazh (Commercial) Court decision No. 09AP-22376/2010 dated September 9, 2010.

[73] Kulik Y. Civil remedies available in case of violation of competition laws: claim for damages // Konkurenziya i Pravo, No. 3, May-June 2011, p. 44; Maleshin D. Russian model of group claim // Vestnik of the Supreme Arbitrazh (Commercial) Court, 4/2010, p. 79, 81: available at: *http://www.law.msu.ru/file/13423/download/13423*); Abolonin G.O. Group claims. Moscow: Wolters Kluwer, 2011, p. 99.

[74] See the Constitutional Court decision No. 1-P dated January 23, 2007. It should be noted that position of the state arbitrazh (commercial) courts on the matter is sometimes different from the position of the general jurisdiction courts, compare 13th Appellate Arbitrazh (Commercial) Court decision No. A56-34010/2011 dated January 19, 2012 and Leningrad Oblast Court ruling No. 33-2948/2011 dated June 9, 2011. See also Art. 16 of the Professional Advocates Code of Ethics that does not recommend charging success fee other than in monetary claims.

[75] Art. 94 and 100 of the Civil Procedure Code. Similar provisions are envisaged by the Arbitrazh (Commercial) Procedure Code Art. 106 and 110.

[76] Art. 98(1) of the Civil Procedure Court and Art. 110(1) of the Arbitrazh (Commercial) Procedure Code: where the claim has been satisfied only partially, the legal fees and other costs would be awarded on pro rata basis to the initial value of the claim.

they found appropriate[77]. Recently the trend has been for the state arbitrazh (commercial) courts to be more liberal in this respect, and less restrictive in awarding substantial amounts in compensation for legal fees.

In any event, for the court to award compensation for legal fees to the successful party, the relevant costs must have actually been paid by that that party to its legal advisor.

3. *Competition Road Map*. – The FAS together with various governmental bodies and non-governmental organizations holds consultations, workshops and conferences aimed at further development of Russian competition law[78].

The recently adopted Road Map for Development of Competition and Improvement of Antimonopoly Policy[79] specifies among its priorities, *inter alia*, measures to improve customer protections (item 7). It envisages that draft federal laws will be prepared by the FAS, the Ministry of Justice and the Ministry of Economic Development in 2013-2014, which cover the following areas:

– implementation of the ability to initiate joint actions (group claims) by a group of claimants, including legal entities;

– the ability to award multiple sets of damages for competition law violations and to distribute the damages recovered between the parties whose rights have been infringed by the relevant violation.

Therefore, it may be envisaged that the FAS will take the lead on further improving the competition protection regime in Russia and combating the deficiencies discussed above.

Roman Dashko - Anastasia Dergacheva - Valentina Semenikhina

[77] Art. 100 of the Civil Procedure Code and Art. 110(2) of the Arbitrazh (Commercial) Procedure Code: «The expenses for the services of a representative, incurred by the party to whose benefit a judicial act is delivered, are recovered by the [commercial] court [at a written request of such person] from the [defeated] party participating in the case, within reasonable limits».

[79] See the FAS report on competition advocacy in 2011-2012 available at URL: *http://fas.gov.ru/about/list-of-reports/list-of-reports_30072.html*.

[79] Government Decree No. 2579-r dated December 28, 2012.