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Competition Law Enforcement Issues Raised by Monopsonies

Contribution

The Russian Federation

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Support of competition is one of the foundations of the constitutional order of the Russian Federation, as well as a constant priority of the state policy. Development of competition in the economy is a multifaceted task, accomplishment of which depends on taking into account the specifics of economic relations. An important role here is played by the protection of the legitimate interests of producers (suppliers, contractors) in the exercise of monopolistic activities by consumers.

In this area of antimonopoly regulation, the Federal Law of July 26, 2006 No. 135-FZ "On Protection of Competition" (hereinafter – the Law on Protection of Competition) provides for mechanisms to respond to consumer actions that pose a threat to the normal functioning of the market. Monopsony practice falls under the scope of Article 10 of the Law on Protection of Competition, according to which actions (inaction) of an economic entity occupying a dominant position, which result or can result in prevention, restriction or elimination of competition and (or) infringement of the interests of other persons are prohibited, including the actions specified in the Paragraphs 1-11 of the Part 1 of the Article 10, in particular establishment and maintenance of monopolistically high or monopolistically low price of the goods, imposition of the contractual terms upon a counteragent that are unfavorable for him or not related to the subject of the contract (economically or technologically unjustified and (or) not directly provided for by federal laws, statutory legal acts or judicial acts requirements for transferring financial assets, other property, including property rights, as well as consent to conclude a contract on conditions of including in it provisions regarding the goods in which the counteragent is not interested, and other requirements).

Therefore, an economic entity that occupies a dominant position in the market as a buyer is subject to the restrictions established by the legislation.

In accordance with the Article 5 of the Law on Protection of Competition, the dominant position is recognized as the position of an economic entity in the market of a certain product, which gives it the opportunity to exert a decisive influence on the general conditions for the circulation of goods in the relevant product market, and (or) eliminate other economic entities from this product market, and (or) hinder access to this commodity market for other economic entities.

In accordance with the Article 7 of the Law on Protection of Competition, the concept of a monopolistically low price of a product is established, which is possible if there is a single consumer in the market of a certain product.

Thus, if the dominant economic entity in the market is consumer, when assessing the direction of its behavior to extract monopoly benefits at the expense of suppliers, the admissibility of the applied price for the purchase of goods is determined according to the rules established in the Article 7 of the Law on Protection of Competition, taking into account the economic performance and costs of its counteragent-sellers.

In particular, from the Guidelines of the Presidium of FAS Russia No. 15, approved by the minutes of the Presidium of FAS Russia of October 24, 2018 No. 11, it follows that the seller may not be able to unilaterally influence the general conditions for the circulation of goods in the relevant product market if buyers have the opportunity to refuse the conditions offered by the seller due to the market power of the buyer, including due to the presence of signs of monopsony (oligopsony) on the other side of the market. While investigating abuse by the buyer, signs of monopoly of sellers that shift the balance of market power have to also be taken into account.

In addition, in accordance with the Paragraph 3 of the Part 2 of the Article 23 of the Law on Protection of Competition, the antimonopoly authority approves the procedure for conducting an analysis of the state of competition in order to establish the dominant position of an economic entity and identify other cases of prevention, restriction or elimination of competition.

When establishing a dominant position in the market, it is necessary to be guided by the Procedure for analyzing the state of competition in the commodity market, approved by the Order of FAS Russia of April 28, 2010 No. 220, which states in the Paragraph 3.2 that when considering an alleged violation of antimonopoly legislation in relation to a buyer (monopsony), the decisive factor in the issue of interchangeability of goods should be the opinion of the seller.

Despite the fact that anticompetitive practices related to monopsony are not that widespread, FAS Russia has experience in handling a number of relevant cases.

In the course of consideration of the case on violation of antimonopoly legislation in relation to AO Nazarovskaya GRES, Krasnoyarsk Regional Office of FAS Russia established the dominant position of the company in the market for the consumption of transport services provided on the railway tracks of the Nazarovo station of the

Krasnoyarsk Railway (branch of OAO Russian Railways) through the station GRES by AO V-Sibpromtrans as the largest consumer with a share of 97.9 %.

The courts recognized as legitimate the conclusions of Krasnoyarsk Regional Office of FAS Russia that AO Nazarovskaya GRES occupied a dominant position in the relevant commodity market, as well as the company's violation of the Part 1 of the Article 10 of the Law on Protection of Competition, indicating that the company's actions to refuse to pay for transport services rendered to it during the period under review testify to the company's abuse of its dominant position and could lead to adverse consequences for the counteragent.

At the same time, FAS Russia in its practice considered a two-way monopoly concerning the complaint of PAO MMK, which together with other manufacturers occupies a dominant position in the pitch market, against the actions of RUSAL trading house, which is the dominant buyer in the coal electrode pitch market.

For the first time in its practice, when resolving a conflict between a monopsonist and a monopolist, FAS Russia had applied a non-standard approach and both metallurgical companies were issued warnings regarding the need to stop the violations of antimonopoly legislation and conclude a supply contract on mutually beneficial terms. The application of this approach made it possible to avoid a violation of the balance of market power within a bilateral monopoly and to develop a model of future interaction of participants in the coal pitch market. By the ruling of FAS Russia, the consideration of the case was terminated due to the execution of the warning.

In addition, over the past few years issues related to monopsony practices have been raised when considering complaints in the agro-industrial sector related to the establishment of low purchase prices for raw milk, as well as when considering transactions of economic concentration in dairy product markets.

Undoubtedly, when dealing with monopsony anticompetitive practices some challenges could arise. When it comes to FAS Russia, due to the absence in the legislation of the "monopsonically low price" concept and methodological approaches to proving it, when considering complaints regarding the establishment of low purchase prices, there are difficulties in proving the fact of violation of the antimonopoly legislation.

In general, the practice of considering monopsony cases is not that widespread, so the consideration of such cases requires the development of individual approaches, taking into account current legislation.