Protecting the Rights of Economic Entities in the Event of Competition Restraint by Public Authorities

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Abstract. The article is dedicated to study of possible protection of violated property rights in the event of competition restraint, which is expressed in imposing the terms of general commercial contracts on behalf of public authorities. It's stated that the provisions of Russian competition legislation play only supplementary role in civil and legal protection of violated rights of economic entities, and therefore need an improvement. It's reasoned that imposing the terms of general commercial contracts to economic entities on behalf of public authorities and subordinate institutions contravene the fundamentals of public order. Such terms cancel out measures of economic promotion provided by federal legislator, undermine trust of economic entities to public authorities. Thus, request on application of consequences of null and void transaction is an effective means of economic entity protection.

Keywords: Protection of competition · Unfair contract terms
Competition restraint · Foundations of public order · Protection of property rights
Violation of competition legislation

Peculiar feature of entrepreneurial activity is a risk related to possible unforeseen losses and lost income[1]. Difficulties and encumbrances on the way of reaching high incomes are generally connected with activity of more successful competitors. However, public authorities often make for entrepreneurs encumbrances, which are more difficult to overcome, than to set up yourself in a competitive battle. Similar encumbrances are generally called administrative barriers, and the state takes diverse measures not to allow entrepreneurial activity restriction.

Comprehensive term of administrative barriers doesn't exist, although there is a whole complex of enactments aimed at their overcoming. Administrative barriers are actions or inactions of public authorities that complicate procedures established under legislation and passed by entrepreneurial subjects, or prevent statutory regulations.

[1] Belyh V.S. Legal regulation of entrepreneurial activity in Russia: Monograph. [*Pravovoe regulirovanie predprinimatel'skoj dejatel'nosti v Rossii: Monografija*]. Moscow: Prospekt, 2005. P. 43.

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Administrative barriers are widespread when rendering state and municipal services, placing of state order, implementing functions of executive authorities. Administrative barriers lead to various negative consequences, for instance, competition restraint, losses to economic entities.

Competition have both a positive, and a negative effect on economic relations. Therewith, totality of positive effects allows esteeming competition as a preferred economic situation, therefore statutory regulation serves to protect competition. Russian legislation proceeds from the premise that competition state should ensure an unavailability of affecting on commodity market by any entity.

Pursuant to Federal law dated July 26, 2006 No. 135-FZ "On protection of competition"[2] (hereinafter – Law on protection of competition) competition restraint represents an outcome of actions by economic entities, authorities and other bodies that affect negatively on commodity market, which lead to possible unilateral impact of economic entities on general conditions of commodity circulation. Features of competition restraint may be a decreasing number of economic entities acting in a certain commodity market, refusal of entities not included in one group from independent actions in the market, establishing conditions and procedure of commodity circulation and etc.

Public authorities have significant opportunities for such influence on market situation that finally lead to competition restraint. That's why the legislator forbids actions by public authorities that give advantages to some entrepreneurs and infringe upon others interests, otherwise impact competitive situation by altering it.

Let's study one possible situation related to impact of public authorities on competition.

When delivering finished food products of meat (for instance, sausage goods), veterinary institutions issue veterinary accompanying documents. Before July 15, 2015 execution of such documents was a commercial veterinary service and was paid by interested economic entities. On July 15, 2015 a new edition of the Russian Federation Law "On veterinary science" No. 4979-1 dated May 14, 1993 became effective[3], and since then execution of these papers had been free by rule of federal legislator. Veterinary Committee of Volgograd region formally satisfied this request and excluded an issue of veterinary accompanying documents from Price list of commercial services. However, it introduced a new service, an "identification and veterinary and sanitary assessment of conformity (non-conformity) of animals, food stock, food (non-food) products, feed of vegetable and animal origin to requirements of veterinary rules and regulations with the aim of transfer" (hereinafter – identification). Performance of state institutions subordinate to Committee– animal health centers – has been arranged in a way that you can get veterinary accompanying documents only after paying identification and document forms. General commercial contracts of economic entities with veterinary stations contained reference at Price list of commercial veterinary services. Administration of the Federal Antimonopoly Service for Volgograd region initiated criminal proceedings

[2] Federal law No. 135-FZ dated 26.07.2006 "On protection of competition"// Collection of the RF legislation. 2006. No. 31 (part 1.). Clause. 3434.

[3] RF Law No. 4979-1 dated 14.05.1993 «On Veterinary»//Gazette of the Congress of People's Deputies of the Russian Federation and the Supreme Soviet of the Russian Federation. 1993. No. 24. Clause. 857.

on violation of legislation on competition protection by veterinary committee for Volgograd region.

Antimonopoly body issued a warning to Veterinary Committee for Volgograd region, and identification was excluded from List of commercial services. Commercial courts approved justice of issued warning. The courts determined that Veterinary Committee acted beyond the power when establishing identification as an obligatory service for provision of state service of issuing Veterinary accompanying documents. Also we revealed that identification and issue of veterinary accompanying document form are constituent parts of one process – execution of veterinary accompanying document. Rules of procedure for this state service were absent[4].

Similar situations lead to that economic entities paying services that to be provided at no charge suffer material losses, therefore arise an issue of proper protection for restoration of rights.

At first sight, should be filed a claim based on paragraph 3 clause 37 of Law on competition protection. Named provision grants the opportunity to Parties whose rights are affected by Antimonopoly violation, to "apply duly to the court, file a claim in a commercial court, including claims of restoration of violated rights, making amends, i.e. lost profit, compensation for damage incurred to property".

Believed that introduction of private provision into Law on protection of competition implies simplification of plaintiff's proof and applying acts of Antimonopoly bodies as a ground for action. However, it's not quite so.

Expressions used in this article create ambiguities. Thus, arises an issue whether introducing such rules is necessary, if they don't supplement and don't precise general rules of civil legislation. It's not quite understandable whether "restoration of violated rights" is an independent way of protection, or it means request specified in clause 12 of Civil Code of the Russian Federation on "restoration of provision existing before violation, and suppression of actions violating the right or posing risks to its violation. There is no uncertainty whether the list of means is exhaustive.

It's worth taking into account that definitive approaches in case law to procedure of application of paragraph 3 clause 37 of Law on protection of competition have not been applied. For instance, the courts differently assess an ajudication of plaintiff's actions as violations of Antimonopoly legislation.

Well, in some situations fact in proof is no different than proof in lawsuit on recovery of damages with reference to general provisions of Civil Code of the Russian Federation. In one court proceeding a plaintiff's claim was rejected despite an order rendered by Antimonopoly body to defendant. The court decided that causal relation between actions of defendant and plaintiff is absent[5]. In another case, court sustained a claim, acknowledged a fact of damage proven, on the ground of circumstances stated with judicial act

[4] Decision in case No. A12-46394/2016 dated September 30, 2016 [Electronic resource]. URL: https://kad.arbitr.ru/Card?number=%D0%9012-46394/2016 (accessed date: 13.05.2017).

[5] Ruling of the Federal Commercial Court of Moscow district dated 10.06.2013 in case No. A40-82507/12-82-758. [Electronic resource]. URL: http://kad.arbitr.ru/Card/9904afe8-0174-4fcb-ba61-4ac4fa2fbf00 (accessed date: 11.05.2017).

on impeachment of decision by Federal Anti-monopoly Service of the Russian Federation[6]. In some instances, neither plaintiffs nor court don't substantiate their demands by reference to Law on protection of competition mentioning only provisions on losses of CC RF as a ground[7].

Thus, cases on restoration of violated property right in relation to violation of Antimonopoly legislation is distinguished by hard probation, and not in every instance acknowledgement of violation of competition legislation means possible recovery of damages for affected person. Recovery of damages is a measure of civil and law liability, therefore person demanding their recovery must proof set of all elements of civil offense.

In legal literature it's offered to consider issues on level of income acquired due to violation of Antimonopoly legislation, an extent of damage when reviewing cases on above named violation[8]. However, we suppose that such approach doesn't match functions and goals of Antimonopoly authorities. In judicial acts of the RF Supreme Commercial court it's repeatedly stressed that Antimonopoly body is not entitled to resolve civil and law disputes of economic entities in terms of its competence[9].

Moreover, in scientific practical commentary to the Law "On protection of competition" edited by I. Yu. Artem'ev, Head of Antimonopoly service of the Russian Federation, is specifically stated that paragraph 3 clause 37 of Law on protection of competition was introduced by "the third Antimonopoly package" for "…promotion of filing a claim by economic entities on making amends to violators of Antimonopoly legislation"[10].

Thus, p.3 clause 37 of the Law on protection of competition doesn't supplement, doesn't clarify provisions of civil legislation on means of violated rights protection, doesn't exclude plaintiff's burden of proof, doesn't alter procedure of proof. This state of matters, undoubtedly, is right, any other would contravene the adversarial principles of commercial process, equality of parties. As reasonably noted by the Federal Antimonopoly service of Russia, "an important auxiliary tool in this case is a decision of

[6] Ruling of the Federal Commercial court of Moscow district dated 30.09.2013 in case No. A40-143297/12. [Electronic resource]. URL: http://kad.arbitr.ru/Card/e83b8c26-8192-48ff-9dcf-a1292dfcf53d. (accessed date: 11.05.2017).

[7] Ruling of the RF Supreme Commercial Court Presidium dated 17.12.2013 No. 9837/13 in case No. A67-8238/2012// Vestnik of the RF Supreme Commercial court. 2014. No. 4.

[8] Bashlakov-Nikolaev I.V., Gavrilov D.A., Kinev A.Ju. and etc. Responsibility for violations of the antimonopoly legislation: problems of theory and practice: monograph [*Otvetstvennost' za narushenija antimonopol'nogo zakonodatel'stva: problemy teorii i praktiki: monografija*]. Maksimov S.V., Puzyrevskij S.A. (ed.). Moscow: NORMA, INFRA-M, 2. 144 p.

[9] Ruling of the RF Supreme Commercial Court Plenum dated 30.06.2008 No. 30 «On some issues arising due to an application of Antimonopoly legislation by commercial courts»// Vestnik of the RF Supreme Commercial Court. 2008. No. 8; Ruling of the RF Supreme Commercial Court Presidium dated 12.07.2006 No. 1812/06 in case No. A33-2953/2005// Vestnik of the RF Supreme Commercial Court. 2006. No. 9.

[10] Aleshin K.N., Artem'ev I.Ju., Bol'shakov E.A. and etc.; Scientific and practical commentary to the Federal Law "On Protection of Competition" (article-by-article) [*Nauchno-prakticheskij kommentarij k Federal'nomu zakonu «O zashhite konkurencii» (postatejnyj)*]. Artem'ev I.Ju. (ed.). Second edition. Moscow: Statut, 1. 1024 p.

Antimonopoly body to the case on violation of Antimonopoly legislation confirming a violation"[11].

At the same time, requirements enumerated in p.3 clause 37 of Law on protection of competition not always can restore violated rights. For example, sometimes parties of reviewing a case in an Antimonopoly body doesn't match, as well as parties whose rights are affected as a result of Antimonopoly legislation violation that also may bring difficulties in rights protection. Developers of provision of p.3 clause 37 of Law on protection of competition suggested that this to be a basis for collective (group) claims. We mark that group risks is rarely applicable in commercial courts, for example, it brings a difficulty of proofing persons participation in one group in one legal relationship. For protection of persons not participated directly in reviewing a case by Antimonopoly body, a more suitable solution is a claim in defense of general public that currently used in the RF Civil Procedure Code that requires corresponding change in definition of p.3 clause 37 of Law on protection of competition. In purpose of completer protection of persons who didn't participate directly in case review in Antimonopoly body, but whose rights are violated, it's worth introducing the following addition to definition of p.3 clause 37: "economic entities are entitled to apply to a commercial court with declaration on protection of rights, freedoms and legal interests of other parties at their request or in defense of rights, freedoms and legal interests of general public".

With regard to civil and law contracts concluded in violation of competition legislation, declaration of claim based only on p.3 clause 37 of Law on protection of competition can't restore violated rights.

Peculiarity of similar contracts is that they formally conform to necessary requirements and exhibit the features of legal transactions. Antimonopoly body is not competent to recognize the contract void or proceed from voidance of transactions. Therefore, a counterpart may refer to freedom of contract, if it's a general commercial contract for provision of any services, even stipulated by law, and the services are paid, then contractor need them. For this reason, claim on recovery of damages, or unjustified enrichment does is not ground for action. It's required to file a claim on application of consequences of invalidity of void transaction or claim for declaration of avoidable transaction void and application of consequences of its voidance.

It's seen that such contracts or contract terms are void.

Ruling of the RF Supreme Commercial court "On freedom of contract and its limits" mentions the possibility of declaring voidance of unfair contract terms due to clause 169 of CC RF for weaker party or inadmissible application of such terms according to clause 10 of CC RF.

Unfair contract terms and possibility of considering them invalid or not applying them take place, if contract draft was offered by one of the parties and contained terms that are expressly exacting for its counterpart and essentially upset a balance of Parties interests, and counterpart was in the state embarrassing agreement of any other content

[11] Interpretation No.6 of Russian Federal Antimonopoly Service "Probation and estimate of losses incurred by violation of Antimonopoly legislation" (Approved by protocol of Russian Federal Antimonopoly service Presidium dated 25.05.2016 No. 7). [Electronic resource]. URL: http://fas.gov.ru/documents/documentdetails.html?id=14664 (accessed date: 15.05.2017).

of several contract terms (i.e. was a weaker party of contract). The RF Supreme Commercial court orders the courts to find out whether accession to the terms is involuntary, what is a professional degree of Parties, competition in the market, level of negotiating powers and etc[12].

In studied situation as an example there are unfair contract terms based on essential violation of balance of interests between contract parties. Accordingly, these transactions should be deemed void, despite that Russian legal procedure as possible continues an invalidity of concluded transactions.

Primarily, it's necessary to pay attention to that public authorities with use of their powers imitate a legal activity by restricting competition and reaching goals that are different from goals and tasks of these bodies.

Such actions are treated as circumvention of law. Actions made with purpose of law circumvention derogate a possible attaining of legal result that should be ensured by enforcement of instructions established by law.

Category of law circumvention is fixed in clause 10 of CC RF and regarded inadmissible exercise of civil rights.

A concept of improving general terms of CC RF defined that law circumvention is use of statutory concept not prohibited formally in some circumstances for reaching a goal, negative position of legislator to which resulted from prohibition on use of other statutory concept reaching the same goal[13].

A.V. Volkov notes that purpose of circumvention is avoidance of impact regulated by enactments on their actual legal relations[14].

Law circumvention is a phenomenon existing not only in civil relations area. By use of power, state authorities can circumvent the law reaching unconscientious goals, upsetting a balance of economic interests in the market and affecting negatively on the competition.

As a whole, law is intended to social relations in a way to ensure both public and private interests that should be in a balanced state. Balance should be fair and proportional. If we talk about balance of interests in competition area, then we need take into account public interests, interests of economic entities and their groups, and also consumer interests. In simplified form we can say that state should be interested in performance of effective self-developing economic system, which demands minimal efforts for its regulation. Economic entities (groups of persons) are interested in acquiring a maximum profit. Consumers are interested in purchase of high-quality goods and services at low prices, in terms of provision of true information.

State intervention in economic entities activity should be justified and necessary from the reasonable point for reaching required behavior in accordance with model. Getting

[12] Plenum Decision of the RF Supreme Commercial Court dated 14.03.2014 No. 16 «On freedom of contract and its limits»// Vestnik of the Russian Federation Supreme Commercial court. 2014. No. 5.

[13] Concept for improvement of general provisions of CC RF//Vestnik of the RF Supreme Commercial court. 2009. No. 4. P. 63.

[14] Volkov A.V. Distinction of circumvention of the law from imaginary and sham transactions [*Otlichie obhoda zakona ot mnimyh i pritvornyh sdelok*], Civil Law [*Grazhdanskoe pravo*]. 4. No 6. P. 6–10.

balance may be considered as a purpose of legal regulation of public relations in competition area. Getting balance implies no clash of interests.

Public interest is reflected in enactments of private and public law. Often, public and private interest is hardly distinguishable. Therefore, when we talk about balance of interests, then most likely it is not about co-relation of public and private interests, but about an interaction of opposite interests in a particular case. At the same time, at legislative level public and private interests should have appropriate implementation, private interests should not be limited in favor of public. Balance of interests represents such a state that provides a full-value exercise of legal public and private interests and established as a result of legal regulation and legislative activity.

Law abuse on behalf of public authorities is dangerous that in such actions public interests are replaced by others, for example, private interests of individual officers. Thus, balance of competitive interests is upset, and declared public interests are not implemented.

Public order is violated when the subject with authoritative powers consciously circumvents mandatory proscriptions of federal legislation restricting hereby the competition. The consequences of this circumvention may be conclusion of civil and law contracts, externally legal, but containing unfair terms aimed at unjustified acquisition of funds of economic entities.

Pursuant to clause 169 of CC RF, transaction made with purpose deliberately contrary to fundamentals of public order and morality is void.

Fundamentals of public order is an evaluation category. It's necessary to reveal whether contract terms imposed by subject of public authority or subordinate institution are indeed unfair and can violate foundations of public order.

As stipulated by p.2 clause 15 chapter the first of "Fundamentals of the constitutional system" of the Russian Federation Constitution "public authorities, local self-governing bodies, officials, citizens and their associations are obliged to abide the RF Constitution and laws".

Therefore, public order in state administration is ensured by unconditional abidance by public authorities and local authorities obligatory rules established by federal laws.

At the same time, as stressed by Constitutional court of the Russian Federation in ruling dated June 06, 2004 No. 226-O[15], clause 169 of Civil Procedure Code states that determining property of antisocial transaction is its purpose, i.e. reaching such result as not only not to comply with law or standards of morality, but contravene – knowingly and expressly for participants of civil law-transactions – fundamentals of public order and morality.

Plenum of the RF Supreme Court draws attention to that antisocial transactions not only not conform to requirements of law or other enactments, but violate principal

[15] Ruling of the RF Constitutional court dated 08.06.2004 No. 226-O "On dismissal of a request for a hearing a complaint of Open Joint-Stock Company "Ufimian refinery" on violation of constitutional rights and freedoms by clause 169 of the CC RF and par. 3 point 11 clause 7 of the RF law "On tax authorities of the Russian Federation". The document was not published. Access from Computer-assisted legal research system «CondultantPlus».

foundations of Russian law order, principles of social, political and economical system, and morals[16].

Fundamentals of legal order may be violated during transaction, if counterpart uses his economic power, actually exploiting another party. Specifically, a moment of exploitation, inequity of possibilities takes place in contract terms with participation of public authority or subordinate institution, if they act through circumvention of law and competition restriction. Unfair contract terms contravene the nature of contract, therefore their presence doesn't conform to legal order.

Commercial court of Volgograd region when reviewing a claim of economic entity to Veterinary institution on recovery of funds paid for identification and forms of veterinary accompanying documents made a right conclusion that "subsequent introduction in contracts and charging a fee for identification and forms had been implemented circumvently (p 11 clause 2.3 of Law "On Veterinary» with the purpose of imposing a duty to pay services of execution of veterinary accompanying documents on the subject of entrepreneurial activity. Specified conscious behavior…, cancelling out the measures of economic promotion stipulated by federal legislation and undermining trust of economic entities to public authorities is mustn't recognized as conscientious and conforming to foundations of the Russian Federation legal order"[17].

You mustn't forget that Russia pursues an economic policy that based on creating favorable conditions for entrepreneurial activity. For example, in 2016 a Strategy for development of small and medium entrepreneurship in the Russian Federation till 2030 was adopted[18]. The purpose of Strategy is development of small and medium entrepreneurship as a new driver, on the one hand, of innovation development and improvement of sectoral composition of economy, on the other hand, of social development and ensuring stable high employment rate. Strategy contemplates various events, including development of competition at local markets, which comprises also dropping of administrative barriers. In the Russian Federation is in effect a series of enactments one way or another designed to solve an issue of passing administrative barriers. Enactments alternate each other successively, resolve immediate tasks arising at particular stage. State and municipal services are mainly rendered according to regulations, general principle of free services is in force (with necessary exceptions).

In these circumstances any actions on behalf of public authorities aimed at acquiring a payment from economic entities for services not stipulated by legislation, but provided as obligatory, unconditionally, contravene economic policy of state, and therewith violate a legal order.

[16] Point 85 of Decision by the RF Supreme Court Plenum dated 23.06.2015 No. 25 «On application of several provisions of par.1 part 1 of CC RF by courts»//Rossiiskaya gazeta. 30.06.2015. No. 140.

[17] Ruling of Commercial court of Volgograd region dated May 23, 2017 in case No. A12-73191/2016. [Economic resource]. URL: https://kad.arbitr.ru/Card?number=%D0%9012-73191/2016. (accessed date: 04.08.2017).

[18] Resolution of the Russian Federation Government dated 02.06.2016 No. 1083-p «On approving a Strategy for development of small and medium entrepreneurship in the Russian Federation for the term till 2030». Official web-portal of legal information http://www.pravo.gov.ru, 10.06.2016.

Therefore, contracts or contract terms are void, if general commercial contract is concluded in terms of violating an Antimonopoly legislation on behalf of public authorities or subordinate institutions. Use of resources provided by authorities in purposes inconsistent with public interests affects negatively on a competition, upsets a balance of public and private interests, and may causes unfair contract terms. Charging a fee for services that, in authorities' opinion (but not pursuant to the law), is obligatory for rendering state service, and is imposed on counterpart, contravenes a legal order in the event that an economic entity is unable to get a state service in another way.

Civil legislation provides a sufficient choice of ways for protection of violated property rights. Part 3 of clause 37 of Law on protection of competition doesn't alter a general procedure for protection of violated rights, doesn't free plaintiff from burden of proof, but solely encourages the persons whose rights are violated, apply to the court or to the commercial one, after finding a violation of competition legislation. Moreover, a wording of this article should be updated due to necessity for protection of persons who didn't participate in reviewing a case by Antimonopoly body, but whose rights are affected by violation.

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