

July 2015

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Recommended Citation

Bardina, Marina P. J.D. (1993) "The Beginning of Development of Legal Regulations of Competition in Russia," *Akron Law Review*: Vol. 26 : Iss. 3 , Article 6.

Available at: <http://ideaexchange.uakron.edu/akronlawreview/vol26/iss3/6>

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THE BEGINNING OF DEVELOPMENT OF LEGAL REGULATION OF COMPETITION IN RUSSIA

by

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Almost a hundred years after the adoption in the United States of the Sherman Anti-Trust Act, directed at the promotion of free competition, the first law "On Competition and Restriction of Monopolistic Activity at the Commodity Markets" [hereinafter the Law] was adopted in Russia (March 22, 1991). For many decades of totalitarian regime in Russia, the monopolized economy was governed by administrative-command methods. There was no place in such a system for competition. When the market-oriented reforms were launched, the necessity for legal regulation promoting demonopolization of the economy and development of fair competition became extremely urgent. The Law was adopted as one of paramount importance in the block of legislation regarded as a prerequisite for the transition to the new type of economic relations.

The goal of the Law is to prevent, restrict and suppress monopolistic activity and unfair competition. Its direction is to promote conditions for the creation and effective functioning of commodity markets.

The Law is applied to business entities, legislative and executive state bodies, and officials acting in the republican or local markets. According to the Law, the business entities include private, state and other enterprises and their amalgamations, which are engaged in the sphere of production, realization or acquisition of commodities. The Law is also directed at citizens occupied with entrepreneurship.¹

There are some exemptions from the scope of application of this Law. It does not regulate the relations connected with monopolistic activity nor relations connected with unfair competition in financial markets and security markets. Except in cases when such relevant rights are deliberately used by their possessors for distortion of competition, the Law does not cover the relations regulated by the rules of legal protection of inventions, industrial specimens, trademarks and copyright. In addition, exemptions from application of the Law may be stated by the Supreme Soviet of Russian Federation in the spheres defined in Art. 21 (3) of the Law "On enterprises and entrepreneurship activity." Art. 21(3) defines the spheres where the exclusive activity of state enterprises,

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¹ The citizens (natural persons) are quite recently regarded as business entities. That was stipulated in the law "On enterprises and entrepreneurship activity" of December 25, 1990.

such as production and sale of weapons, drugs, and virulent and poisonous substances, is permitted.

Regarding the Law's scope of application, it is important to emphasize that the Law is applied to economic activity in the territory of the Russian Federation as well as to the actions of agreements of the enumerated subjects taking place abroad which have the effect of distorting competition, or other negative consequences within the territory of Russia.

The first law on competition determined what was to be considered an illegal action or inaction in the activity in the commodity markets. Adopted in a country with an overmonopolized economy, the Law created conditions for the development of competition. It addressed suppressing the prohibition of unfair competition.

The Law provided for the establishment of a special committee in the Council of Ministers,² State Committees on Antimonopolistic Policy (SCAP), to implement state policy on market development and competition -- support new economic structures. The SCAP develops local agencies. The Law gave the SCAP the necessary legal instruments to perform its functions and to define the rules to be used. The Law stipulated the legal consequences of violations by business entities, executive state bodies, the SCAP and their officials.

Analyzing the legal regulation of the activity in the commodities markets, required by the Law, we begin with an examination of provisions on prevention, restriction and prohibition of monopolistic activity. Monopolistic activity is defined by the Law as action or inaction of business entities or state bodies, that contradict the Law and are directed at barring, restricting or distorting competition and/or causing losses to the consumers.

The antimonopolistic regulation of the Law includes: a) establishing special regulation of the activity of enterprises that have dominant positions in the market; b) preventing and suppressing actions of the legislative and executive bodies that distort competition; and c) moderating the establishment, merger and reorganization of business entities aimed at prevention and elimination of dominant market positions.

² It should be noted that the Supreme Soviet of Russian Federation on November 22, 1991 adopted the amendment to the Law which excluded the SCAP from the structure of federal bodies of executive power and subordinated it to the Supreme Soviet. The President of the Russian Federation applied the Constitutional Court on the consideration of the correspondence of this amendment to the Constitution of RF. On May 20, 1992 Constitutional Court adopted the resolution where recognized that this amendment did not correspond the Constitution (see - *Rossijakaya Gazeta* of July 2, 1992). So SCAP remained in structure of Council of Ministers of RF as it was provided for in the Law on Competition.

Regulation of Competition in Russia

The Law envisages the special regulation of business entities possessing dominant positions. It defines the dominant position as an exclusive position in a definite commodities market, which has a considerable effect on competition, which hampers access to the market for other enterprises or restricts economic activity in another way.

As the main criterion for recognition of the dominant market position, the SCAP annually establishes maximum market share of the definite goods. A market share not exceeding 35 percent can not be recognized as dominant. The business entity may prove that in spite of exceeding the maximum share limit, its market position is not dominant.

The dominant position is not considered to be illegal, but the abuse of dominance, which leads or may lead to the serious restriction of competition or infringement of the interests of other business entities or citizens is prohibited. The following economic activities are prohibited: immobilization of goods from circulation that creates and maintains a market deficit resulting in inflated prices; restriction of access to the market by other business entities; and the violation of the rules of price formation established by normative acts.

In the contract practice, it is considered illegal for the party of dominant position to include terms either unprofitable for another party or not concerning the subject of the contract. It is also illegal to include in the contract terms that discriminate against the other party or to include provisions concerning goods in which the other party does not have an interest.

For realization of the antimonopolistic provisions of the Law, the formation of the State Register of Russian Federation of amalgamations and enterprises -- monopolists was begun. According to the Regulations on State Register, approved by the SCAP order N 60 (Oct., 10, 1991),³ business entities are included in the Register if the market share of their production of the relevant goods exceeds 35 percent or the quantity annually established by the SCAP, and if their activity violates the antimonopolistic legislation. The Register is formed by SCAP. SCAP can increase or decrease the size of the Register. The information contained in the Register is given to the mass media.

The Register contains the list of enterprises under constant state control. The special regime for them is formed by the Law and other legal acts regulating the entities' activity. The number of these acts is constantly increasing. It includes for example: the statute "On state regulation of prices and tariffs on production

³ *Ekonomika, Zhizn*, 1992, N5.

and services of monopolists in 1992-1993 years" (11.8.1992); the statute "On the determination of the amount and payment into the budget of the sums, gained by the enterprises - monopolists due to exceeding the limited level of profitability in 1992-1993" (12.10.92); and some others. The emphasis on the regulation of prices in forming special regimes for monopolists is due to the fact that the liberalization of prices, carried out under high levels of monopolization in the country, has been abused by the monopolistic producers and distributors. It resulted in the extreme raising of prices in the country, but it did not result in growth or production. However, quite obviously such acts alone could not essentially change the situation.

Equal to the suppression of individual monopolistic activity, the Law provides for special legal regulation for competing entities (or potential competitors) possessing the dominant position in sum. For prevention and suppression of collective monopolistic activity, the Law stipulates that the agreements (concerted practice) of such business entities, having a dominant position in sum, which have as a result or can have as a result a distortion of competition, are forbidden and are partially or fully null and void. This prohibition is applied to agreements that are usually called horizontal -- the agreements between undertakings at the same level of commercial activity.

Among such prohibited agreements are the agreements on price fixing, on market shares on territorial principle, on the volume of sale, on assortment of goods, and on the circle of sellers and buyers. In addition, agreements on the limitation of access to the market or removal from the market of other business entities -- the sellers or the buyers of definite goods, agreements directed at the refusal from conclusion of contracts with definite sellers or buyers and others are also prohibited. This list is given just for example and is not exhaustive. The Law also prohibits, achieved in any form, agreements (concerted practices) of noncompeting enterprises -- vertical agreements, in which one of the parties has a dominant position, if it distorts competition.

The considered agreements (concerted practices) of undertakings, as well as the individual monopolistic activity can be regarded rightful if the actors prove, that their agreements or actions promote or shall promote the enrichment of the markets or of the commodities, contribute to the improvement of the quality of the goods to the consumer and to raise their competitiveness, particularly in the external market. So where the agreements or actions meet these requirements and the harmful effects of such kinds of activity are counterbalanced by a number of beneficial results, the prohibition is not applicable.

Prevention and Suppression of Actions Which Distort Competition

An important anti-monopolistic regulation contained in the Law concerns prevention and suppression of the acts and actions of legislative and executive state bodies, which distort competition. In contrast to other countries, where the monopolists appeared as the result of competition, in Russia they were created by state monopolism in the governing of the economy. As a result, great attention is paid to the problem in the Law.

According to the Law, it is prohibited for the state legislative and executive state bodies to adopt acts and to commit actions that restrict independence or create discriminatory or favorable conditions for separate business entities, if such acts and actions lead to the essential restriction of competition or infringement of the interests of economic subjects. For example, the Law forbids: the prohibition of some kind of activity or on production of some kind of goods; acts or actions, hampering activity in the concrete sphere; the ban on sale (purchase, change, acquisition) of the goods from one region of Russia to another, or other restriction of the rights of the business entities in the sphere of sale or purchase of goods; and instructions on primary delivery of goods or services to definite circle of enterprises or on primary conclusion of contracts without the priority stated in the normative acts. These provisions are necessary to begin to free the economy from state monopolism, to reduce state involvement, and to create equal conditions for state and private business entities.

In spite of the importance of the problem of state monopolism in the governing of the economy, the regulation does not seem to be quite fully elaborated. Thus, the Law prohibits ungrounded hampering of the creation of new business entities in some spheres or unjustifiably providing to separate business entities tax or other privileges, favoring their position in comparison with other enterprises of the same commodity market. However, there is no criteria for considering the act and actions to be grounded. There is no provision for rightful exemptions, but exemptions are granted. There are a considerable number of acts, establishing tax privileges or some privileges in the sphere of export licensing, but there is no sufficient legal guarantee for all of them to be grounded.

The Law also covers agreements (concerted actions) of state bodies between themselves or with business entities that distort competition, by price fixing, market sharing, restricting market access, or removing the business entity from the market. The Law contains a special provision, forbidding the participation of officials of state bodies in entrepreneurship -- to own an enterprise, to indulge in independent entrepreneurship, to hold a position in the governing bodies or business entities, etc. But when we shall analyze the

provisions on liability for violation of the Law, we shall not see any sufficient and effective measures to prevent such participation.

Moderation of the Establishment, Merger and Reorganization of Business Entities

Another aspect of the anti-monopolistic regulation is the preliminary state control over the establishment, merger, reorganization and liquidation of business entities for the prevention of dominant position. This control should prevent the inheritance of monopolistic giants by the creating market. The preliminary state control is carried out by the SCAP (local agencies) which gives the consent necessary for registration, establishment, reorganization or liquidation of the enterprise or which gives a motivated refusal. For promotion of uniformity in the carrying out of such control, a special order was elaborated for considering applications. The order was approved by the SCAP. It provides that refusal to consent to the establishment, reorganization or merger of the enterprises can take place if such reorganization or merger can lead to the dominance of business entity or essential distortion of competition. But, exemption may be granted if the merger or reorganization can considerably contribute to the situation in the markets, to the improvement of the quality of consumer goods and their competitiveness in the external market.

The preliminary state control does not effect the joint stock companies, limited partnerships and other organizations with stated capital not in excess of 50 million roubles or another maximum amount stated by the SCAP. But, the increase of the stated capital of these organizations over the maximum can be done only with the consent of the SCAP.

For promoting the decentralization of the economy, preliminary consent of the SCAP is provided as necessary for acquisition by business entities possessing more than 35 percent of the market of the definite commodities and/or of the shares of the stated capital of another business entity in the same market. Such consent is envisaged for the purchase by any legal or physical person possessing a controlling share of the enterprise, possessing the dominant position. The controlling share, according to the Law, is constituted by such number of shares, which provide 50 percent in voting for the adoption of a decision at the general meeting of the shareholders of the company.

Besides merger control and the control over acquisition of shares, the Law provides for such instruments of demonopolization as compulsory division of business entities possessing the dominant position in cases when they are indulged in monopolistic activity or their actions lead to distortion of competition. Demonopolization may begin only if special conditions exist as stipulated by the Law.

Paying primary attention to the prohibition of monopolistic activity, the Law also contains a special section on unfair competition. This section is very short and the included provisions simply establish a basis for the creation of a proper legal regime to regulate market activity. The Law contains a general rule on banning unfair competition, listing the following examples of such illegal activity: the spreading of false, inaccurate or distorted information, which can cause losses to the other business entities or cause damages to business reputation; misleading consumers on the character, mode of production, indication of origin, consumer characteristic and quality of the goods; and incorrectly comparing their goods with the goods of other business entities through advertising. Among the enumerated examples are; unwarranted use of trademark, firm title; marking of the goods; imitation of the form, packing, appearance of the goods of another business entity; and obtainment, use, disclosure of science-technique, production or trade information, including commercial secrets, without the consent of the owner. Some of the provisions on prohibition of unfair competition were developed in the Law "On protection of consumer rights" (February 17, 1992), in the Law "On trade marks, marks of service and indication of the place of origin of the goods" (September 23, 1992). The problem of suppression of unfair competition in the newly created Russian market is considered to be one of the most difficult. It demands serious legal efforts in this field, the restoration of the historic ties with the traditions of Russian merchants, forgotten during the past decades.

State control over the adherence to the Law is carried out by the SCAP and its local agencies. To fulfill this function the SCAP has extensive powers to collect the information it needs. It is empowered to demand from business entities, state bodies and officials, that they deliver trustworthy documents, written and oral explanations and other information necessary to perform its functions. The persons empowered by the SCAP for the realization of its functions have a right of free access to the ministries, state bodies, enterprises, and organizations, for acquaintance with all necessary documents. Information, which constitutes a "Trade Secret," received by the SCAP and its local agencies, shall not be divulged. According to the Law, in case of disclosure of such information, the resulting losses are compensated by the SCAP.

The observance of the duty to deliver trustworthy information to the SCAP requested by the business entities, state bodies (legislative and executive) and their officials are ensured by the imposition of fines, stipulated by the Law. When incorrect, deliberately false information is given by a business entity, the fine of 50,000 roubles is imposed. When incorrect, deliberately false information is given by an official of executive state bodies and business entities, the fine of 1,000 roubles is imposed. Obviously the amount of the fines is too low to be an effective deterrent. For most business entities or officials it is more profitable to submit false information and pay a low fine than it is to disclose damaging

information. The situation in this field was not seriously improved by amendment to the Code of Administrative Offences by Article 157-1, (March 13, 1992) which envisaged the liability of the officials for non-delivery of the requested information to the SCAP in the form of a fine equal to six minimum salaries. There is an urgent need to establish seriously effective measures to stimulate the participants of the market to observe the duty to deliver trustworthy information necessary for the SCAP to determine whether the violation of the law is taking place.

In order to see the whole mechanism prevent and suppress violation of the Law on Competition, it is necessary to analyze the relevant articles of this Law, rules considering matters on violation of antimonopolistic legislation, approved by the SCAP,⁴ and some new provisions of administrative and criminal legislation. The supervision of the observance of the Law is carried out by the SCAP and its eighty-two (82) local agencies. They consider the facts and circumstances of violations of the Law and adopt decisions according to their jurisdiction.

The list of those entitled to submit an application to SCAP for consideration by them of violation of the Law is rather wide. It includes People's Deputies, business entities, state bodies, and the unions of consumers. Consideration may also be launched by the procurator's office, of the court and by other bodies considering economic disputes as well as on initiative of the SCAP and its local agencies.

The application must be submitted in written form with the documents that support the claim and provide evidence confirming the violation of the Law. It is provided that the information that they contain is not to be divulged.

The vice-president of the SCAP examines the application within ten (10) days and makes a ruling on the institution of the proceeding, or on the rejection of it with cause, or refers the application to the local agency, if it is within the scope of its jurisdiction. According to the rules, the matter shall be considered not later than within three (3) months and this period may be prolonged only in exclusive cases.

The award is made by a majority of votes as the result of the collective examination. The award shall include, in particular, the result of the examination of the case and shall determine the actions that shall be performed by the participants of the matter.

⁴ *Ekonomika, Zhizn*, 1991, No. 34.

The award of the SCAP is the basis for prescription. The prescription is the main instrument of the SCAP by which it takes necessary measures to put an end to the infringement of the Law. The prescriptions of the SCAP are binding on those to whom they are addressed -- on business entities and executive state bodies. The prescription must be performed voluntarily. Information about it shall be sent to the SCAP. There is a special section in the SCAP and its local agencies, which controls the performance of the prescriptions.

Violation of the Law entails an obligatory prescription. Only if the prescription is not performed is the President of the SCAP empowered to make a decision to institute the proceeding and to impose a fine on such business entities and officials. Such proceedings are instituted based on the documents presented by the mentioned section of the SCAP or an application of a subject. Thus, only a failure to respond to the prescription makes the SCAP undertake the second step -- to institute the proceeding to impose a fine. Only the SCAP has the power to impose such fines.

According to the Law, the amount of the fines for non-performance of the prescriptions varies from violation to violation. Business entities liable for deviation from performance of prescriptions, or for inopportune performance of prescription on termination of illegal conduct and restoration of the original situation, on compulsory division, on cancellation or change of a contract contradicting the Law, shall pay a fine of up to one million roubles. Taking into account the process of inflation in the country, the amount of this fine cannot be considered high enough to be an effective measure. Besides, it should be mentioned that the Law determines only the maximum level, but does not contain any criteria for determining the amount of a concrete fine, so it cannot ensure uniformity in application of these fines, and does not correlate the amount of the fine to the gravity of the violation of the Law.

The fine for non-performance of prescriptions by an official was originally stipulated up to 2,000 roubles, which was also too low and needed to be revised. On March 13, 1992, the Code of Administrative Offences was amended by Art. 157 that provided a fine for non-performance or inopportune performance of prescription by the officials of up to 8 minimum salaries.

Officials which during the year already were subjects of administrative liability for non-performance of prescription and committed it again, are punished according to Article 175 of Criminal Code of Russian Federation (amended on March 13, 1992). This article provides for criminal liability of two years corrective labor or payment of a fine of up to 10,000 roubles, or deprivation of a right to hold definite posts or to be occupied in definite activity for a period of three years.

All fines imposed by the SCAP are paid by business entities and by officials into the budget within 30 days of receiving a decision. In case the subject avoids the payment of the fine, the SCAP applies to the court of arbitration with a claim on imposition of the fine.

Since the fines are paid into the budget, not to any party injured by the infringement of fair competition, they do not have a compensative role. Thus, the injured party may seek damages in the court or arbitration.

Equal to the SCAP's application for compulsory measures for imposition of fines is its application for compulsory measures directed at real performance of the prescription. According to the Rules, in cases of non-performance of a prescription, cancellation or a change of a contract, or reaffirmation or change of illegal acts of the state executive body, the SCAP applies directly to the court or arbitration and files a statement of claims for change or cancellation of a contract, or for nullification of the whole or partial illegal act of a local state body.

According to the Law, the business entities and officials may appeal the decisions of the SCAP to the court or arbitration. They may claim full or partial nullification of the prescription of the SCAP or reversion or change of the decision to impose a fine. But the act of filing an application does not interrupt the performance of the prescription or payment of the fine for the period of its consideration by court or arbitration, unless court suspends the performance or the payment.

The observance of the Law on Competition is ensured not only by the provisions for liability of participants of market relations, but also by the provisions for the liability of the officials of the SCAP and its local agencies for violation of the Law. However, the fines provided for such violation are not high enough. In this aspect, of more importance is the special provision of the Law, according to which in case the acts of legislative and executive state bodies, including the SCAP, as a result of non-performance or improper performance of their duties, cause losses to a business entity, it can file a statement or claim for compensation for the damages in the court or through arbitration.

The analyzed mechanism ensuring the observance of the Law and suppression of its violation is based mainly on the use of the binding prescription of the SCAP to terminate illegal behavior. The fines are stipulated not for violation of the Law, as a rule, but for non-performance or inopportune performance of the prescription. But, for a country where legislation on competition did not exist and traditions of fair competition must first be formed, such an approach may not be sufficient nor effective.

Because the fines are not high enough, such fines do not stimulate the strict observance of the Law, prevent the violation of the Law, and punish the infringer. Probably the corrections of the amount of the fines and of the methods of their calculation can become a factor increasing the effect of this law on transforming economic relations in the country.

CONCLUSION

The analyzed first law on competition is rather short. There are some problems with its text, and there are many gaps in regulation. But it marks the beginning of the development of legal regulation on competition and prohibition of monopolistic activity in Russia. The Law will be developed and improved and such perspective is envisaged in its text. Envisaged among the main functions of the SCAP is submitting to the Council of Ministers' proposals on improvements to the anti-monopolistic legislation and its application. The process of amending the Law have begun.

Different aspects of regulation of competition and restriction of monopolistic activity are included in some legal acts of general and special character and also contribute to the development of legal regulation in this field. An important perspective of development of a legal regime on competition is connected with the more and more evident need for multilateral regulation of these problems in the frame of the Commonwealth of Independent States. The negotiations in this sphere have started.

Obviously the development of legal regulation alone cannot change the situation in a country with an overmonopolized economy, nor can it ensure free competition and demonopolization. These processes of activating competition can be essentially promoted by including the country in world economic relations and by opening the economy to foreign business entities. But these perspectives depend not only on legal regulation, but are to a great extent determined by economic factors.

