

# PRIVATE ANTITRUST SUITS IN RUSSIA: CURRENT SITUATION AND FUTURE PERSPECTIVES



The importance of private antitrust lawsuits in Russia has risen significantly over the past few years. In 2000-2011 such claims were satisfied quite rarely.<sup>1</sup> However, in January 2012, a provision directly entitling to sue a legal entity, which committed an antitrust violation, for damages caused by such violation, was introduced into Russian law.<sup>2</sup> Since that time, the overall number of private antitrust lawsuits filed in Russian courts has substantially increased, as well as the number of satisfied claims.

The Federal Antimonopoly Service (FAS) intends to enhance the role of private antitrust lawsuits even further. It has developed draft legislation (Draft Law) that provides a person, who suffered from a violation of antitrust law, a right to claim compensation from the infringer. The amount of compensation may vary from 1% to 15% of the price of the goods sold, involving the breach of antitrust law.<sup>3</sup> The only thing that claimants must prove to receive compensation, is the fact of purchasing goods from the infringer at a certain price. The exact amount of compensation would be defined by the court, based on the nature of antitrust breach.

Below we analyze the current trends in court practice, relating to private antitrust lawsuits.

The decision of the FAS establishing an antitrust violation is not a required prerequisite for filing a private antitrust claim in Russia. Therefore, both 'follow-on' (claim based on the decision of the FAS) and 'stand-alone' (claim where the antitrust violation has not been established by the FAS decision, and therefore the claimant must prove both the antitrust violation and the fact of inflicted damages) claims may be submitted. However, we have not found any 'stand-alone' claims that were satisfied, since the claimants were not able to prove the antitrust violation by themselves. All private antitrust claims satisfied in Russia were based on FAS decisions.

In most of the cases, the FAS decision is deemed by courts as a sufficient proof of unlawful nature of defendant's actions.<sup>4</sup> However, it is not enough for the satisfaction of a private antitrust lawsuit. In addition, as in the other cases relating to the recovery of damages, the claimant must prove:

- (i) the existence and amount of the loss; and
- (ii) a direct causation between actions of the infringer and the claimant's loss).<sup>5</sup>

The general approach of the Russian courts towards the recovery of damages has become more lenient after the Decision of the Supreme Arbitration Court dated September 6, 2011 No. 2929/11 has been passed. According to this decision, the court cannot dismiss the claim on the sole grounds that it is impossible to count the exact amount of damages suffered. This decision of the Supreme Arbitration Court made it easier to recover damages for antitrust violations as well.

The claimant can recover both actual loss and loss of expected profit caused by the antitrust violation. As in other cases relating to the recovery of damages, it is more difficult to recover the loss of expected profit. Private antitrust claims of this type are satisfied if the claimant is able to prove that the violation of antitrust law was the only circumstance that caused the loss of profit and that the claimant had real prospects of receiving profit.<sup>6</sup> An illustrative example of a successful claim for actual loss is the recent case No. A55-9327/2013, where the claimant received more than RUB 5.7 million from the infringer of antitrust law (Decision of the Supreme Arbitration Court No. BAC-7495/14 dated June 25, 2014). Loss of expected profit has been successfully recovered by the Decision of Moscow Arbitration Court dated June 24, 2014 case No. A40-14800/14, where the claimant received more than RUB 408 million.

The Supreme Arbitration Court also ruled that it is possible to recover compensation of expenses for administrative proceedings in the FAS if the person complained of the breach of competition law to the FAS<sup>7</sup> (Decision of the Presidium of the Supreme Arbitration Court No. 9837/13 dated December 17, 2013).

Review of the court practice shows that claims based on unfair competition or on abuse of a dominant position, in a form of imposition of contract conditions

<sup>1</sup> E.g., the Resolution of the Supreme Arbitration Court of the Russian Federation dated April 24, 2002 No. 6695/01, Decision of the Federal Arbitration Court of East-Siberian Region dated December 1, 2010 case No. A33-5393/2010.

<sup>2</sup> See Article 37 of the Federal Law dated July 26, 2006 No. 135-FZ "On protection of competition".

<sup>3</sup> The full text of the Draft Law may be found here (published in June 2014): [http://regulation.gov.ru/project/15533.html?point=view\\_project&stage=2&stage\\_id=10793](http://regulation.gov.ru/project/15533.html?point=view_project&stage=2&stage_id=10793).

<sup>4</sup> See, for example, Decision of the Supreme Arbitration Court dated October 14, 2013 No. BAC-13916/13, Decision of the Supreme Arbitration Court dated January 15, 2012 No. VAS-19156/13.

<sup>5</sup> See, for example, Decision of the Supreme Arbitration Court dated August 19, 2013 case No. A40-82507/12-82-758; Decision of the Federal Arbitration Court of West-Siberian Region dated May 15, 2012 case No. A27-8310/2011.

<sup>6</sup> See, for example, Decision of the Federal Arbitration Court of Povolzhskiy Region dated July 24, 2012 case No. A06-590/2010, Decision of the Federal Arbitration Court of Moscow Region dated September 7, 2012 case No. A40-118546/10-22-1086.

<sup>7</sup> See, the Resolution of the Supreme Arbitration Court dated December 17, 2013 No. 9837/13.

or unreasonable supply interruption, are satisfied more often than other types of private antitrust claims.<sup>8</sup> At the same time, private antitrust claims for the recovery of difference between contract price that was recognized by the FAS as being monopolistically high and market price, usually fail. In such cases, the courts deem that such contract conditions were set up by the parties freely and, therefore, the price difference may not be recovered. Accordingly, in order to recover damages, the claimant must prove that an agreement was made with the 'defect of the will'.<sup>9</sup> However, there is a possibility that this harsh approach will be changed if the Draft Law, which introduces an alternative type of claim, comes into force.

In relation to cases connected with state procurement procedures, the courts are more willing to satisfy claims

for damages (usually in a form of loss of expected profit), if a state contract has been already concluded and an infringement occurred on the later stages (e.g., during the performance of contract).<sup>10</sup> In contrast, claims are rarely satisfied in cases when a state contract has not been signed yet, since it is difficult to prove the reality of expectations.<sup>11</sup>

Overall, court practice on private lawsuits in competition law is still in the stage of its formation. Although there are some trends in its development, there is no guarantee that the courts will reach the same conclusions in similar cases. The result of a private lawsuit depends on specific circumstances of each case and on the claimant's ability to prove all the necessary elements to recover damages.

<sup>8</sup> See, for example, Decision of the Federal Arbitration Court of Moscow Region dated September 4, 2013 case No. A40-135137/12-131-526 (approved by the Supreme Arbitration Court); Decision of the Federal Arbitration Court of Moscow Region dated October 3, 2013 case No. A40-2196/11-50-19.

<sup>9</sup> See, for example, Decision of the Federal Arbitration Court of North-West Region dated April 12, 2010 case No. A56-32803/2009; Decision of the Supreme Arbitration Court dated December 5, 2012 No. BAC-16082/12.

<sup>10</sup> See, for example, Decision of 14th Arbitration Appeal Court dated July 10, 2014 case No. A13-16417/2013.

<sup>11</sup> See, for example, Decision of the Federal Arbitration Court of Moscow Region dated June 17, 2011 case No. A40-66505/10-24-556 (approved by the Supreme Arbitration Court); Decision of 10th Arbitration Appeal Court dated July 8, 2014 case No. A41-66633/13.

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