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Protección contra la imposición de cláusulas abusivas por parte de la posición dominante en la legislación rusa: aspectos para garantizar un equilibrio de intereses

Protection against imposing unfavorable contract terms by the dominant party in the russian legislation: issues of ensuring the balance of convenience

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Resumen

Los problemas legales de contrarrestar la imposición de términos desfavorables del contrato por dominante forman un complejo de problemas teóricos y prácticos. Los autores de este artículo intentan determinar la naturaleza legal de la "imposición", así como desarrollar enfoques para resolver los problemas de la resistencia integral a esta violación para garantizar un equilibrio de intereses. La base filosófica y concepcional es, en primer lugar, la idea de un equilibrio de intereses, como la base objetiva de la regulación legal. Entre los principales métodos filosóficos y científicos utilizados en el trabajo, en particular, son dialéctico, legal formal, hermenéutica legal, legal comparado, empírico. La base teórica es el trabajo en el derecho civil, administrativo, empresarial y procesal. La naturaleza legal de la imposición como la violación debe determinarse por la lógica general de la regulación antimonopolio. La posibilidad del uso paralelo de los recursos de derecho público y privado requiere el desarrollo de medios legales procesales para garantizar una práctica uniforme de aplicación de la ley, un equilibrio de intereses. En primer lugar, la unidad de los enfoques en el marco del derecho público y los recursos del derecho civil deben relacionarse con la determinación de los signos y el contenido de los elementos de la imposición. También se proponen los enfoques para la formación de un modelo procesal apropiado.

Palabras clave: Acuerdo; derecho antimonopolio; equilibrio de intereses; imposición; derecho público; pleito

Abstract

Legal issues of counteracting the imposition of unfavorable contract terms by the dominant party raise a number of theoretical and practical problems. The authors of the article try to determine the legal nature of imposition and develop methods of comprehensive counteraction to this violation in order to ensure the balance of convenience. From the philosophical perspective and a certain worldview, the study is based on the balance of convenience regarded as the objective foundation of legal regulation. The main philosophical and scientific methods used in this article include the dialectic method, the formal-legal method, the method of legal hermeneutics, as well as the comparative-legal and empirical methods. The theoretical basis is represented by scientific works in the field of civil, administrative, entrepreneurial and procedural branches of law. The legal nature of imposition as a type of violation should be determined with due regard to the general logic of antitrust regulation. The parallel use of both public and private law necessitates the development of procedural legal means ensuring uniform law enforcement and the balance of convenience. First of all, the unity of approaches regarding legal tools of public and civil law should be concerned with the definition of features and the essence of elements compiling the imposition itself. The authors also propose approaches to the formation of an appropriate procedural model.

Keywords: Agreement; antitrust law; balance of convenience; imposition; public law; tort.

Introduction

According to Yarmonova (2019), "social relations become more complicated, therefore law needs to be more flexible and dynamic" (pp. 2-2). It seems that this thesis should be clarified, specified and conditionally accepted for out-of-context use. Sometimes excessive dynamism can be unjustified, while stable and conservative law is more consistent with the balance of convenience. In addition, flexibility can hardly serve as an absolute category that defines one of the imperatives of legal development. In different situations, it is obvious that dynamism and legal flexibility can entail various consequences for purposes of regulation and law enforcement, which are not always positive. We cannot but agree with Yarmonova that regulation really lags behind social relations and results in conflicting law enforcement and imbalance. The need for dynamism and legal changes is clearly manifested and recognized but it is necessary to follow the original idea of law, i.e. to ensure the balance of convenience based on the principle of equity. These changes should be effective and guarantee the balance of convenience in the changing conditions of forming new and more complicated social relations.

Thus, it is quite logical that public authorities should ensure the compliance of positive law and rapidly developing social relations. However, the current legislation lags on a number of issues and its position is not clear enough or completely unclear. One of the issues requiring more detailed and purposeful legislative regulation is the legal nature of violated antitrust rules, as well as the grounds, order and ratio of using legal remedies against these violations. One of such violations is the imposition of unfavorable contract terms on the counterparty by the dominant party (hereinafter referred to as "imposition").

The foregoing is relevant in the context of distinguishing between essential elements and actual violations of antitrust law that is crucial for considering the Russian antitrust problems. In this article, we try to determine the legal nature of imposition and develop approaches to counteracting such violations in order to ensure the balance of convenience.

Theoretical Research Base

The research subject is addressed by both public and private law, which conditioned our appeal to the works and approaches developed by civil, business and administrative law as the theoretical basis. In addition, the study of legal remedies is impossible without referring to the legal procedure and process, which makes it necessary to address procedural branches of law, in particular, arbitration, administrative and judicial proceedings (Zelentsov and Yastrebov, 2017).

Methodology

To solve the above-mentioned tasks, determine problems, draw conclusions and develop proposals, we used a complex of philosophical and scientific methods. From the philosophical perspective and a certain worldview, this study is based on the balance of convenience regarded as the objective foundation of legal regulation, including relations aimed at opposing the imposition of unfavorable contract terms. The main philosophical and scientific methods used in this article include the dialectic method, the formal-legal method, the method of legal hermeneutics, as well as the comparative-legal and empirical methods.

Results and Discussion

Within the framework of the Russian law, the imposition of unfavorable contract terms upon the counterparty violates the existing antitrust law and is regarded as an antitrust violation. Thus, the Federal Law No. 135-FZ (2006) "on the Protection of Competition" (Law on the Protection of Competition) prohibits the actions of an economic unit holding the dominant position, which infringe upon the interests of other persons or are irrelevant to the agreement in question (art. 10, 2006).

Initially, the legal nature of imposition as a violation should be determined with due regard to the general logic of antitrust regulation. The relevant scientific literature notes that imposition has

common features with a number of other legal phenomena, for example, oppressive contracts prohibited by civil law. However, there are certain differences that associate imposition with the manifestation of market power and, accordingly, antitrust regulation (Petrov, 2010). We can also emphasize the lack of physical coercion in the structure of imposition. In general, we try to use the integrated approach to disclosing the concept of imposition as a violation of antitrust law and the subject of antitrust control (Petrov, 2010). Popova rightly notes that "imposition as a form of unlawful behavior can be committed by an entity that has a sufficient degree of economic power, i.e. holds the dominant position in the market" (Popova, 2016).

In turn, antitrust regulation aims at solving systemic problems of the economy through means ensuring the protection of public competition without violating other types of public interests. It conditions the predominance of public-legal remedies, primarily means of administrative and legal regulation, in the complex of antitrust rules and principles. This is typical of both the Russian and foreign antitrust law. Objectives of the main antitrust act –the Law "On the Protection of Competition"– are undoubtedly public: to ensure the unity of economic space, the free movement of goods, the freedom of economic activity in the Russian Federation-RF, the protection of competition and the creation of conditions for the effective functioning of commodity markets (Kvanina, 2014). The above-mentioned objectives guarantee public interests, i.e. interests of society and state, as well as socially significant interests of an indefinite number of persons (Supreme Court of the Russian Federation, 2015).

Antitrust law achieves these goals through counteracting monopolistic activity. Based on the goals and objectives of antitrust regulation, antitrust authorities should properly respond to business statements about restricting competition or imposing unfavorable conditions by a monopolist, solve the problems of monopolizing economy as a whole and create suitable conditions for opening markets for new businesses where competition justifies itself and contributes to economic well-being (Mikheeva, 2008).

Thus, imposition is unlawful because of the prohibitions established by antitrust law. Such a violation as imposition is present in the Russian legislation as a result of antitrust regulation banning it as an independent tort. Antitrust law prohibits imposition as a special case of abusing the dominant position by an economic entity. To define imposition as an antitrust violation, it is necessary to establish all the elements of such a violation that should correspond to general features of abusing one's dominant position and specific features common to imposition. If imposition reveals signs of abusing one's dominant position as a whole, it forms elements of a violation of antitrust law. In this case, public-legal remedies should be used since such a violation of antitrust law negatively affects public interests.

There is a number of questions, including whether imposition with established elements of this violation of antitrust law also affects civil law. In other words, can an individual who believes that their civil rights have been violated use civil-legal remedies for their protection?

Before answering this question, it is necessary to dwell on the very concept of imposition. According to the corresponding scientific literature, the current legislation, including antitrust law and the Civil Code of the Russian Federation, does not contain the definition of imposition (Petrov, 2010). In particular, it hinders the successful overcoming of various law enforcement difficulties associated with the determination of particular behavior as unlawful, including situations when courts consider disputes related to the abuse of the dominant position by an economic entity.

The foregoing does not help distinguish between two concepts: "possible violation of antitrust law" and "actually established violation of antitrust law". In relation to the violation in question, a definition revealing its constituent elements could possibly contribute to determining its signs, i.e. at least suggesting a possible violation if not establishing it yet. The solution to this issue is not only of theoretical but also of practical importance. According to the Russian antitrust law, an antitrust authority should issue a warning upon detecting signs of any violation, including imposition. However, such

an authority can issue an order and impose some penalty only after the fact of violation has been established.

Since there is no proper definition of imposition in the current legislation, we need to refer to the method of legal hermeneutics to identify its meaning. Moreover, it should be noted that explanatory dictionaries of the Russian language do not provide this definition as well. At the same time, they mention the word "to impose" that means "to force something to be obeyed or received, to force someone to accept something". Consequently, imposition is an act of making someone do something that they do not want to do or that is not convenient. Petrov shares this opinion and defines the imposition of contract terms as the coercion of a party to conclude a contract on unfavorable terms or an agreement not related to its scope (Petrov, 2010).

Therefore, we can define imposition as coercion and assume that it refers to the absence of the real will of the party forced to commit certain actions. In other words, the conclusion of such a contract is conditioned only by an external necessity for one of its parties that does not have free will, at least in full capacity.

The conclusion drawn corresponds to the position expressed in one explanation provided by the Federal Anti-Monopoly Service (FAS). It says that imposing unfavorable contract terms to the counterparty is the behavior of some business entity, in which the counterparty's rights are infringed or it is forced to enter into legal relations on unfavorable conditions (FAS, 2013).

In addition, we should pay attention to the fact that imposition defined as a violation of public order by antitrust regulation inevitably encroaches on the rights of individuals and infringes them. Some scholars associate not only imposition but also other acts prohibited by Article 10 of the Law "On the Protection of Competition" with the concept of "abusing one's rights" established by the Russian civil law and consider the abuse of one's dominant position as a special case of the latter (Egorova, 2018).

This article does not aim at either confirming or refuting the validity of this approach. In this case, scholars share a similar opinion on

the possibility of determining imposition as a tort of civil law. This approach is stipulated by the Civil Code of the Russian Federation (CCRF). According to Clause 1, "not admissible shall be actions performed with the express purpose of inflicting damage to another person, as well as the abuse of the civil rights in other forms. Not admissible shall also be the use of the civil rights for the purpose of restricting the competition, as well as the abuse of the dominating position on the market" (CCRF, 1994, art. 10).

Regarding the behavior expressed in relation to the counterparty, imposition violates not only public order but also the fundamental principles of civil law: free will, the equality of parties to legal relations, contractual freedom, the balance of convenience, good faith and the inadmissibility of law abuse.

Kuznetsova (2006) notes that the principles of civil law interact with each other and comprehensively influence the behavior of its subjects. When one of the principles of civil law is violated, the others are also negatively impacted. Thus, Pyankova believes that "the balance of convenience should be understood as the basic idea of civil law, which consists in the fact that law should strive for the proportionality of rights and obligations of its legal parties and should ensure equal opportunities for the realization of their legitimate interests" (Pyankova, 2015).

This definition clearly indicates the relationship among the balance of convenience, the principle of equality of legal parties and the principle of good faith. Drozdova claims that good faith "acts as the principle of civil law, whose effect is manifested in the emergence and exercise of civil rights and obligations and aims at achieving the balance of convenience between parties to certain relations" (Drozdova, 2005). In turn, Volkov emphasizes the connection between the principle of good faith and the inadmissibility of law abuse. He notes that "in contrast to Article 1 of the Civil Code of the Russian Federation, Article 10 describes intentional actions, i.e. willful acts of a person" (Volkov, 2013). If unfairness can exist on its own and manifest itself without abuse, the abuse of rights cannot be bona fide behavior of parties to the relevant legal relations.

Speaking about the principle of good faith, Ryzhenkov states that "the legislator enshrines the principle of good faith in the Civil Code of the Russian Federation but does not further explain it. Legislators probably refer to the corresponding moral norm accepted in society and objective understanding of good faith" (Ryzhenkov, 2013). It is impossible to analyze good faith without considering imposition as coercion that does not correspond to the actual will of some subject.

It is worth mentioning that the balance of convenience is often considered by courts in disputes between business entities and the counterparty forced to accept unfavorable contract terms imposed on it. According to Clause 9 of the Resolution of the Plenum of the Supreme Arbitration Court of the Russian Federation of March 14, 2014 No. 16 "On the Freedom of Contract and Its Limits", contract terms that significantly violate the balance of convenience between the parties are regarded as unfair and can be declared void under Article 169 of the Civil Code of the Russian Federation or a court can prohibit their application at the request of the injured party due to the provisions of Article 10 of the Civil Code of the Russian Federation (Supreme Arbitration Court of the Russian Federation, 2014). However, the freedom of contract established by Article 421 of the Civil Code of the Russian Federation (CCRF, 1994) has its own limits that are determined by the current laws and regulations. Thus, there is a certain correlation between the balance of convenience and the freedom of contract. There is no doubt that the balance of convenience cannot be properly realized if the freedom of contract is unlimited.

Based on the foregoing, imposition as a specific model of the counterparty's behavior is definitely a violation of civil law. Whether abuse of one's dominant position is recognized as a type of rights abuse or not, imposition as the special abuse of one's dominant position should be considered as a civil tort based on its constituent elements, as well as the rules and principles of civil law.

It is crucial to attribute imposition or other types of abusing one's dominant position to rights abuse since the resolution of this issue helps determine the subject and scope of evidence on such a violation.

If we assume that imposition is a special case of rights abuse, it will not be enough to declare the abuse of one's dominant position but will also be necessary to provide evidence for rights abuse to apply civil remedies. Given that the legal proceedings on rights abuse differ from antitrust law, it can become a factor that does not contribute to the uniformity of practice and, consequently, the predictability and balance of convenience.

Regarding imposition as a type of rights abuse or a different kind of abuse is not crucial for evaluating the possibility of applying various methods to protect civil rights, including the compensation of losses, since civil law links the application of legal remedies established in the Civil Code of the Russian Federation not only with the acts resulting from rights abuse but also with other behavioral patterns that cause the violation of civil rights. Consequently, it is possible to claim compensation for losses and apply other permissible and appropriate civil remedies if a person holding the dominant position abuses such a position in the form of imposing unfavorable contract terms.

At this stage, we face another problem. What is the best model for applying civil remedies against imposition if it is recognized not only as a violation of civil law but also as a violation of public law? We should emphasize that imposition is initially a violation prohibited by antitrust law in order to protect public interests. The abovementioned arguments urge to recognize imposition as a civil tort and prove its status as a violation of public law, which necessitates the possibility of applying appropriate legal remedies both in public and in private law.

We should dwell on the position of Kvanina who studies legal means of protecting private rights and interests in antitrust law and concludes that the latter "must a priori protect both public and private interests" (Kvanina, 2014). While generally supporting her opinion, we cannot but criticize this approach since the wording provided can be interpreted in different ways, i.e. as the possibility of protecting both public and private interests by antitrust authorities in their contradiction and/or substantial discrepancy. The scholar probably did not mean this inconsistency but we find it reasonable to suggest

a new approach. In its context, antitrust law and antitrust authorities do not protect both public and private interests. According to the logic of full or partial coincidence, antitrust regulation protecting public interests also ensures private ones that do not contradict them and whose protection corresponds with the goals and objectives of defending personal interests. Private interests contradicting public interests cannot be subject to legal protection. The opposite approach will distort the goals and functions of the executive branch which can turn into a means of securing someone's private interests.

Turning back to the correlation of public-legal and private-legal remedies, we should note that the use of both types aims at ensuring the balance of convenience due to the need to create consistent approaches to understanding the essence of unlawful imposition and constituent elements of this violation, which can be complicated by the procedural autonomy of civil-legal and public-legal remedies.

In connection with features of the Russian model of antitrust regulation and control, public-legal and civil-legal measures can be implemented in two main ways:

1. Based on the antitrust investigation conducted by the Federal Anti-Monopoly Service of the Russian Federation and under Chapter 9 of the Law "On the Protection of Competition" (Federal Law No. 135-FZ, 2006), a person applies civil-legal means after establishing the violation of the current antitrust law, for example, claims compensation for losses. In this case, there is apparently no reason for the discrepancy between the results of private-legal protection based on judicial proceedings and approaches to competition policy that can harm public interests.
2. A person can claim compensation for the losses caused by the imposition of unfavorable contract terms by the dominant party without appealing to antitrust authorities. Russian law does not exclude the fundamental possibility of such an approach. At the same time, a number of issues remain unresolved and misunderstood. What is the procedure for addressing antitrust authorities to establish the defendant's dominant status – before the trial or in its course? Will this appeal entail procedural actions of the latter to identify elements of violation if the fact of dominance

is proved? Is it significant for judicial proceedings if no signs of violation have been established? How to protect public interests realized within the framework of the competition policy against the risks of getting a judicial decision that substantially differs from the approaches used by antitrust authorities in cases of imposition? Furthermore, it is not about the cancellation of some antitrust act due to the abuse of authority, etc. This approach is rather connected with judicial proceedings unrelated to the logic of protecting competition in the same type of court cases using administrative means.

An attempt to partially resolve the above-mentioned issues, in particular the last one, is represented by the Resolution of the Plenum of the Supreme Arbitration Court of the Russian Federation (the Plenum Resolution). Its interpretation of law states that "in addition to the right to appeal to the arbitration court with claims and allegations of violated antitrust legislation (Federal Law No. 135-FZ, 2006, cl. 6, part. 1, art. 23), by virtue of Federal Law No. 135-FZ (2006, cl. 7, part. 1, art. 23), antitrust authorities have the right to participate in the consideration of judicial cases related to the application and/or violation of antitrust law initiated on the basis of claims and statements of other persons. Therefore, considering cases initiated by lawsuits and applications of other persons, the arbitration court must notify antitrust authorities to enable their participation. Moreover, the procedural status of such authorities is based on the nature of the dispute under consideration" (Supreme Arbitration Court of the Russian Federation, 2008).

Obviously, a model was being formed, under which antitrust authorities were informed about the initiation of a lawsuit not preceded by an administrative antitrust process. The Federal Anti-Monopoly Service of the Russian Federation retains the right to participate in such proceedings or simply be informed about such a case. In the first case, the procedural status, importance and consequences of such participation are not quite clear. If antitrust authorities are notified but refuse to participate in proceedings,

is it equivalent to their initial consent with the future court decision and the corresponding position in the above-mentioned case? Many authors of the relevant scientific literature have already highlighted that the Plenum Resolution does not clarify the procedural aspects of law enforcement within the framework of this model (Bashlakov-Nikolaev, 2013).

Shortcomings of the model presented in the Plenum Resolution are indirectly confirmed by judicial proceedings and their diversity: from considering the insufficient information sharing between courts and antitrust authorities as a reason for canceling a judicial decision and applying for a new trial, to the opposite attitude to this circumstance (involvement of antitrust authorities does not affect the final decision) (FAS, 2011). These circumstances necessitate the development of a better model that provides the balance of convenience in connection with the possibility of filing a private-legal lawsuit in defense of imposition and other violations of antitrust law. It is likely that the most consistent method is the first approach enshrined in legal rules and principles. However, there are certain specifics if the rule applies not to particular categories of cases but all violations of antitrust law. In this case, important aspects should be taken into consideration to ensure the balance of convenience associated, for example, with a specific form of protection against unfair competition. In some countries, unfair competition unlike monopolistic activity does not belong to the sphere of public interests and is subject to judicial protection as a violation of private law. In this context, it can be unjustified to force an individual seeking protection against unfair competition to apply to the Federal Anti-Monopoly Service of the Russian Federation.

Bashlakov-Nikolaev offers a two-stage model, in which "an appeal to arbitration courts for the protection of rights violated as a result of the violation of antitrust law follows the consideration of the case of violating the existing antitrust legislation" and prefers it "for the purpose of restoring the violated rights of individuals". Exceptions are those cases when it is not necessary

to establish the dominant position of some economic entity, for instance, the abuse of the dominant position by natural monopolies (Bashlakov-Nikolaev, 2013). According to this approach to exceptions, it is not entirely clear how to legally guarantee the balance of convenience, as well as the harmonization of approaches of judicial and executive authorities to ensuring public interests in the field of antitrust regulation.

In general, the issue under consideration raises a number of additional questions, including the expansion of the mandatory pre-trial procedure for settling public-legal disputes. In cases of imposition, there is a public-legal component related to the nature of violation and civil-legal component if the injured counterparty wishes to protect their rights and restore their economic well-being (to recover losses). In this regard, the first approach means the mandatory pre-trial procedure for resolving a dispute related to civil protection, in particular damages as related to determining constituent elements of some violation. If the fact of such a violation is established, this model enables the injured party to apply to a court for compensating damages. In the absence of violation established by antitrust authorities, it is impossible to recover any damages unless the act of establishing the violation in question is declared unlawful.

Conclusion

Thus, protecting the counterparty against the unfavorable contract terms imposed by the dominant party is quite challenging due to the insufficient legal definition of imposition, unclear and subjective elements of this violation and its overall specifics in the context of elements that establish the fact of such a violation.

Furthermore, the current Russian legislation does not contain a list of actions of the dominant party or criteria by which its particular action can be regarded as imposition. As a result, courts considering disputes related to the imposition of contract terms

have to be guided by their own understanding of imposition and their own conviction when classifying a particular action of the dominant party as unlawful in the process of making appropriate decisions.

Nowadays, this situation results in the lack of uniform judicial proceedings in this category of disputes. We suggest to legally define the concept of imposition and determine the criteria, according to which a particular action of the dominant party can be recognized as imposition. In addition, it is instructive to form a draft list of actions (inactions) of the dominant party, which may indicate imposition individually or collectively.

Imposition is a violation of antitrust law infringing on public interests, which makes the state represented by an authorized antitrust authority undertake procedural measures aimed at protecting public interests against this violation. At the same time, imposition is also a civil tort that allows the use of legal remedies by the injured party to a certain civil contract that caused the fact of imposition in the first place.

Since antitrust law and antitrust authorities belong to the executive branch ensuring public interests, they are not entitled to protect private interests. However, the protection of public interests is connected with the need to protect private interests, which are included into the above-mentioned public interests, correspond to their essence and fall within the logic, goals and objectives of this process.

When applying legal remedies of public and private law against imposition and other antitrust violations, the main task is to ensure the balance of convenience in order to develop consistent approaches to understanding the illegality of imposition and its specific elements, which can be particularly challenging due to the self-sustaining procedural order of applying civil-legal remedies in contrast to a similar procedure of applying public-legal remedies.

The parallel use of both public and private law necessitates the development of procedural legal means ensuring uniform law

enforcement and the balance of convenience. First of all, the unity of approaches regarding legal tools of public and civil law should be concerned with the definition of features and the essence of elements compiling the imposition itself, as well as corresponding elements of violating the existing antitrust law.

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