**Popcorn, sugar and taxi: how the Federal Antimonopoly Service fights small business**

by Alexey Ulianov

The Antimonopoly legislation reform, which was discussed in Duma, won’t resolve a problem of unfair complains from the Federal Antimonopoly Service (FAS) to the small and mid-size business.

In the end of October state Duma will consider the draft law “About changes in Federal Law “About competition protection” and separate legislative enactments of Russian Federation”, which was named “the fourth antimonopoly package”. It’s great, that during the discussion the feedback from experts and business community was taken into consideration. But many negative norms still exist, and business community in the person of “Delovaya Rossiya” and other associations seeks for the changes in the package in the second and third amendments. One of such norms is a possibility to prosecution of small-sized business. The amount of proceedings brought into action had been increased in 7 times for last 8 years (to 55000 in 2013) and now it is more than in the all other countries in sum.

At the same time share of the small and medium-sized business (SMB or SME) is increasing to 55% of all of the proceedings. But the proceedings involving foreign corporations are a rarity. On the middle of 2014 100% of large fines were paid by Russian companies. By the way, foreign rivals in USA are the main object of antimonopoly proceedings (92,2% of fines are exacted from foreign companies) and the smallest figurant is Transitional Optical company with $800 million turnover.

The FAS actively uses the “hardest” part №1 of asset №11 of Federal Law 135 (“Cartel”) against MSB, including criminal liability. In developed countries cartels of small-sized business are nonsense, but in Russia two-thirds of cartel proceedings are against MSB. The story of sole proprietorships Avtonomova E.V. and Koshechkin I.S. about the agreed price for trampoline’s rent in Gorno-Altaysk became a talk of the town.

But there are a lot of equally anecdotal examples.

A sole proprietorship Steklyannikov S.V. with monthly profit of 14000 was declared as a monopolist in the market of veterinary-sanitary processing of vehicles and was fined for a monopoly high price.

OOO “Kino City Novosibirsk” was fined 2 million rubles for a limitation of competition in the market of popcorn within the limits of TRZ “Sibirskiy Mall”.

A sole proprietorship Meteleva (Syktyvkar) was selling persistent cream hair dye on 17 square meters and was accused of vertical contract with other sole proprietorship.

Sole proprietorships Sablin A.D., Gurin A.V., Evtushenko M.N., Ovsyannikov S.V., Reshetnikova L.A. from Rubtsovsk (Altai Krai) were accused in collusion because of the increasing of prices for taxi from 150 rubles to 170 in New Year’s Eve.

Sole proprietorships Prichina V.E., Pasynkova T.P., and Bulychev A.V were declared as a cartel and were fined for similarity in gas prices. The the FAS hadn’t taken into consideration, that the prices wasn’t higher then large networks prices, let alone a principal impossibility of sole proprietorships to affect the market.

The FAS took into action a proceeding against a sole proprietorship Puhov and other two sole proprietorships because of coordinated actions in a form of “synchronous price increase” in the market of sugar. The prices differed in 80 kopecks, despite the fact that sugar is an exchange commodity.

A sole proprietorship Mamonenkova V.V from Elista was accused in cartel collusion. The reason was that the proprietorship was realizing transfers on the route №5 in Elista. On the 21st of March her vehicle was broken, and she asked another sole proprietorship to substitute her.

The FAS had detected a cartel of husband and wife. The antimonopoly service identified a collusion in actions of an individual farm Vodopyanov S.S. and OOO”Zhivotnovod” (Stavropol Krai), which founder is Vodopyanov’s wife, because of joint participation in the tender for a rent of a holdings. Despite the married couple, no one wanted to go in for agriculture on that ground. There weren’t any complains but the FAS was inexorable.

OOO “Law center “Sovetnik Prava” from Moscow was declared as a monopolist in power transmission market within the limits of the building and was fined for refusing to provide electricity to another firm because of default of payment.

Therapeutic mud-baths in Pyatigorsk was declared as a monopoly on the heat supply market and was fined for notification to “UK “Kommunalshik” about limitation of heat supply because of payment default.

It is only isolated instances of the FAS absurd decisions against SMB. That’s why experts and businessmen are talking emphatically about the need of immunity for SMB from antimonopoly prosecution.

The FAS states that the EU legislation doesn’t include immunity for SMB from antimonopoly prosecution. But this is not the case: Eurocommission in directives № 2004/C 101/07 and №2001/C 368/07 set that collusions between companies - rivals (horizontal cartel collusions) are admissible, if market share sum of the companies is below 10%. In other words, Europeans had come to a conclusion, that that collusion between companies with shares 6% and 4% of market wouldn’t affect the competition. For the other agreements (vertical, other, coordination) a limit of 15% of the market was set. Whereas 2001 year directive set a closed list of the most hazardous collusions, which are inadmissible at any market share of companies (price cartels, collusion on bindings), directive № 2004/C 101/07 don’t make such exceptions.

These norms were adapted in almost all European countries.

In China all of the agreements between small-sized and medium-sized business are allowed. Even in the USA, where cartel collusions were prohibited without exceptions after the Sherman’s law implementation in 1890, since 1970’s collusions were allowed for the companies with sum of the market shares less than 7%. Since 1990’s this limit was increased to 20%. In the European legislation establishment of privileges for small companies was named “rule de minimus”.

The FAS states, that idea of providing privileges for small-sized business is defective, because it can cause a fragmentation of large companies. This is not the case: according to point 1, part 1, asset 4 of federal law 209 “About support of SMB”, a company with more than 25% of capital, belonging to a large company, can’t be a subject of SMB. If a large company will fragmentize, it wouldn’t get the immunity from antimonopoly prosecution, according to the proposal of the Ministry of economic development legislative.

According to declarations of the FAS leadership in the EU a company with 10-20 million rubles turnover (€200-400 thousands) is recognized as a small-sized business. This is not the case: recommendations of Eurocomission 2003/361/EG set the limit of turnover to €10 million for a small-sized business, and €50 million for medium-sized business. Thus in Russia and the EU limits of referring to SMB are similar and there isn’t a danger of using the immunity to rather large companies.

The FAS still haven’t provided examples of decisions against SMB, not referred to natural monopolies, which have a positive social-economic effect.

During the monitoring, we haven’t found any examples of the FAS defending customers from abuse by local monopolist. Even “local monopolist” definition isn’t established in laws and seems to be strained. As usual the FAS proceedings against SMB on competitive markets provide interference in commercial disputes between SMB or carry the pretensions to an absurdity (“trampoline cartel”). Limits of market are narrowed unfoundedly and as result SMB becomes a monopolist within the limits of building, mall and municipal organization. Courts often pay the FAS attention to the similar mistakes, declining 44% of disputed decisions against SMB.

The proposal for setting the “immunity” for SMB is concluded in government’s instructions, in initiatives of Ministry of economic development and in the report by business-ombudsman Boris Titov to the president of the Russian Federation. However these arrangements weren’t pictured in “the fourth antimonopoly package”.

My great hope is that the common sense will prevail and small-sized business wouldn’t be declared as a monopolist like everywhere in the world.

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