Working Session

"Damage claims in competition matters: The dawn of a new era?"

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QUESTIONNAIRE

CHAPTER I: STATUS QUO OF PRIVATE ENFORCEMENT

1. **How would you summarize in few lines the status quo of private enforcement in your jurisdiction?**

Private enforcement of the antimonopoly legislation is possible under Russian law. However, there is not much court practice with regard to private antitrust litigation actions. Most of these relate to abuses of dominance rather than cartel arrangements.

   a. ***[For Non-EU Member States]*** **Can individuals (or only consumer organisations) file an antitrust damage claim? Who can bring an antitrust damages claim? (i.e. are there any requirements or limitations to standing in private enforcement proceedings?)**

      If yes, what is the legal basis (codified or case law) and are they able to submit both stand alone and follow-on actions?

Pursuant to the Article 37 of the Federal Law N 135-FZ as of July 26, 2006 "On Protection of Competition" (hereinafter – the "**Competition Law**"), both individuals and legal entities private rights of which were violated as a result of non-compliance with the Competition Law by the federal executive authorities, state governments in the Russian Federation, local authorities, as well as commercial and non-profit organizations and their officials, individuals, have a right to file an antitrust damage claim.

The types of claims are specified in the Part 3 Article 37 of the Competition Law:

- for redress;
- for compensation of losses, including lost profits;
- for compensation of damage caused to the property.

In accordance with the Article 15 of the Civil Code of the Russian Federation (hereinafter – the "**Civil Code**"), under the losses shall be understood:

- The expenses, which the person, whose right has been violated, made or will have to make to restore the violated right, the loss or the damage done to his property (the compensatory damage);
- The undeceived profits, which this person would have derived under the ordinary conditions of the civil turnover, if his right were not violated (the missed profit).

If the person, who has violated the right of another person, has derived profits as a result of this, the person, whose right has been violated, shall have the right to claim, alongside with the compensation of his other losses, also the compensation of the missed profit in the amount not less than such profits.

Antitrust damage claim may be filed on the ground of the decision of the antimonopoly authority or the court justified the violation of the antimonopoly legislation (follow-on actions) as well as without these decisions (stand- alone actions).

CHAPTER II: COURT AND PROCEDURE

2. What is (are) the court(s) in charge of antitrust private enforcement?

a) Is there a specialized court specifically for antitrust based claims?
If No: are there specific chambers for antitrust claims within the civil/commercial courts?
If Yes: is the court composed only by judges, also economic experts and/or other persons?

There are no specialized courts specifically for antitrust based claims in the Russian Federation. This type of claim is heard in arbitrazh (state commercial court) within which the specific chambers are not formed.

Please however note that antitrust cases are usually considered by the judges specializing in this specific field.

b) May the court impose interim measures?

In accordance with article 90 of Arbitrazh Procedural Code of the Russian Federation (hereinafter referred to as "**Arbitrazh Procedural Code**") the court may impose interim measures under the application of a person, participating in a case. There is not any restriction on category of cases in which the interim measures may be imposed, thus the interim measures may be imposed in any cases, including antitrust cases.

c) May the trial proceed in parallel and independently of a National Competition Authority investigation?

According to clarifications provided in the Resolution of Plenum of Supreme Arbitrazh Court No. 30 as of June 30, 2008 a party may choose to either use administrative (i.e. competition authority) or judicial (the court) way to redress its infringed rights. Choosing either of those options does not preclude a possibility to apply for another one.

If so, how likely it is that the court suspends the case up to the National Competition Authority decision?

The abovementioned Resolution of Plenum of Supreme Arbitrazh Court No. 30 as of June 30, 2008 governs that arbitrazh courts shall postpone judicial proceedings until competition authority renders its decision.

d) Is the decision subject to appeal?
If Yes, does the 2nd (and/or 3rd) instance court assesses both the merit of the case and the law?

The decision of court of first instance is subject to appeal in appellate, cassation appeal and supervisory instances. The appellate court consider both the merit of the case and the law while the courts of cassational and supervisory instances assesses only the law. It should be noticed that in accordance with article 52 of the Competition Law a decision of the Federal Antimonopoly Service of the Russian Federation (hereinafter - "**the FAS**") may be also appealed to arbitrazh court. Decision of regional departments of the FAS may be also appealed to the collegial body of the FAS and after that may be appealed to the court. In

such case, the decision of court of first instance is also subject to appeal in appellate, cassational and supervisory instances.

3. **What nexus with the jurisdiction is required to bring a private action to a court within your jurisdiction (and to keep it there)? Is there room for forum shopping (eg, is an "anchor defendant" sufficient (*cf* ECJ, C-352/13))?**

Article 3 of the Competition Law establishes the principle of its exterritorial effect. It is possible to refer to the Russian court if there is a proof that certain actions or agreements have an impact on the state of competition in Russia.

In accordance with article 247 of Arbitrazh Procedural Code the Russian courts are competent to consider cases, in particular, if the defendant or its assets are located in Russia, the damage was caused or occurred in Russia or there is another substantial connection of dispute with Russia.

However, in practice, Russian courts mainly apply the principle of extraterritoriality to control over economic concentration with respect to Russian companies and assets.

4. **How long does a single (or collective) antitrust private enforcement action in first instance usually take?**

In accordance with the general rule set forth in article 152 of Arbitrazh Procedural Code, the court should consider a case within three month from the date when a claim was filed to the court. There is a special rule for collective action. Pursuant to article 225.16 of Arbitrazh Procedural Code the court of first instance should consider a collective action within five month from the date when the claim was accepted by the court.

Please however note that those terms are of non-binding nature and in practice consideration of the case may take longer. To large extent, duration of the proceedings depends on their complexity, procedural behavior of the parties and workload of the judge (e.g. in Moscow and Moscow region courts the judges are extremely overloaded).

5. **Who bears the legal costs (court fees, the own representation costs and the representation costs of the opposite party)?**

Accordingly common practice, during the court hearings each party bears its own legal costs, including court fees and representation costs, as well as other expenses linked to litigation. In accordance with article 110 of Arbitrazh Procedural Code and in accordance with court practice the court may recover the legal cost of the winning party from the losing one. If the claim was partly satisfied, the court collects legal cost in proportion with the amount of satisfied claim.

It shall be noted that Russian courts demonstrate rather formalistic approach to legal costs recovery and are reluctant to award a winning party full compensation of the expenses – usually it is limited to those expenses which are directly connected to the court proceedings as such (i.e. participation in the court hearings and preparing procedural documents).

6. **In your jurisdiction, are there any alternative funding options or fee arrangements that can be put in place by the plaintiff (for example conditional fee or damages based agreements)? Please outline and give examples if so. What rules on the assignment/bundling of claims exist in**

your jurisdiction that could allow third parties to buy claims from cartel victims?

In Russia, there is no special regulation of conditional fee agreements, damages based agreements, etc., although in principle the client and legal counsel are free to set any terms and conditions with regard to their fee arrangements. Please however note that Russian courts demonstrate contradictory approach to such agreements and not always recognize their enforceability. In addition, Russian courts do not allow recovery of success fee from the losing opponent in court; therefore, expenses on payment of the success fee shall be borne by the client.

Provided that there is no special regulation of the assignment of rights of claim arising from antitrust violations damages, the general rules of assignment shall apply.

Recent amendments to the Civil Code introduced the possibility to assign future claims that have not emerged at the time of the assignment (e.g., assignment of damages that will be awarded by the court or the amount of court costs). However, there is no uniform court practice on this issue and it is not clear how it will work in practice.

7. **Beside antitrust private actions, does your jurisdiction dispose of a collective redress system?**
    - **If Yes, how it is applicable to antitrust private enforcement, (e.g. direct/indirect purchasers, consumers and/or clients)?**

In accordance with Article 225.10 of the Arbitrazh Procedural Code a legal entity or natural person being a participant of legal relation has right to file a claim to protect rights and legal interests of indefinite number of persons, who also are parties to respective legal relations.

Collective redress system was introduced into Russian legislation in 2009, thus as for the present moment there is no well-developed case law. In respect of antimonopoly legislation, collective redress system has become available since 2011. Herewith, there are no antitrust cases at all. However, from our point of view, the collective redress system may be applicable to antitrust private enforcement in Russian court practice.

- **Do collective redresses operate through an opt-in or an opt-out system? In case of an opt-out system, how is the class defined?**

In accordance with the Arbitrazh Procedural Code, the opt-in system exists. Potential participants of the collective claim can submit an application for joining a class action suit.

The party, which filed a class action suit, shall notify other potential members of the group by means requested by the court – e.g. making mass media announcement, sending written proposals to join the group, etc.

The decision of the court will apply only to persons who joined the proceedings.

- **How is it coordinated with the individual actions' framework?**

The right to file a claim to protect rights and interests of indefinite number of persons implies the violation or contesting of rights of not less than five subjects. Moreover, all subjects must be parties to one legal relationship.

If the person, who joined the collective claim, simultaneously submits individual claims, the individual claim shall be left without consideration.

CHAPTER III: EFFECT OF NATIONAL DECISIONS, BURDEN OF PROOF, LIMITATION PERIODS, JOINT AND SEVERAL LIABILITY

8. **Are National Competition Authority decisions relevant for individual antitrust claims, in particular**
    - **as presumption / proof of the infringement in the follow-on case? (f.i. does it matter for the division of the burden of proof between parties if the action is a follow on damages case or a stand-alone action? If so, please elaborate on any difference with regard to the burden of proof)**

In accordance with article 69 of Arbitrazh Procedural Code any circumstances established by the decision of arbitrazh court, or court of the general jurisdiction or by court sentence in criminal case shall not be proved again and shall be obligatory for the court.

On the one hand, the decision of the FAS, if it is not came into force, cannot be used as a presumption of the infringement in follow on case. In any case, it can be used as evidence and should be estimated by the court together with other evidence.

However, if the decision of the FAS comes into force, or the decision was recognized as legitimate by the decision of arbitrazh court, it can be used as a presumption and proof of the infringement in the follow on case.

- **in terms of the *quantum* of the compensation?**

The decision of the FAS could not be used for terms of quantum of the compensation.

Please note that exact amount of compensation shall be always determined on a case-by-case basis provided that it is subject to proving by the party claiming such compensation.

- **for the limitation period?**

Considering that the decision of the FAS or its regional departments can be appealed and litigation can take several months, the claimant will probably wait until the court of last resort delivers a judgment. Also the limitation periods (indicated below) should be taken into account then a claimant considers bringing 'follow-on' action.

9. **What are the relevant limitation periods (taking into account question 8 above)?**

In accordance with the Code of Administrative Offenses, the period of bringing to administrative responsibility for committing antitrust violations is one year. This term is estimated from the moment of adoption by the FAS of a decision on violation of the Competition Law.

Civil claims on compensation of damages, recovery of unjust enrichment, etc. may be submitted during the three years limitation period

10. **What is the liability regime as regard parents for the infringement of their subsidiaries?**

Current Russian legislation provides for a possibility to hold liable for infringement of antitrust legislation any member of the group, who gained profit from such infringement.

11. Please describe limits and scope of joint and several liability for antitrust infringements performed by undertakings (in particular between cartelists) in civil litigation. Does this differ from liability vis-à-vis the authorities

Liability on a 'joint and several' basis is possible in case an action is brought against several defendants and in respect of each of them the claimant proved *corpus delicti* specified in the point 19 below *(*violation of antitrust legislation; infringement of rights and legitimate interests, occurrence of the damages; amount of damage; cause-effect relation). The claimant should also justify the amount of damage (loss) inflicted by actions of the particular defendant, otherwise an action may be dismissed by the court.

CHAPTER IV: DISCLOSURE OF EVIDENCE

12. What evidence is admissible in individuals' actions for antitrust infringements?

In accordance with the Article 64 of Arbitrazh Procedural Code and Article 45.1 of Competition Law any written or material evidence, explanations of parties involved in the case, witness statements, expert reports, audio or video records and other documents and materials can be used as evidence. There is no special requirements for evidence in individuals' actions for antitrust infringements.

- **Is there any pre-trial discovery procedure available?**

Pursuant to the Article 65 of Arbitrazh Procedural Code each party of the judicial proceeding should disclosed any evidence before the court hearing or during the court hearing. There is no special pre-trial discovery procedure.

- **Is there any evidence protected by legal privilege?**

In accordance with the Article 71 of Arbitrazh Procedural Code, the evidences have no binding force for arbitrazh court. The court estimate each evidence separately and collectively with other evidence. Thus, there is no evidence, which are protected by legal privilege.

13. Can the court order the discovery of evidence to defendants or to third parties? Please describe its limits and scope.

Pursuant to the Article 66 of Arbitrazh Procedural Code if the party cannot obtain evidence from the other party who possess it, it is entitled to file an application on discovery of evidence. This right applies to all parties involved to the proceedings. In cases arising from administrative and other public legal relations, if state or municipal body possess evidence and does not provide the court with it, the court can order request of evidence at its own initiative.

14. Do the claimants and/or courts have access to the National Competition Authority's files? If so, also during a pending investigation? Please describe its limits and scope.

In accordance with the Article 43 of the Competition Law, from the beginning of the case on violation of the Competition law, persons involved in the case have the right to

familiarize the materials of the case and make extracts from them. However, persons involved in the case cannot familiarize with confidential information within the case consideration in the FAS.

Within the case consideration in the court, the parties to the case have the right to familiarize with all documents (including confidential) from the case.

CHAPTER V: THE PASSING-ON OF OVERCHARGES

15. Are indirect purchasers entitled to claim compensation, and which limitation do they face?

Since according to the Competition Law claimants, rights and interests of which have been infringed by the violation of antimonopoly legislation, are entitled to bring an action, both third parties and indirect purchasers are able to bring actions. There is no regulation of limitations of such actions.

However, claim of indirect purchaser is complicated by the necessity of proof of the fact the indirect purchaser suffered damages. This element is estimated by the court in each case. The absence of evidences that the indirect purchaser suffered damages, as a result of the actions of the Competition Law violator, may be the ground for rejection of claim.

16. Are victims of "umbrella damages" entitled to protection against antitrust infringements and to compensation in court?

There is no definition of "umbrella damages" in the Russian legislation

17. Is the passing-on defence allowed?

There is not much court practice with regard to private antitrust litigation actions. Generally, the court should decide to collect from the defendant actual damages and lost profit. In case the damages claimed by the claimant were somehow reduced, the court will take it into consideration than determining the compensation amount. The sanctions in the Russian civil law have no punitive character.

CHAPTER VI: DAMAGES

18. What form of compensation can be granted by national courts for antitrust violations?

In accordance with Article 37 of the Competition law the court can grant compensation of damages including lost profit, compensation of harm caused to property, or to restore violated rights of plaintiff.

In particular, can national courts accord punitive damages or treble damages or compensatory function exclusively?

As a general rule, under Russian law damages have exclusively compensatory function and punitive damages are not allowed.

CHAPTER VI: QUANTIFICATION OF HARM

19. What do individuals have to prove in court in order to successfully obtain compensation for antitrust damages, who bears the burden of proof?

In accordance with article 65 of Arbitrazh Procedural Code each participant involved in a case should prove the circumstances to which he refers as to the ground of his claims or objections. Thus, a party who claimed compensation of damages should prove (*so-called corpus delicti*):

- Violation of antitrust legislation, which caused violation of his right and interest
- The fault of defendant in violation of antitrust legislation
- Cause and effect relationship between the violation of antitrust legislation and damages
- The amount of damages

20. Is there a difference between stand alone and follow-on actions?

The main difference between stand alone and follow-on actions consists in burden of proof. In case of submission of stand-alone action claimant must prove all essential circumstances, in particular, the presence of antitrust violations, the amount of damages and the causal relationship between the damages and the violation. Proving the existence of antitrust violations is rather difficult, as it requires analysis of the respective market and professional economic knowledge.

In the case of follow-on actions, the FAS proves the existence of antitrust violation, and the claimant shall therefore prove to the court the amount of damages and the causal relationship between the damages and violation of the antitrust legislation.

21. How is damage quantified?

Pursuant to article 15 of the Civil Code the damage is quantified from expenses, which the person, whose right has been violated, made or will have to make to restore the violated right, the loss or the damage done to his property (the compensatory damage); or from the amount of undeceived profits, which this person would have derived under the ordinary conditions of the civil turnover, if his right were not violated (the missed profit).

22. What defence is recognized, if any, for defendants (besides the passing-on defence (question 18 above), if applicable)?

A defendant can use all the defences provided by the law. Taking into account that claimant has burden of proving conditions for damages (antitrust violations, the amount of damages and the causal relationship between the damages and the violation), the defense strategy of the defendant is mainly based on the absence such conditions.

23. What is the role of economic experts, if any?

If the claimant presents an economic analysis in respect of quantifying damages for particular antitrust breaches, it increases the chances for the respective amount of damages (losses) confirmed by such analysis to be awarded to the claimant by the court. However, no specific methodology is preferred.

24. What other types of experts are typically engaged in your jurisdiction?

There is no specific regulation of the expert engagement in the court proceedings. Herewith, since burden of proof is the claimant's, he should present to the court calculations of damages (losses) incurred and prove the amount of such damages (losses) and has the right to engage any of the expert in order to confirm his evidences.

25. **In case of follow-on claims, are the fines imposed by the national – or supranational – competition authority taken into account in evaluating the quantification of damages?**

The fine imposed by the Federal Antimonopoly Service is not taken into account while calculating the damages.

The damage caused shall be compensated in full by the person who inflicted such damage. According to the Resolution of the Plenum of the Supreme Commercial Court of the Russian Federation №30 dated June 2008, 30 "On application by the commercial court of antitrust legislation" (the Resolution of Supreme Commercial Court) bringing the wrongdoer to administrative liability as well as recovery of illegally received income to the budget does not disable the affected person to claim damages.

CHAPTER VII: ALTERNATIVE DISPUTE RESOLUTION

26. **Is there any form of alternative dispute resolution available in your jurisdiction?**
    If yes, in which form, and how do they coordinate with the civil and criminal proceedings regarding antitrust infringements?

There is no available alternative form of resolution of antitrust disputes in Russian legislation. Infringement of antitrust legislation is considered by the FAS or its regional departments and/or by arbitrazh courts.

CHAPTER VIII: SETTLEMENTS

27. **Please briefly set out the settlement mechanisms (if any) in your jurisdiction, for instance:**
    - **settlements requiring court approval;**
    - **settlements outside of proceedings;**
    - **timing of settlement;**
    - **etc.**

The parties to a dispute may conclude at any time the settlement agreement that will define the mutual rights and obligations. The settlement agreement shall be made on the subject matter of dispute, to comply with applicable legislation and not violate rights of third parties. This agreement has to be approved by arbitrazh court.

After approval of the agreement, it shall be executed immediately. The decision of the court approving the settlement agreement may be appealed within one month.

The possibility to reach settlement is applicable in respect of antitrust disputes, in particular, such settlement agreements may establish the consent on qualification of actions of the person, full or partial waiver of claims, etc.

CHAPTER IX: RECENT CASE LAW

28. Please give an example of noteworthy cases or authorities in your jurisdiction rendered in the last 18 months which are relevant to the content of this questionnaire.

In December 2015 the Supreme Court of the Russian Federation satisfied the claim of BIOTEK on compensation of damages expressed in the lost profits inflicted by TEVA.

This proceeding on private antitrust damages was initiated after making the decision of the FAS which establishes violation of the antimonopoly legislation by TEVA and the decision of the arbitrazh courts, which upholds the decision of the FAS.

Thus, in December 2013 the antimonopoly service found that TEVA violated Point 5 Part 1 Article 10 of the Competition law (abuse of dominance) as a result of refusing to conclude the contract with BIOTEK for supplying "Copaxone" medicine without any economic and technological justification and issued an remedy aimed at maintenance of the competition. The appeal court confirmed legitimacy of the remedy.

In proceeding initiated by BIOTEK, BIOTEK lays damages at TEVA in the amount of 16.5% from the sum of the contract which was not concluded between them and, in contrast, was concluded between TEVA and its subsidiary. This sum of lost profits was justified by the fact that in the case of concluding this contact BIOTEK will gain the profit in the mount not less than 16.5% from the sum of this contact. This provision was established in the bonus agreements concluded between the claimant and the defendant.