**FAS against competition**

by Alexey Ulianov

**The antimonopoly department has consistently pursued a policy of a giant amount of small proceedings by the army of many thousand of low-paid employees. All of their energy is spent on a fight with russian medium enterprises.**

The Federal Antimonopoly Service (FAS) of Russia is one of the most influential and most frequently mentioned authorities in mass-media. Igor Artemyev is a head of the FAS for more than seven years. The FAS gained not only an international acknowledgement, but different powers, like an ability to impose multibillion fines, initiate criminal cases and number of its staff has been doubled. Igor Artemyev is one of the most fertile lawmakers: the Antitrust Law was changed 20 times, the State Tenders Law – even more. So why do we have a situation where four from five Russian entrepreneurs do not feel the improvement of the competitive environment?

**Everything is possible**

The base function of each antimonopoly authority is controlling mergers and acquisitions. According to Igor Artemyev, the main achievement in this sphere is a decreasing of administrative pressure on business by refusal of the medium-sized deals control: in 2004-2006 years the FAS controlled 22-25 thousands of deals, while in 2007-2011 years the number decreased to 5-6 thousands. This practice doesn’t have any analogue in the world – the antimonopoly authority in every large economic doesn’t control more than several hundreds of deals. From the countries with advanced market only in USA the number of controlled deals exceeds one thousand, and it is still four times less than in Russia. But the USA market of mergers and acquisitions is 15 times as large as in Russia.

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The secret of this anomaly is in the features of our antimonopoly legislation, and its creator is the FAS. So if you are a more or less large holding and you are going to purchase a small company, which assets are priced as good apartments in Moscow, or you buy an insignificant russian asset from a large international company, or the holding owns a boiler-room, which have been listed as a monopolist, and the holding is going to be restructured, you will need an agreement from the FAS. In fact, similar deals don’t have any effect on market competition and such deals aren’t a subject of control in advanced countries. There are only two or three hundreds of deals that truly affect the market.

It might seem that model law of the European Comission can be just translated on Russian and be enacted, using the normative of the International Competition Network. However, firstly, thousands of examined proceedings allows to record a high load on the FAS staff and consequently obtaining increasing of employment. Secondly, large holdings must always adjust with the FAS, because of the legislation, and it creates an opportunity for corruption.

The FAS explained its failures by the monopoly markets structure. But there are few companies in Russia that have become monopolists because of an introduction of a new product in the market or a winning the market. How did the monopolists appear? All of the monopolistic deals were accomplished with an approval from the FAS. Less than a percent of huge deals were refused by the FAS. There were an injunctions, which permits the monopoly but on appointed structure and behavior terms, only for 3-4% of the deals. (Antimonopoly authorities refused to approve
5-10% of deals and impose limitations on 10-15% of mergers in developed countries.)

Such attitude to monopolies costs one dear to consumers. The FAS didn’t prohibit the transition of the energetic establishment to oligarchic groups, which were interested in the growth of tariffs. As a result of it, consumers should pay more and more every year, but the industry didn’t get the promised investments. If the implementation of the agreement had been a clause, the problems with investments wouldn’t have been such a big problem.

The deal, which leaded to the creation of the monopoly “Eurocement”, was examined by the FAS just in 4 days instead of statutory 3 months. After that deal in 2005-2008 the prices had increased 8 times. According to the law, simple or small mergers should be examined in 30 days, complicated and large – in 90 days. It allows for the FAS officials to examine a merger just one day or 29 days. With all of its legislative activity, the FAS haven’t prescribed any criterion, limiting this freedom of action. As a result of it, a plenty of significant deals, affecting the market and the competition, are examined in a simplified order. The record is the purchase of a big coal asset by a metallurgic company. The deal was approved in…two hours. At the same time medium enterprises often complain about the procrastination of time constrains of examination of small deals, not affecting the competitive sphere.

In the second antimonopoly pack of laws there was adopted such an anticompetitive and corruptogenic norm as adjudgement of a monopoly status to a company irrespective of its market share. It means that, if the company’s market share is 1% and its closest rival’s share is 0,5%, the company could be at the center of attention of the FAS: ordinary contractual practice can cause million fines and prison sentence for heads. Complaining of every green mailer on refusal of his deal on his terms would be accepted to examine.

The norm, allowing not to declare that a firm, which market share is more than 50%, isn’t a dominating firm, is unprecedented. It doesn’t need any additional comments to explain what arguments could be used declaring that a firm, which market share is 99%, isn’t a dominating firm.

Everything is possible after adopting these two laws: a company, which market share is 1%, could be a monopolist, but it could be denied that a company with 99% market share is a monopoly. As a result of it, antitrust law in the last version could be considered as one of the most corruptogenic norms in Russia.

**“Untouchables”**

The second important function of each antimonopoly authority is an initiation of proceedings and its investigation for violations of the antitrust law (in the case of cartels, unfair competition and abuse of a dominative position). The number of proceedings under investigation is increasing (more than 12 thousands in 2011), while western colleagues rarely investigate more than a hundred of proceedings in a year. At the same time (but antimonopoly department of the Department of Justice prefers not to divulge this information) the most of large proceedings under investigation in developed countries was initiated concerning foreign companies, their part in sum of paid fines in USA is 90%.

According to the information on the official FAS web page, the main violator is russian middle enterprises. Proceedings, concerning foreign and the largest russian companies can be counted on fingers. When Gazprom implemented fines for shortage and excess of gas two years ago, only two departments of the FAS had reacted on it. In 2009 initiative members of the FAS initiated about 300 proceedings against state corporation “Rostechnologii”, but they was closed by the head of Antimonopoly Service (for the sake of truth, it should be mentioned, that Igor Artemyev was against the creating of this monopoly). Another “untouchable” is OAO “RZD”, which wins every not numerous proceeding against it.

Even noted proceedings against four oil companies concerning the increasing of the gasoline prices were initiated only after Vladimir Putin’s interference. It is notable, that in the first place the central FAS department was inactive. Several regional departments not even initiated proceeding, but had won them: before Putin’s interference regional departments had collected 160 million rubles of fines, while central – only 200 thousand rubles.

The FAS had won the proceeding in Supreme Court of Arbitrage, but then process of the conclusion of peace between the FAS and oil companies. Besides the sum of fines was reduced, it was a record – more than 20 billion rubles. But the following increasing of the prices for gasoline proved that Artemyev’s PR actually was paid by consumers.

**Power against weak**

Every entrepreneur knows: you shouldn’t quarrel with authorities. During the proceedings the FAS was pressing over the companies: conducting a check, joint with Tax police and security agencies, procrastinating of a consideration of applications and other. Despite this the FAS had lost 40% of proceedings in 2009-2011.

Power is used only on small private firms, while all large companies were getting all of needed approvals. And the tougher antitrust law became, the more it contained loopholes for big business. In particular, the FAS have been promoting an idea of oil exchange for 8 years.

In theory exchange trade is a nonsense, if the seller is the monopoly: he would start manipulating with volumes and inflating the price. According to FAS, such a company ceases to be a monopolist.

This is the FAS politic consists from. Igor Artemyev, by his letters (what is doubtful from a legal standpoint), fully abolished the price regulations set in terms for companies “Fosagro” and “Eurocement” for yield on the stock exchange. As a result, the price of apatite concentrate and cement had extremely raised. “Gazprom” could be jealous of the companies’ profitability: the price for gas is set by government, but the prices for cement and fertilizers could be raised easily by covering with the letters from the FAS.

The fight with cartel is another important aim, which was recently declared. It seems like it is very wholesome activity. The FAS stated to initiate the proceeding concerning real cartels, including the proceedings that were overlooked. However, vicious system “every department should find and neutralize” lead to the situation, when the FAS started to regard every contract (for example, dealer contract) as a cartel. In the west dealers are taken out from the antimonopoly control. But in Russia the FAS is looking at anticompetitive points in dealer contracts. Not numerous russian companies, that had saved the producing of goods and dealers network, are endangered. The FAS activity affects producers of automobiles, cash registers, constructional and special mechanisms, building materials, other manufactured goods, its dealers and consumers.

The advertisement control by the FAS causes many questions too. Antimonopoly authority was proud of the victory over a kvass “Nikola” advertisement and advertisement of a producer of rusks from Novosibirsk. Both times large foreign producers had won, and two small native companies were punished. A similar situation was with Kazan fat plant and “Nevsky konditer”. Many of native goods have been ousted by aggressive advertisement of transnational companies. But the FAS is inactive.

**Too big to be efficient**

When Igor Artemyev had come to the FAS in 2004, there was a hope for creating of efficient Russian antimonopoly service.

And this is true, russian antimonopoly legislation approaches to the world standards and the FAS became a respected organization. But as times go by the plentiful amount of staff directed all of its energy to fight russian middle enterprises. In specific russian conditions antimonopoly politic started to prevent for a development of the competition. Thereafter, the corruption risks increased – if the decisions are made depending on a sum of a bribe, big business would be a winner and small and medium sized business will lose. Unfortunately in a number of cases it should be acknowledged that the FAS activity not just haven’t any effect on competition, but can worsen it.

These risks could be avoided by decreasing the number of staff and increasing their salary. This way was chosen by “Rosoboronpostavka” and Ministry of Health. However, Artemyev has chosen another way serially realizing the politic of a giant amount of small proceedings by the army of many thousand low-paid employees. As a result, the actual number of regular staff in FAS brought almost to a record level for federal agencies - 95% of nominal.

Probably, authority had started to promote corruptogenic normative acts since 2009. This could be seen on an example of dominative position and vertical agreements. It is an appropriate time to note that the countries of South-East Asia had been slowing the creation of antimonopoly agency or had allot agency only insignificant power before the level of corruption was radically decreased (in China antimonopoly agency had started its work just since 2009 ).While industry ministers and regulators was successfully developing the competition. The FAS of Russia, the largest antimonopoly agency in the world for its amount of staff and functions, amazes and jaundice of western antimonopoly officials.

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