

законодательство, с энтузиазмом и надеждой ожидает действительно-го правового влияния обновленных нормативных актов на предпринимательскую среду и востребованность юридических услуг в целом.

## **International Standards for Regulation of Competition Liability\***

*Yuri Monastyrsky\*\**

Let me thank the authors of this conference for the granted opportunity to speak on a most important topic regarding responsibility for non-compliance with competition law. In the narrow legal sense, such responsibility means any penalties being imposed on a violator. They are the main tool for regulation, because their effectiveness, clearness, efficiency and predictability should force any person to comply with the regulatory and, as concerns competition, any personal prescriptions issued by the competent authorities. If an enforcement mechanism is imperfect, then it will promote disorder rather than order.

According to the law, a guilty person may incur administrative, civil or criminal liability. The third antimonopoly package contains a number of novelties in this regard.

### **1. Administrative responsibility**

Let me remind you of the general legal model of penalty application. The condition here is the behaviour of the person who has inflicted the damage, subject to a sufficient cause-and-effect relationship between the former and the latter and the fault of the violator. As regards the protection of a competitive environment, the prerequisites for responsibility have some major distinctions which, given the specific legal techniques of the law, its language and terminology, provide the basis for a broadest discretion of antimonopoly authorities and courts and can persistently produce absurd results in law application. This occurs frequently in our practice.

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\*\* Yuri Monastyrsky – Ph.D. in Law, partner of the law firm “Monastyrsky, Zyuba, Stepanov & Partners”. [www.mzs.ru](http://www.mzs.ru).

What makes inactivity an offence in administrative law as a whole and in its competition-related paragraphs in particular is an example of poor legal techniques involving the vagueness of duties, of the terms and dates of their performance etc. (in contrast to civil law where the contents of any claims or property expectations are always clear). To be liable, any behaviour in the field of competition should be active. Any refusal to sign a transaction should involve a non-existent legal fact, failure to comply with rules. Evasion normally expresses itself in actual acts or activities. The term “anti-competitive behaviour” appears especially adequate in this context. Even where an agreement of any kind capable of influencing the market environment is entered into, a violation will occur not when such an agreement is signed but when performance under the agreement starts. “For the purpose of legal evaluation, neither the evil will in itself nor the result of the relevant act is important, but the only thing that matter is the link between the intention and the result or the degree to which the evil will is implemented in the act.”<sup>2</sup>

It is only factual acts that should be evaluated by an antimonopoly authority. Any interference with the field of civil law or disqualification of transactions as such should be as much as possible limited by law, otherwise that would provide the basis for unjustified intervention into commercial turnover. The express possibility of treating inactivity as an administrative offence can lead to distortions. It would be incompatible with the principle and purpose of competition law, i.e. guaranteeing economic freedom to any persons.

If passivity were deemed to be equivalent to illegal activity, then one could conclude that a manufacturer, by ceasing to produce and supply certain products to the market, commits a serious offence by means of weakening rivalry between the market players and, therefore, reducing competition.

The second specific feature of responsibility is the nature of damage. In contrast to criminal and civil law, damage in administrative law can generally manifest itself in a violation of public order and involves the infliction of any kind of harm to multiple persons.

Such a basic notion as fault is clearly different in the regulation of competition. The humanistic line of jurisprudence associates it with a person’s relationship with his or her culpa act, himself or herself and its consequences. In other words, the person will be excused from responsibility

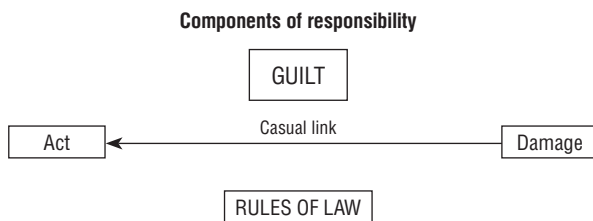
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<sup>2</sup> V. Solovyev, *The Justification of Good: An Ethical Philosophy – Respublika*, 1996 – p. 334 (written in 1897).

for any occurrence which is, as one of the scholars aptly noted, “the intervention of external forces into the normal course of events”. This principle will be adjusted by the allocation of the risk burden in more specific cases.

However, we see a different approach towards organisations in the Code of Administrative Offences (“CAO”) (Article 2.1(2): “A legal entity will be declared liable for an administrative offence, if it is established that it had the ability to comply with the relevant rules or provisions non-compliance with which leads to administrative responsibility according to the laws, but that entity failed to take all measures within its power to comply therewith”). This is a clear expression of the so-called “behavioural concept” of strict responsibility, including responsibility for any event other than, of course, unavoidable events (or force majeure). Such responsibility is conditional upon the existence of “a set of negative elements caused by the disorganisation of the legal entity’s activities, its failure to take any necessary measures to perform its duties properly or its failure to use any required efforts to prevent any violation of law and eliminate any causes therefor”.

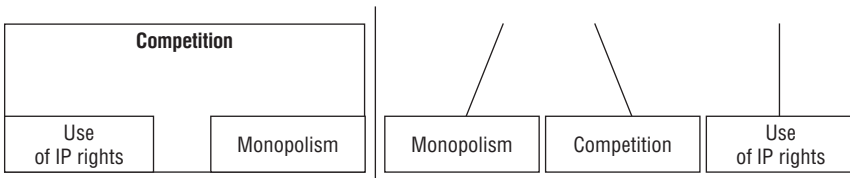
It is important for us, legal practitioners, to know that the less stringent psychological theory which rules out responsibility for any external and real accidental circumstance should apply to any manager, official or individual entrepreneurs as regards the establishment of guilt.



And, finally, let us mention the most important distinctive feature of Russian national competitive law which primarily explains the broadest discretion given to the Federal Antimonopoly Service (“FAS”) divisions in deciding as to whether any person should be held responsible. In addition to the fact that the definition of guilt for companies is understood in an extremely broad manner and includes failure to take any expected measures to prevent any violation, there exists a far more important legal factor due to which business transactions can be declared unlawful. The matter is that guilt, however strict it is, manifests itself and can exist subject

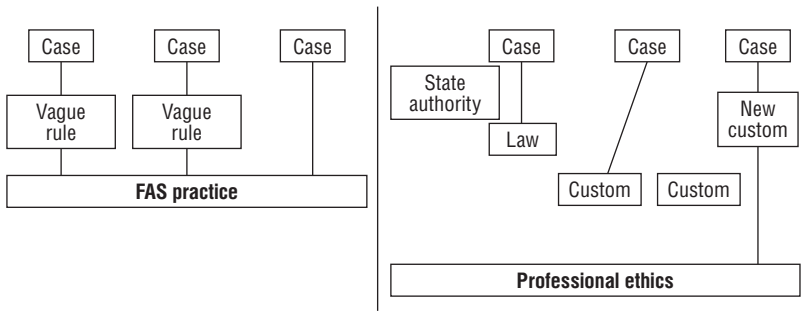
to one important prerequisite, namely that the behaviour of the person goes beyond that which is prescribed by the regulations and is against the law. But, unfortunately, the general prohibitions on “creating potential restrictions on competition” or “impairing the rights” of other market players neutralise this basic condition, and, in a broadest range of cases, it would not be very difficult to declare some behaviour anti-competitive, although natural competition is always aimed at restricting the opportunities of and putting pressure upon competitors, that results in a reduction of their market shares and revenues. It would not be an exaggeration to say that there exists a legal possibility of commanding market players like figures on a chessboard.

The concept of legal protection of fair business competition, despite the availability of international experience, differs from such experience and has distinctive national features. It is primarily characterised by an excessive emphasis on the doctrine of monopolism (abuse of a dominant position), which is just an inherent part of unfair competition, along with, for example, unauthorised use of other persons’ identification means or unfair advertising.



This produces difficulties in decision making, because this establishes an absolute condition that the limits of the relevant market must always be determined.

Court practice in the European countries consistently refers to the observance of “the rules of play” by the market participants; first of all, it uses the term “unfairness” which is not so abstract as it may seem at the first sight. Why? Because, as regards a specific segment of the economy, it is based on the rules of business ethics and on the business customs brought to the level of law, which can be established by courts and proved by competitors in both administrative and civil proceedings. Therefore, elements of self-regulation and self-government, along with state control, are brought into this complex and totally stochastic environment. For example, only a business custom which has become a regulation can answer the question as to whether the solicitation of personnel from other companies in the same industry constitutes unfair competition. Perhaps the answer is “no” in baking and rather “yes” in legal services.



## 2. Property remedies under private claims

The use of civil law mechanisms depends upon the additional efforts of market players and the creative position of the High Arbitrazh Court which is quite discouraged by the applicable rules the most important of which should be devoted to responsibility. The Civil Code establishes the system of “mixed tort” and, in addition to a list of various offences, states as follows: “any harm shall be redressed in full” (CC Article 1064). It is extremely difficult to exercise any private remedies given the doctrinal understanding of the term “harm”, since any harm may only be caused to the actual property of the harmed person (direct damage). For the sake of justice, it should be said that, in accordance with Article 1082 of the Civil Code, the court may, depending upon the circumstances, award losses, but they will include, in most cases, only direct damages which will be payable instead of the harm according to the principle of its full compensation, but will not include any lost profit.

The regulatory basis for claims with respect to anti-competitive behaviour should be formed by a new article on special tort according to which the harmed person would bear the burden of proving the guilt (the general presumption of guilt would be inapplicable here) and which would contain a clear indication to the power to recover any lost income or costs arising from the violation.

Article 10 of the Civil Code allows the harmed person acting as a defendant to defend himself from claims but not to claim. It is only as part of civil law reform that amendments regarding the right to seek relief for abuse may be made. Of course, there exists Article 15 of the Civil Code regarding full compensation for all damages in the event of a violation of law, but it requires a certain legal ingenuity in proving the fact of unlawfulness and, most importantly, the contents of the vague

provisions of the competition law. Those provisions could be made more specific by using the business customs established in the various industries and businesses. However, our courts do not apply the business customs and the presumptions underlying any normal judicial discourse.

### **3. Criminal penalties**

Until recently, the law enforcement tools did not work for the purpose of curing our competitive environment. Article 147 which is intended to stop intentional crime in the field of intellectual property rights and which is still included in the chapter devoted to the protection of personal rights, implies that only individuals may act as harmed persons in this field, although it is clear that exclusive proprietary rights are mainly held by those companies which commercialise them.

Some commentators and practitioners complained that Article 178 of the Criminal Code was paralysed by such a criterion of responsibility as the existence of large (in excess of one million roubles) damage caused by competition-related offences, since the investigating authorities used a too literal meaning of the term “damage” which means an expected income.

Statistical data demonstrated that no criminal law mechanisms were used indeed, largely due to the absence of appropriate arrangements within the Interior Ministry.

The amendments to the Criminal Code introduce the following radical novelty: “A person who has committed a crime shall be excused from criminal responsibility, if it has... otherwise satisfied the aggrieved party.” I wonder how it could work, given that the FAS does not initiate criminal cases, but they would rather be opened by the police on their own initiative.

The key hidden mechanism and incentive for violations in the field of competition is corruption, one of the most latent kinds of crime. The tools of competition law are aimed at suppressing a visible result of this ubiquitous phenomenon, but the legal framework for fighting commercial bribery as such are far from being perfect.

It is not uninteresting to note that, being a member of the UN Convention against Corruption (31 October 2003) and the UN Declaration against Corruption and Bribery in International Commercial Transactions (16 December 1996), Russia does not hurry to bring its laws into conformity with the basic principles of those documents. In Russian law, a legal entity still cannot be criminally prosecuted, despite the generally recognised European approach in fighting bribery and anti-competitive behaviour,

the very practices that are used by monopolists in order to obtain orders, benefits and preferences. As a result, no effective investigation into lobbyist corruption in large business is possible, and no large fines can be imposed upon the legal entities involved.

It should be noted that, in accordance with the provisions of the Council of Europe's Criminal Law Convention on Corruption and Improper Influence (27 January 1999), the Russian Federation undertook to take a series of anti-corruption measures and, in particular, to "adopt such legislative and other measures as may be necessary to ensure that legal persons can be held liable for the criminal offences of active bribery, trading in influence and money laundering established in accordance with this Convention, committed for their benefit by any natural person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person" (Article 18).

To date, the Russian Federation has failed to comply with those obligations.

Notwithstanding the aforesaid, the Russian legal community welcomes the adoption of the above-mentioned amendments to competition legislation and looks forward with enthusiasm and hope to an effective legal influence that the amended regulations should have upon the business community and upon demand for legal services as a whole.