

LEGAL PROTECT OF COMPETITION IN THE SPHERE OF HOUSING AND COMMUNAL SERVICES

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Abstract: The paper is devoted to the analysis of legal problems of ensuring competition in the field of housing and communal services. The paper studies the features of business relations in the market of housing and communal services. The Russian and foreign experience of law enforcement of competition is investigated. The authors propose ways to build an effective mechanism for the legal regulation of business activities in the field of housing and communal services. R.R. Izmailov believes that the presence of competition is a prerequisite for the effective functioning of the legal regulation mechanism for entrepreneurial activity in the field of housing and communal services. The authors conclude that the problems of improving the legal support of competition in the housing and communal services sector are due to a high level of historically established economic concentration in certain

commodity markets, as well as a significant proportion of natural monopoly entities. It is noted that monopolistic activity in the sphere of housing and communal services can manifest itself in the form of abuse by an economic entity of its dominant position, as well as in the form of agreements and concerted actions. According to S.A. Baryshev, unfair competition as a type of activity prohibited by law can manifest itself in the field of housing and communal services in various forms. It is proposed to attract concessionaires as one of the ways to develop competition in the housing and communal services sector, including by transferring communal facilities to the management of private operators on the basis of concession agreements, as well as improving the procedure for determining tariff regulation in the housing sector.

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1. Introduction

Legal regulation of housing and communal services sector is complex. Entrepreneurial relations in this area are governed by the norms of various branches of law. The combination of imperative and discretionary principles in the regulation of entrepreneurial activity in the sphere of housing and communal services is due to the specifics of this activity and the focus of its results on providing services to end users which are individuals. Various actors operate in the sphere of housing and communal services, carrying out business and economic activities aimed at ensuring comfortable and safe residence conditions for citizens. Effective activities in this area are impossible without the presence of competition between economic entities. In accordance with the above, it seems necessary to explore the peculiarities of the legal regulation of business relations in this area, to identify the main

problems of the legal support of competition and possible ways to protect competition.

2. Methods

The methodological basis of the work is a set of scientific techniques and methods for studying phenomena and processes, including analysis and synthesis methods, comparative law, and the formal legal method. The use of the proposed methods seems appropriate for several reasons. The formal legal method allows the conceptual apparatus applicable in the study to form based on legislative norms, to identify the features and characteristics of the institution under consideration. Comparative legal method occupies a significant place in the work and allows authors to explore the possibility of implementing foreign experience in legal regulation.

3. Results and discussion

Competition protection issues in Russia are regulated by a whole group of legal instruments, in particular, the “Law on Protection of Competition” dated 2006, the Law on Natural Monopolies dated 1995, the Law on Competition and Restriction of

Monopolistic Activity in Commodity Markets dated 1991, as well as by-laws and departmental acts. The central place in matters of ensuring competition in the field of housing and communal services is given to the Law on Protection of Competition [1, P. 103] The said law defines the organizational and legal framework for the protection of competition, including the prevention and suppression of monopolistic activity and unfair competition, as well as, restrictions and elimination of competition by public authorities. Such a model of competition legislation [2, P. 212-214] in Russia includes features inherent in both the American [3] and European [4, P. 14-32] legal regulation models and takes into account the historical features of the development of the latter [5 P. 2-13]. The provisions of the Law on Protection of Competition are not applicable in practice without taking into account special housing legislation, in particular, the Housing Code of the Russian Federation. The Federal Antimonopoly Service of Russia (FAS) is the main regulator [6, p. 481] which performs the functions of adopting regulatory legal acts,

monitoring and supervising compliance with competition legislation.

There are both competitive and naturally monopolistic areas of activity in the housing and communal services market [7, p. 89-90]. Natural monopoly, in particular, includes services for the transmission of electrical energy; heat transfer services; water supply and water disposal using centralized and municipal infrastructure systems. Legal regulation of entrepreneurial activity in the field of housing and communal services combines various methods [8, p. 119] in establishing the principles for introducing public power tools into the market and competitive environment. The presence of healthy market competition is a prerequisite for the effective functioning of the business activity legal regulation mechanism in the field of housing and communal services.

Chapter 2 of the Law on Protection of Competition contains provisions prohibiting the monopolistic activity. Article 10 of the Law on Protection of Competition establishes a ban on the abuse by an economic entity of its dominant position. To qualify the actions of an economic entity as a

monopolistic under Article 10 of the Law on Protection of Competition, it is necessary for it to occupy a dominant position in the relevant product market, to commit an action (inaction) characterized as abuse of this position, and that actions have led (created a threat) to limiting competition or to restraints of interests of other persons (economic entities) in the field of entrepreneurial activity or to an indefinite number of consumers. An example of these actions is the Administration of the Federal Antimonopoly Service decision in the Komi Republic dated February 22, 2019, No. A06-05 / 18, in which the municipal public enterprise Ukhtaspetsavtodor is considered to hold a dominant position in the market for services on disposal of solid municipal (household) waste in Ukhta. The dominant position was reflected in the application by the enterprise in settlements with consumers of a tariff exceeding those established by municipal orders, which led to a violation of the pricing procedure established by regulatory legal acts and to infringe upon the interests of consumers in the field of entrepreneurial activity.

The Law on Protection of Competition in Articles 11 and 11.1 prohibits agreements restricting competition and coordinated actions of economic entities. Exploring the judicial and administrative practice in this area, we can distinguish several groups of agreements and concerted actions: “horizontal” agreements and concerted actions, “vertical” agreements and concerted actions, agreements (concerted actions) of economic entities and authorities.

An example of a “horizontal” agreement in this area is case No. 435 dated June 10, 2014, considered by the AFAS in the Republic of Mordovia. As established by the antimonopoly body, an agreement was reached on dividing the multi-apartment management service market on a territorial basis between management companies that are not in the same group of entities and are competitors. The actual implementation of the agreement had a negative effect on the state of the competitive environment in the market of services for the management of apartment buildings because 14 economic entities have been eliminated from the market since the beginning of the implementation of the

agreement between management companies.

In practice, examples of concluding “vertical” agreements in the sphere of housing and communal services are also widely presented. The most common violation is the conclusion of an agreement with the participation of a managing organization, a resource supplying organization and a settlement centre. Such a violation is associated with the establishment of a recipient of payments for utility services from the public in violation of the law or the terms of the management contract. In connection with a large number of such cases, the FAS of Russia prepared Letter No. IA / 58547/16 dated August 25, 2016, explaining that the mere conclusion of a contract for servicing with a managing organization on settlements with owners does not indicate the existence of a monopoly agreement. A formal indication of a change in the conditions of circulation of goods in a market cannot be used to justify the negative impact of the actions of economic entities on the competition. An example is a decision made in the case No. 37-11K AFAS in the Voronezh Region on May 15, 2015, about an

agreement between the management organization and the clearing centre that all payments collected from consumers for services are credited to the clearing centre. It was found that between several management organizations and the settlement centre an agency agreement was concluded for the complex servicing of a management organization for settlements with owners and suppliers of a communal resource. Under the contract, the centre delivers monthly payment documents to consumers, a provider of services for which the management organization is. When paying, the funds are credited to the settlement account of the settlement centre. The antimonopoly authority indicated that, based on the provisions of the law, the owners of the premises in an apartment building should pay utility bills to the provider of these services. Since payment agents or bank payment agents are not a party to the contractual relationship for the provision of services, such agents are not entitled to require the transfer of funds to their settlement account. These actions unilaterally determined the general conditions for the circulation of services in the market for the management of apartment houses,

which, in accordance with paragraph 17 of Art.4 of the Law on Protection of Competition is a sign of restriction of competition.

Agreements (concerted actions) of economic entities and authorities are also limiting competition in the housing and communal services sector. The most common practice is the granting by local authorities to an economic entity the authority to manage an apartment building in violation of the open competition procedure for the selection of management organizations, as well as the conclusion of a commodity market division agreement between the government authorities and economic entities. For example, the Resolution of the FAS in the Republic of Khakassia dated 30.03.2015 No. 91-A-14 found that in violation of Part 2, Art.163 of the Housing Code of the Russian Federation, local government did not hold tenders for the selection of a management company in respect of apartment buildings, and transferred these houses in economic management to the municipal public enterprise which actually performed the managing organization functions in respect of these houses.

In the practice of antitrust authorities, there are cases of concluding other agreements (committing other concerted actions) that cannot be attributed to the groups considered earlier. For example, in the FAS Resolutions for the Yaroslavl Region dated February 28, 2014, in cases No. 07-07 / 04-14, and 07-07 / 05-14, the managing organization and the entity which carried out the construction of the apartment building were brought to administrative responsibility, because they interfered with a management company newly elected on a competitive basis to start managing this house in due time. These actions were expressed in evasion of the transfer of technical documentation on the apartment building; the documentation was necessary for the management company to exercise its powers. The antimonopoly authority concluded that the said actions would limit competition in the form of reducing the number of business entities operating in the commodity market for managing apartment buildings.

In addition to the above varieties of monopolistic activities in the field of housing and communal services, one can also identify various unfair

competition actions. In Russia, a list of unfair competition action kinds is contained in Chapter 2.1 of the Law on Protection of Competition. It is necessary to distinguish the abuse of dominant position having signs of anti-competitive action which is illegal, from unfair competition as a kind of illegal action [9, p. 34]. As noted by S.A. Baryshev, the actions of economic entities representing unfair competition can be classified as illegal for various reasons. The most relevant of them is the classification depending on the nature of the object of civil rights, in respect of which actions that constitute unfair competition, were performed [10, p. 108]. Unfair competition as a type of activity prohibited by law may manifest itself in relations connected with the housing and communal services sector in various forms [11, P. 49]. The most widely used form of unfair competition in the field of housing and communal services is the misinformation of owners and tenants of residential premises. Misinformation of consumers in the housing and communal services market can manifest itself both in relation to a company providing housing and communal services and in relation to

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prices and tariffs for those services. Separately, it is necessary to single out other forms of unfair competition, expressed, for example, in the failure to provide the competitors with technical documentation on the serviced premises.

The case No. RSh107-12 / 16 considered by the AFAS of Russia in the Komi Republic dd. February 17, 2017, can serve as a vivid example of this violation of competition law. It follows from the case file that an LLC "U" had an obligation to transfer the technical documentation for the apartment building and other documents related to the management of this house to the newly selected management company TA LLC on the basis of Article 162 of the Housing Code. This obligation was not fulfilled within the prescribed period. Wrongful failure to transfer by the LLC "U" to the LLC "TA" technical documentation is contrary to the requirements of Art.14.8 of the Russian Law on the Protection of Competition, the Paris Convention for the Protection of Industrial Property, Business Practices, Requirements of Integrity, Reasonableness and Justice, and is aimed at obtaining unlawful advantages in business activities.

Another interesting question is the placement of signs and / or advertising structures on the facades (external walls) of apartment buildings. According to Part 2, Article 36 of the Housing Code of the Russian Federation, common property in a municipal public house belongs to the owners of the premises in the house on the right of common ownership, while the owners own, use and manage such property. The position of the FAS of Russia in letters dated 08.04.2010 No. AK / 9921 and dated 03/15/2010 No. AK / 6745 comes down to the fact that an owner or tenant of non-residential premises has the right to place a sign on the facade of this house containing data that should be communicated to buyers by law, without the consent of the owners of the premises in the house. However, if the sign (e structure) is advertising, then its placement on the facade of the house is legitimate only if there is a positive decision accepted by the general meeting of the owners of the premises in the municipal public house. In this case, the placement and operation of advertising structures may be charged. Today, in arbitration practice, there has not been a uniform approach to distinguishing

signboards and advertising structures, and when assessing the circumstances, courts are guided by the indication of the name of a legal entity or its type of activity, as well as the technical characteristics of such a structure.

4. Conclusions

Our study of theoretical problems and administrative practices in the Russian Federation on the issues of ensuring competition in the housing and communal services sector allows us to highlight the following conclusions:

1. The presence of competition is a prerequisite for the effective functioning of the business activity legal regulation mechanism in the field of housing and communal services.

- 2 Problems of improving the legal support of competition in the sphere of housing and communal services are due to the high level of historically established economic concentration in certain commodity markets, as well as a significant proportion of natural monopolies

3. Monopolistic activity in the sphere of housing and communal services can manifest itself in the form of abuse by an economic entity of its

dominant position, as well as in the form of agreements and concerted actions.

5. There are several groups of agreements and concerted actions in this area: 1) "horizontal" agreements and concerted actions; 2) "vertical" agreements and concerted actions; 3) agreements (concerted actions) of economic entities and authorities; 4) other agreements (performance of other concerted actions).

5. Unfair competition as a type of activity prohibited by law in the sphere of housing and communal services can manifest itself in various forms. The most common form of unfair competition in practice is to misinform residential owners and tenants about prices and tariffs for housing and communal services, as well as about the organization that provides housing services. In addition, other forms of unfair competition under Article 14.8 of the Law on Protection of Competition, as well as the Law on Advertising are also possible.

6. The development of competition in the housing and communal services sector is possible by attracting concessionaires, including by transferring to the management of

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private operators on the basis of concession agreements utility facilities, as well as improving the procedure for determining tariff regulation in the housing and communal services sector.

Our study allows us to systematize knowledge regarding competition in the housing and communal services sector and to work out ways to improve the effectiveness of preventing these actions.

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