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I. INTRODUCTION

A new stage in the development of the Russian antitrust policy began in 2006, due to the development and adoption of the package of laws aimed to harmonize Russian antitrust legislation with European practices. This adoption changed not only the design of the antitrust legislation, but also its role in the development of the business institutional environment in Russia. The norm of collective dominance, defined in the Part 3 of the Article 5 of the Law "On Protection of Competition, became one of the most important innovations of the this Law. By the time the new Law was passed, the EU had accumulated valuable experience in the application of the concept of the collective dominance, though a special norm listing all the necessary qualifying signs of the collective dominance has never existed. This article asks: Are there grounds to believe that Russian law enforcement follows European practices by borrowing the European norm of collective dominance, and adapting it in Russia to deal with its emerging market economy?

To analyze the issue we will examine the features of the legal structure of the collective dominance concept in Russian law and identify possible options of the concept's application from the key dimensions of the antitrust policy perspective. We will also show by examples what is the specific Russian feature that takes into account the EU experience.

II. DESIGN AND OPTIONS FOR APPLICATION OF THE "COLLECTIVE DOMINANCE" LEGAL NORM.

According to the Part 3 of the Article 5 of the Russian Law "On Protection of Competition" collective dominance can be established by three groups of criteria:

1. Market shares of the largest economic entities in the market.
2. Time interval, change (fixity) of market shares, and the possibility of overcoming entry barriers.
3. Substitutability of goods and availability of the information on the conditions of their sale.

In accordance with the first group of criteria, collective dominance is established when, adding their respective individual shares, no more than three undertakings have more than a 50 percent market share, ($CR_{\leq 3} > 50\% / s_i \geq 8\%$ where s_i is the market share of the one of the three undertakings); or when, adding their respective individual shares, no more than five undertakings

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have more than a 70 percent market share ($CR_{\leq 5} > 70\% / s_i \geq 8\%$, where s_i is the market share of the one of the five undertakings).

In accordance with the second group of criteria, the relative sizes of the shares of the undertakings have been, for a long time period, constant or have undergone only minor changes, and entry of new competitors to the relevant product market is difficult. Note that consistent with common practice, a time period of not less than a year can be considered long if the market has also existed longer than a year.

In accordance with the third group of criteria, the following holds true: merchandise sold or purchased by the undertakings cannot be substituted by other merchandise for consumption; an increase in the price of the merchandise doesn't lead to a corresponding decrease in demand for the merchandise; and information on the price of the merchandise, conditions of its sale, or purchase in the relevant product market is available to an indefinite number of persons.

In this regard, one cannot but draw attention to the trend towards a more rigid codification of concepts, including the concept of collective dominance in Russian Antimonopoly legislation in comparison with European. In Europe, on the basis of more general wording laid down in Article 82 of the Treaty of Amsterdam (now Article 102 of the Treaty on the functioning of the EU), the concept of a collective dominance has crystallized through decision-making by European antitrust authorities and courts. Unlike the European practice, Russian courts' discretion is much more limited.

Norm of the collective dominance can theoretically be applied to three groups of cases related to protective competition policy:

a. Preventing abuse of dominance in any form, listed in Article 10 of the Law on Protection of Competition, but especially in the form of monopolistically high and monopolistically low prices, which corresponds to Article 2 of the Sherman Act in the United States or Article 82 of the Treaty of Amsterdam in the EC (in 2009 the Article was replaced by Article 102 of the Treaty on the functioning of the European Union);

b. Avoidance of collusion and concerted practices that restrict competition in any form, listed in Article 11 of the Law on Protection of Competition (in this case there is reason to consider collusion and concerted actions together because the results of concerted actions and collusion by market participants do not differ much—higher prices and less volumes of sales in kind require less competition as mechanisms for achieving these results). This corresponds to Article 1 of the Sherman Act in the United States or Article 81 of the Treaty of Amsterdam in the EC (in 2009 the Article was replaced by Article 101 of the Treaty on the functioning of the European Union).

c. Control over mergers and acquisitions, which affect the borders of so-called "Economic Firms" where the legal analogue is a group of undertakings related as to common control.

In other words, we are talking about three areas of antimonopoly policy, constituting its "hard core," hence the significance of the concept. Accordingly, we can distinguish seven options that identify the scope of the collective dominance norm:

1. Only "a"
2. Only "b"

3. Only "c"
4. "a" as well as "b"
5. "a" as well as "c"
6. "b" as well as "c"
7. "a", "b," and "c" together.

It should be noted that each option is peculiar from the point of view of emergence of Type I and II errors tin law enforcement, i.e. erroneously punishing the innocent (who didn't restrict competition with its actions as an undertaking) or erroneously not punishing a violator, (whose actions led to the restriction of competition). The question of the probability of making Type I errors from these various combinations seems particularly important.

In connection with the discussion of the scope of the norm on collective dominance, the Guidance on market research prepared by the U.K. Office of Fair Trading should be mentioned, as it listed the major characteristics of a market that can contribute to coordinated behavior of market participants.[2] In this Guidance, reference is made to court rulings, which singled out three conditions necessary for detection of the collective (joint) dominance, as follows:[3]

1. Every participant in collective dominance ("dominant oligopoly") should have an opportunity, with only a minor cost, to obtain information on the behavior of other subjects of collective dominance, (which generally corresponds to the "information characteristic" of collective dominance in the Russian legislation norm on collective dominance, but, strictly speaking, doesn't quite fit under the properties of the market it terms of its structure). Such transparency is essential to ensure effective monitoring of compliance with the established common objectives or subjects agreed upon. The result of the analysis of information characteristics of the market—the characteristics pointing to the mechanisms applied for generation, transmission, and use of the information by market participants as well as to the content of information transmitted—is very important.
2. Participants in collective dominance should have the ability to influence any undertaking that deviates from the common policy in this market through an agreement restricting competition, as well as concerted actions which does not involve a formal or informal explicit agreement. Such ability is especially relevant to the problem of collective actions against the opportunists. This problem exists because the punishment of offenders, here as well as in other cases, requires expenditure of resources. The punishment will be effective when it restores the restricting competition activities of several market participants, that is in the interest of each of the parties to the agreement (other than the offender). However, in this case, we should distinguish between collusion and concerted actions, because there is no specialized enforcement mechanism for concerted actions,

[2] Including significant entry barriers, the homogeneity of the production of firms, symmetry of the firms with respect to market share, cost structure, decision-making time horizon and stability of market conditions in demand and in terms of costs, the level of excess capacity, transparency of prices, market shares, outputs to competitors, etc. (*see* RFC 2251). Office of Fair Trading, *Market investigation references: Guidance about making of references under Part 4 of the Enterprise Act*, p. 27 (2002).

[3] *Id.*

unless the principle of imputation is applied. The latter situation is fairly widely used in economic studies of such an analytical construction as an implicit contract.

3. The expected reaction of competitors, both existing and potential, should not have a significant influence on the expected results of concerted actions (common policy of the participants of collective dominance in the target market).

Thus, in the first approximation, the economic meaning of collective (joint) dominance may be defined as follows: a market structure with collective dominance implies the possibility of a decisive influence by two or more undertakings for the treatment of goods in the market at a relatively low cost of coordinating of their actions. Such a low cost is possible because each of the undertakings can freely obtain substantive current information about the actions of other economic actors in the market and suppress (enforce punishment on) any competitors who deviate from the common way of conduct in the market. The characteristic also implies relatively low costs due to the response of the potential competitors and competitors-incumbents, which are not the subjects of collective dominance.[4] The problem of using this definition is that part of these essential characteristics may be based on the peculiarities of any past interaction between these undertakings.

It is easy to see that, in this context, the norm on collective dominance clearly corresponds to the problems of collusion and concerted actions. However, because of the fact that collective dominance is primarily a characteristic of market structure, the most appropriate way to apply this design is in the framework of mergers control. If collective dominance occurs or increases as a result of such merger, the antimonopoly authority should, in its ruling, cover the risks either by prohibiting the transaction or by formulating behavioral or structural remedies aimed at reducing the risks of further restriction of competition (errors of Type I in regulatory decisions).

However, one shouldn't come to a conclusion that the norm on collective dominance really only applies to mergers control. In this regard, one cannot help but notice, for example, the inconsistencies between Article 82 of the Amsterdam Treaty and the norms governing the mergers control, as identified by the experts.[5]

III. THE EXPECTED IMPACTS OF THE CHOICE OF THE SCOPE OF THE NORM

In connection with the various options for identifying the scope of the norm on collective dominance, a number of assumptions can be made of the possible risks of making Type I and Type II errors, other things being equal, which are summarized in table 1.

[4] A. SHASTITKO, GOVERNMENT POLICY IN RESPECT OF COLLUSIONS AND CONCERTED ACTIONS THAT RESTRICT COMPETITION (ECONOMIC APPROACH), p. 39 (2004) (in Russian).

[5] F. Depoortere & G. Motta, *The Doctrine of Collective Dominance: All Together Forever?* 1 ANTITRUST CHRON. (Oct. 2009); S. Stepanou, *Collective Dominance Through Tacit Coordination: The Case for Non-Coordination Between Article 82 and Merger Control Collective Dominance Concepts*, 1 ANTITRUST CHRON. (Oct. 2009).

Table 1

Expected consequences of choosing an option of the scope of the norm on collective dominance

	Option	Type I error	Type II error	Comment (including by the area of the errors' emergence)
	The absence of norm on collective dominance	No	Yes	Control of economic concentration transactions, to a lesser extent, suppression of collusion and concerted actions
	a	Yes	No	Unwarranted reduction in the market shares threshold of dominance
	b	No	No	Excess cost of assessment of competition in product markets
	c	No	No	Prevention of collusion and concerted actions by a regulatory effect on the costs of collective action
	a + b	Yes	No	
	a + b	Yes	No	
	b + c	No	No	
	a+b+c	Yes	No	

As a general comment, it should be noted that the table does not reflect the possibility of parallel application of the norm at the junction of the respective articles and, respectively, of the scopes.

As a slight digression, let's note that in the early 90s of the last century the EU Commission, in fact, attempted a parallel prosecution of companies for the violation of both Articles 81 and 82 of the Treaty of Amsterdam.[6] It was the case against three Italian producers of the Italian Flat Glass, in which the authorities described the understanding of collective dominance in oligopolistic product market as follows: "Two or more companies jointly have—on the basis of agreements or licenses, technological leadership, which allows them to act largely independently of their competitors, customers and, ultimately—consumers."[7]

Lack of a norm on collective dominance, taking into account the reservations made above, means that it is not used, and because of its non-use, may mean the emergence of Type II type errors; in particular, approval of the economic concentration transaction (the merger) by the antimonopoly authority.

[6] G. Tovey, *European Community Law, Elements of Competition Law*, Lecture Notes, (2003), http://www.topnotes.org/EC15v1.pdf.

[7], Office for Competition and consumer protection-Warsaw, *Abuse of dominant position in the light of legal provisions and case law of the European Communities*, p. 26 (2003) (hereinafter Warsaw).

Application of the norm on collective dominance to the individual actions of undertakings not only de facto reduces the dominance threshold (individual!), but actually instigates the accusatory trend in the legal practice that is primarily associated with the Type I errors.

It would seem that the norm on collective dominance could not be better suited to deal with collusions and the concerted practices that restrict competition. However, there is one "but"—the cost of using this tool. Does it depend on who initiates the finding of collective dominance? How are the cases for which this tool of antimonopoly policy will be applied selected? Even if, for a moment, we assume that the errors in the analysis of markets for the purposes of the application of competition law never occur (although in each case the results are not known *ex ante*), the structure of incentives of stakeholders can lead to excessive costs, first on the side of the State (taxpayers), and second on the side of the undertakings—potential participants of collective dominance.

In addition, if the working norm on collective dominance contains thresholds for the market shares of participants, then there is an additional question of how to apply this norm to the supposedly existing collusion, in contrast to its prevention, in particular through mergers control. After all, if the idea that the abuse of collective dominance (collectively) is a synonym of concerted actions is taken too literally, it turns out that the "right" to be among the participants of collusion may be denied the economic entities with a share of less than 8 percent according to Russian law? This can lead not only to the errors of II type, but also to discrimination in law enforcement.

Prevention of collusion and concerted actions restricting competition through mergers control, including the prevention on the basis of the concept of collective dominance, involves the least risk of Type I and II errors.

Expected results of the other options, listed in the table, are a combination of simpler options. A peculiar fact is that selection by Type I and II errors corresponds to the worst characteristic of the composite element (assuming that there is no positive or negative spillover effects).

IV. EXAMPLES AND LESSONS OF LAW ENFORCEMENT

An example widely discussed in the economic publications[8] that provides a detailed account of the fundamental ideas of using the concept of collective dominance in the European practice of law enforcement is the case of "Airtour, "which sold packages of foreign tours in the United Kingdom. In 1999, the U.K. Competition Commission imposed a ban on Airtour's acquisition of another company operating in the same market—"First Choice." At the time of the analysis the international tours packages market featured high concentration; total share of the four largest companies (including "Airtour," "First Choice." "Tompson" and "Tomas Cook") stood at 80 percent.

The Competition Commission's rationale for the decision to ban the acquisition was that such a boost in concentration would create a high danger of collective dominance and restrict

[8] *See*, e.g, M. Motta, *EC Merger Policy and the Airtours Case*, Eur. 21 (4) COMPETITION L. REV., pp.199-207, (2000); M. Nicholson & S. Cardell, *Airtours v Commission: Collective Dominance Contained?*, EC Merger Control, A Major Reform in Progress, pp. 285-301 (G. Drauz, M. Reynolds (eds.)); A. Overd, *After the Airtours Appeal* 23(8) EUR. COMPETITION L. REV. pp. 375-377; V. Rabassa, *The Airtours Decision: Is There a New Commission Approach to Collective Dominance*, 22(6) EUR. COMPETITION L. REV. (2001); Warsaw, *supra* note 7 at 26.

competition, given: (a) a homogeneous product; (b) slow growth of demand; (b) low elasticity of demand; (g) identity of the cost structures of the main suppliers; (d) information transparency of the market; (e) high entry barriers; and (f) the lack of the customers' real influence. However, the Court of First Instance, on Airtour's appeal, overturned the decision in 2002. According to the Court, the EU Competition Commission had not provided sufficient evidence of possible restrictions of competition on the basis of collective dominance.

The discussion on the possibilities of the application of the norm on collective dominance in relation to the individual actions of undertakings is still open. In particular, in a recent paper reviewing enforcement practices of the rules of Article 82 of the Amsterdam Treaty, the fact that there are cases covering individual abuses of dominance in the group of collectively dominant economic entities is underlined.[9] In particular, an example of this practice can be found in the case against the Irish Sugar.

Application of the norm on collective dominance in Russian practice suggests that individual abuse of dominant position by an undertaking in a group of collectively dominating economic entities is possible! The practice of applying the norm on collective dominance, only discussed in the EU, got a second wind in Russia. In particular, a similar approach was used by the Federal Antimonopoly Service (FAS) of the Russian Federation during the "first wave" of antitrust cases against oil companies in 2008-2009. A detailed analysis of the cases is beyond the scope of this article. That's why we shall focus only on the description of the general meaning of the arguments presented in these cases. These proceedings were initiated against four companies—JSCs "Rosneft," "PC Lukoil," "Gazpromneft," and "TNK-BP Holding."

It is known that to determine the fact of an abuse of dominant position one should start with establishing the fact of dominance on the respective wholesale markets of petroleum products. The latter should be made on the basis of determining market boundaries—product and geographic. Geographic boundaries of the market, according to the Russian antimonopoly authorities, coincided with the boundaries of the Russian Federation. Accordingly, companies under consideration have been dominant, though not individually but collectively, because none of them had the share of the wholesale markets of petroleum fractions exceeding 35 percent (minimum threshold of individual dominance as it was before Law changes).

In particular, in the Decree of its Presidium of May 25, 2010 N 16678/09, the Supreme Arbitration Court made a final ruling on TNK-BP:

> Federal Antimonopoly Service of the Russian Federation found that a significant share in the wholesale markets of motor gasoline and aviation kerosene (more than 70 per cent) belongs to groups of undertakings of the said oil companies, which are vertically integrated entities, since they are composed of the undertakings performing in the Russian Federation major extraction of oil, oil recycling at their refineries and sale the final oil products.
>
> In addition, the FAS of Russia revealed that the share of each of the said oil companies on the wholesale markets exceeds 8 per cent and the shares of the other economic agents; their shares changed only slightly in the analyzed period; information about the price and conditions for the purchase of motor gasoline and

[9] A. JONES & B. SUFRIN, EC COMPETITION LAW: TEXT, CASES, AND MATERIALS, p. 609 (Third Ed.) (2008).

> aviation kerosene on the wholesale markets is available to an indefinite number of entities; increase in the prices of automotive gasoline and aviation kerosene is not due to a change in the general conditions of the sale and purchase of the merchandise.
>
> Based on the established facts the FAS of Russia concluded that by virtue of paragraph 3 of Article 5 of the Law on Protection of Competition the company "TNK-BP Holding" together with the other oil companies ("Rosneft," "PC Lukoil," "Gazpromneft "—author's note) is dominating on the wholesale markets of motor gasoline and aviation kerosene.
>
> Geographic boundaries of the markets coincide with the territory of the Russian Federation, as the sales of the petroleum products produced were carried out in all the regions of the Russian Federation by the collectively dominant vertically integrated entities. Thus, the findings of courts on the definition of the product and geographic boundaries of the wholesale markets of motor gasoline and aviation kerosene are unfounded. The arguments of the antimonopoly service on the collective dominance of vertically-integrated entities have not been taken into account by the courts improperly. The dominant position of the company "TNK-BP Holding" in the wholesale markets of petroleum products is determined by the FAS of Russia in accordance with paragraph 3 of Article 5 of the Law on Protection of Competition.

Internal statistics of the antimonopoly authority contain information about the facts of violations and rulings against offenders, without details of the cases, with respect to determining the characteristics of structure of the market where the infringement was discovered. Thus, it is not possible to assess directly how common is the practice of determining the fact of a collective dominance in a product markets, with subsequent charges of an undertaking (undertakings) on abuse of dominant position as an individual entity in a group of collectively dominant entities. The FAS of Russia's top officials state that there are only a few of such markets (their share is less than 1 percent of the total amount of markets).[10]

But in itself the task of making such quantification is important because of the connection between the extent of the norm on collective dominance application in the area where the risk of Type I errors is pretty high. Moreover, it is important to keep in mind that even if the share of these markets is small, this does not mean that the share of turnover in these markets as a percentage of the total turnover is also small.

Formally, we can determine four classes of situations where there is an abuse of collective dominance:

1. All entities in a collectively dominant group abuse such a position. In this case, the question arises how an abuse of dominant position differs from collusion or concerted actions. There is also a question whether there is a reason to talk about collective abuse of a dominant position, or whether an abuse of a dominant position can only be individual?

[10] *See*, for example, http://www.fas.gov.ru/fas-in-press/fas-in-press_4398.html; http://www.fas.gov.ru/fas-in-press/fas -in-press_8492.html.

2. At least one company in the group of collectively dominant undertakings does not abuse its dominant position (for the first version of the definition of collective dominance according to Russian law there may be one or two such companies, for the second version—from one to four of them). This issue, in particular, is discussed in one of the papers devoted to the problems of abuse of dominant position, in connection with the analysis of the norm on collective dominance for the possibility of using discretionary decisions first on the composition of the collectively dominant undertakings, and then on the composition of offenders.[11]
3. Only one company abuses its dominant position, while the others act competitively. This class allows defining most clearly the market share threshold, beyond which the dominance can be established. With respect to the norms of the Russian legislation, the minimum market share threshold theoretically decreases to 8 percent. In other words, in these situations, although the dominance is collective the abuse is individual in the literal sense! Only in this case, at first glance, it is possible to avoid a head-on collision with the conclusions of economic theory, subject to qualification of collective dominance in terms of market structure, and tacit collusion—in terms of the actions of market participants.
4. None of the companies abuse a dominant position, either collectively or individually. This case is important with the purpose to again emphasize that collective dominance is a market structure, indicating the possibility of collective action in restraint of competition, but not the actions themselves and especially not their implications.[12]

Of course, the second and third classes are of the greatest interest. If the overall reaction of competitors, being a sum of the multidirectional individual reactions of competing firms, is negligible, then there is not enough reason to declare a unilateral determination of the general conditions of circulation in the product market on the basis of abuse of a dominant position. Otherwise, in fact, it would mean weakening the criteria on which the possibility for an economic entity to influence the general conditions of circulation in the commodity market is established. In terms of identifying characteristics of competition in a product market the structure of the reactions of competitors in response to the actions of the entity under consideration may be essential for qualification of its actions, and in some cases, for qualification of its position in the market.

Indeed, if an undertaking reduces sales by raising prices, and its competitors, on the contrary, increase sales without rising prices (their response is reverse)—the behavior of the first entity cannot qualify as an abuse. However, if the response is positive, then first of all one needs to pay attention to the signs of a concerted actions. A prerequisite for finding that the actions of the undertakings are concerted is parallelism in their behavior; though, as the practice of the qualification of the phenomenon shows, the parallelism itself is not illegal (as opposed to conscious parallelism as a synonym for concerted actions), unless it is proved that it is due to reasons other than those defined by market participants whose behavior can be characterized as parallel.

If the creation of distributional effects in its favor does not require an undertaking to make an agreement with the competitors, there still remains a possibility of concerted actions.

[11] Yu Tai Yu, *Abuse of dominant position in a product market*, CORP. L., p. 36 (May, 2011).
[12] If only the very collective dominance is not the result of actions aimed at restricting competition.

However, judging from the context, we are not necessarily talking about concerted actions here. Otherwise, why use the idea of bad faith instead of the concerted actions. That is why, as a minimum, there is a reason to believe that we are talking about individual actions independent of the behavior of other competitors, wherein the party of collective dominance redistributes the most winnings from a voluntary exchange.

Is a situation possible in which an individual market participant (with market boundaries defined in accordance with the requirements for setting standards of a study of the state of competition in the markets for the application of antimonopoly laws), even if it controls only a small share of the market, may still benefit at the expense of the contractors? Strictly speaking, such situations are possible in cases of a phenomenon that is known in the economic theory as a fundamental transformation: transformation of the relations of competition *ex ante*, i.e. until the conclusion of the agreement (contract), into bilateral dependency (or dependency within a narrow circle of actors) *ex post*.[13] The problem of a fundamental transformation was identified and systematically studied in the New institutional economics—especially in the papers of Oliver Williamson, winner of the Nobel Prize in Economics in 2009.

In fact, by this we have the argument associated with the customers switching costs from one vendor to another *ex post*, which may be explained by the fact that all the market participants are boundedly rational and not only cannot anticipate all the events that will occur in the future, but cannot process (as it would be required for optimization task elaboration and solution) all necessary information as well.

However, can using an argument about the costs of switching because of a fundamental transformation be the grounds for the use of the construction of collective dominance in the format of "individual abuse in a group of collectively dominant economic entities"? Maybe this case generally refers to different product markets and, consequently, to the need to adjust the rules of market research for the purposes of the application of the antimonopoly legislation.

If there is an issue of a fundamental transformation and, in this regard, of opportunism in the form of hold-up from one of the parties, the contractor, if he acts in the competition conditions *ex ante*, should solve the issue of opportunism at least partly, and not hope for the antimonopoly authorities' capabilities in the settlement of commercial disputes through the antimonopoly enforcement, when really the use of medicine can be more dangerous than the disease itself.

V. CONCLUSION

Collective dominance is an important tool for antimonopoly legislation, used to qualify a variety of situations in a market where a predisposition to actions restricting competition is combined with the alleged knowledge of the interdependence of market participants.

Although the collective dominance is, first of all, a market structure, the existence of a "behavioral" component in the properties of collective dominance is the basis for explaining and taking into account the peculiarities of application of this concept in antimonopoly policy.

Improper use of this tool—consequently, the occurrence of Type I and II errors—can cause adverse consequences and effects up to the restriction of competition and subsequent loss of

[13] O. WILLIAMSON, THE ECONOMIC INSTITUTIONS OF CAPITALISM (1985).

welfare for market participants. At the same time, the risks of such errors could be even higher than in the case of individual dominance. This is seen in the case of collective dominance where it is more difficult to separate structural characteristics of the market from the actions of market participants, because of the importance of links between them (primarily information characteristics of the market) for qualification of the participants' market positions. That is why it is important that this medication should not lead to much worse consequences than the disease itself, against which the medicine has been developed and is applied.