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**Distribution agreement as the legal form of vertical restraints**

*The article considers distribution agreements concerning the inclusion of vertical restrictions in the agreements which affect competition in the market. It analyses prohibitions on anticompetitive contract terms stipulated in Russian antimonopoly legislation, the practice for the application of the prohibitions as well as the exemptions from them. The provisions of the Russian competition law regarding prohibition of resale price maintenance are compared with the similar provisions of the competition law in the EU and the competition law in the US. Consideration has been given to some deficiencies in the current Russian antimonopoly law and the ways to improve it are outlined. Russia and other countries law enforcement research leads to the conclusion that there is a need for developing and improving of sub-legislative regulatory provisions to provide detailed regulation of the analysis and evaluating of distribution and other agreements by the competition agencies.*

**Дистрибьюторский договор как правовая форма вертикальных ограничений**

*В статье рассматривается дистрибьюторский договор с точки зрения наличия в нем вертикальных ограничительных условий, влияющих на конкуренцию на товарном рынке. Анализируются предусмотренные российским антимонопольным законодательством запреты на антиконкурентные условия в вертикальных соглашениях, практика применения данных запретов, а также возможные исключения. Приводится сравнительный анализ положений антиконкурентного права России, Евросоюза и США в части запрета на установление цены перепродажи товара. Уделено внимание отдельным недостаткам текущего антимонопольного законодательства и обозначены пути его дальнейшего совершенствования. Исследование российской и зарубежной правоприменительной практики приводит к выводу о необходимости развития и совершенствования подзаконных нормативных актов, подробно регламентирующих анализ и критерии оценки антимонопольными органами дистрибьюторских и иных соглашений.*

***Keywords:*** *distribution agreement, vertical restrictions, antimonopoly law.*

***Ключевые слова:*** *дистрибьюторский договор, вертикальные ограничения, антимонопольное право.*

A distributorship contract is one of the most common kinds of contracts in use in Russian and foreign trade dealing. A special feature of the contract that distinguishes it from other agreements specified in Chapter 20 of the Russian Civil Code is that it imposes obligations on the distributor to promote the goods received from the supplier. The model Contract on Distributorship developed by the International Chamber of Commerce [1] includes provisions concerning distributor’s duties to create distribution and marketing networks as well as provide the after-sales support. Furthermore, the distributorship contract may include limitations on the territories in which the distributor is to operate, resale price maintenance, prohibition for the parties to enter into an agreement with competitors.

Going beyond the contract for Delivery stipulated in the Russian Civil Code, the distributorship contract, according to V.A. Maslova makes it possible to achieve “synergies for cooperation between manufacturers producing consumer goods and selling them through distributors and distributors that are capable of offering their logistics and other services to promote goods” [2, p. 63], which makes the distributorship contract indispensable in business activity enabling to blend elements of the Contract for Delivery, the Contract for the Repayable Rendering of Services, the Brokerage Contract, the Contract of the Commercial Concession in one single agreement. By nature, the distributorship agreement refers to the agreements unspecified by the Russian Civil Code which can be concluded in accordance with Article 421 of the Russian Civil Code. The attempts to classify the distributorship agreement as a mixed contract seem to be theoretically incorrect, as that would require to apply to it the rules on the contracts those elements are contained in the distributorship agreement, including the rules on essential terms non compliance with which would lead to considering it not concluded [3]. Given its sui generis nature and the fact that it cannot be reduced to the elements of the agreements stipulated by the Russian Civil Code, it must be treated according to the general provisions on the agreements and obligations of the Russian Civil Code while towards certain elements of it similar to ones of stipulated kinds of agreements is possible to apply the analogy of the law according to Paragraph 2 of Article 421 of the Russian Civil Code.

Of particular interest are terms on price-related and non-price-related restrictions included in a distributorship agreement. The terms are based on passive type of legal duties and can take form of exclusivity conditions (distributor’s refusal to conclude distributorship contracts with the supplier’s competitors or supplier’s refusal to conclude distributorship contracts with third parties within the territory the distributor operates in), quantity, price and territorial restrictions. There is a possibility to include restriction terms regarding several agreements stipulated in the Russian Civil Code: in The Contract of Commission (Paragraph 2 of Article 990), the Contract of the Commercial Concession (Article 1033), the Brokerage Contract (Article 1007), the License Contract (Subparagraph 2 of Paragraph 1 of Article 1236). From the economic legal point of view, the restraining terms should be considered as one of the ways to coordinate market conduct of economic entities. Therefore, considering that such coordination can have a negative impact on market, the distributorship agreement frequently becomes the subject of attention from the antimonopoly authorities.

According to the paragraph 19 of the article 4 of the Federal Law of July 26, 2006 No. 135-FL on the Protection of Competition, the distributorship contract belongs to vertical agreements with respect to which the paragraph 2 of the article 11 of the Act prohibits price fixing (excluding minimum resale price maintenance) and the inclusion of reseller’s duty not to sell goods of the supplier’s competitors. A literal interpretation of the provisions of the paragraph 6 of the article 11, the article 12 and the paragraph 1 of the article 13 of the Federal Law on the Protection of Competition leads to a conclusion of relative character of the referred prohibitions. First of all, the vertical agreement is considered acceptable provided the market share of each party for the good which is the subject of the agreement does not exceed 20 per cent. Secondly, the vertical agreement is valid if it’s the Contract of the Commercial Concession. And thirdly, if the concluded vertical agreement results in economic growth (matches the criteria stipulated in Subparagraphs 1 and 2 of Paragraph 1 of Article 13 of the Federal Law on the Protection of Competition)

Nevertheless, attention should be drawn to the General Exemptions regarding agreements between buyer and seller, stipulated in the Resolution of Government of the Russian Federation of 16 July, 2009 No. 583 “On the admissibility of agreements between economic entities” (hereinafter – the General Exemptions) [4], which significantly limit the grounds for declaring the agreements valid under the article 13 of the Federal Law on the Protection of Competition. In particular, according to Subparagraph “a” of the paragraph 1 of the General Exemptions the resale price maintenance is considered illegal leading to a conclusion of per se illegality of the agreements which are not in compliance with the prohibition.

It’s worth noting that the legality of price fixing is being addressed differently in the various legal orders. Similar to the Russian approach is the approach of the European Union. For example, according to Subparagraph “a” of the paragraph 1 of the article 101 of the Treaty on the Functioning of the European Union agreements directly or indirectly fixing purchase or selling prices or any other trading conditions is prohibited. Moreover, the article 223 of the Guidelines on Vertical Restraints issued by European Commission treats minimum or fixed resale prices maintenance as hardcore restriction which fall outside the scope of the rule that allow vertical agreements between undertakings whose individual market shares does not exceed 15% (articles 9 and 10 of the Guidelines on Vertical Restraints).

Prior to 2003 minimum resale price maintenance was unlawful per se in the US. On June 28, 2007, the Supreme Court of the United States significantly relaxed antitrust restriction on the practice concluding that “vertical agreements establishing minimum resale prices can have either procompetitive or anticompetitive effects, depending upon the circumstances in which they are formed, and thus they must be assessed under the rule of reason” [7]. Thus, after the decision handed down by the Supreme Court minimum resale price maintenance is no longer illegal per se and allowed under certain conditions. Justifying the approach, the Supreme Court among the positive aspects of the price restraints included: 1) Stimulation of inter-brand competition by reducing intra-brand competition. 2) Possibility to avoid outflow of consumers to other distributors offering lower prices compared to their competitors, because they are able to afford it since they did not invest in market promotion (“free riding” problem). 3) Facilitating market entry for new firms and brands. 4) Encouraging retailers to provide ancillary services and thus increasing inter-brand competition. But at the same time, the Supreme Court noted the possible negative effects of the price restraints: 1) Resale price maintenance may facilitate a cartel at either manufacturer or retailer level while a horizontal price fixing which is illegal per se is disguised as allowed vertical price fixing. In general, it can lead to higher prices for consumers. 2) Resale price maintenance may be abused by an undertaking having market power.

Taking into account the specificity of the Russian Federal Law on the Protection of Competition, it has to be pointed out that the main way of justifying vertical price fixing is stipulated in the paragraph 2 of the article 12 of the Federal Law on the Protection of Competition under which agreements between undertakings with market share not exceeding 20% are deemed allowed. The Guideline on methods for determining the market shares of undertakings is approved by the order of the Federal Antimonopoly Service of the Russian Federation of April 28, 2010 No. 220 “On approving the procedures for analyzing the state of competition on goods markets”. It’s important for a Competition Agency to conduct an investigation in strict compliance with the Guideline since otherwise an order issued by the agency may be declared illegal by the Court due to not following the established procedures for analyzing the state of competition on goods markets. This practice was especially common in previous years when the Federal Antimonopoly Service rarely conducted a market analysis in accordance with the Guideline directly applying the paragraphs 1 and 2 of the article 11 of the Federal Law on the Protection of Competition [5].

For example, in the Resolution of 26 August, 2014, case No. A29-4292/2013 the Arbitration Court of the Volga-Vyatka district upheld the decision of the lower court which declared invalid an order of a Competition Agency noting that the Agency hadn’t fully determined the undertakings operating on the market, and thus the market share of the concerned undertaking could not be defined. Apart from the above mentioned resale price maintenance prohibition there should be taken into consideration the General Exemptions approved by the Government of the Russian Federation which include a number of provisions raising some concerns in reconciling them with the provisions stipulated in the Federal Law on the Protection of Competition. In particular, subparagraph “g” of the paragraph 1 of the General Exemptions deems illegal contract terms prohibiting the buyer to produce, buy or sell goods which are substitutes to goods obtained or which may be obtained from supplier in accordance with the agreement. At the same time, there is an exemption to the prohibition concerning cases when the prohibited terms are established for the period not longer than three years which contradicts the subparagraph 2 of the paragraph 2 of the article 11 of the Federal Law on the Protection of Competition containing prohibition on contract terms imposing on a buyer obligation not to sell goods obtained from undertakings that are competitors of the supplier. It could be argued, however, that Subparagraph “g” of Paragraph 1 of the General Exemptions is applicable only to cases involving application of Subparagraph 1 of the paragraph 13 of the Federal Law on the Protection of Competition which provides for additional conditions under which agreements or other legal transactions leading to economic growth and lacking anticompetitive effect can be deemed allowed. However, the paragraph 4 of the Resolution of the Government of the Russian Federation “On the admissibility of agreements between economic entities” stipulates that agreements which are not in compliance with the General Exemptions may be deemed allowed if they comply with the conditions established in the paragraph 1 of the article 13 of the Federal Law on the Protection of Competition which means even the agreements concluded for a period more than three years may be deemed allowed.

The foregoing results in a conclusion that the prohibitions established in the General Exemption are relative. They aren’t applicable when the market shares of the considered undertakings don’t exceed 20% and even if they do there is a possibility not to apply them provided the conditions stipulated in paragraph 1 of article 13 of the federal law on the Protection of Competition are fulfilled. The question remains how other prohibitions stipulated in General Exemptions should be assessed and applied including those concerning vertical agreements and that are not enshrined in the Federal Law on the Protection of Competition. These included, in particular, prohibition of obligating buyer not to operate within a certain territory defined in an agreement. The inclusion of the terms and conditions in the agreement concerning geographical boundaries a distributor is allowed operate within is not a violation by itself as demonstrated by judicial practice. For example, in the Resolution of 19 February, 2013, case No. F03-264/2013 the Federal Arbitration Court of the Far-Eastern District while justifying the decision to declare an order issued by a Competition Agency invalid pointed out that defining a location where distributors are to sell goods obtained from the supplier in an agreement doesn’t affect the possibility of potential consumers of distributor’s competitors to buy goods directly from them.

Another practical issue concerns relation between conduct of the parties under the vertical agreement and coordination of economic activity by a third party specified in the paragraph 14 of the article 4 of the Federal Law on the Protection of Competition. Prior to the implementation of the “third antimonopoly package” there was a practice of competitive agencies to qualify a large number of distributorship agreement concluded by the same supplier as a coordination of economic activity. In that approach a set of similar distributorship agreements between a supplier and distributors was recognized as horizontal restraints. According to M.A. Egorova the distinction between a coordination of economic activity and conduct in scope of vertical agreements driven in the paragraph 14 of the article 4 of the Federal Law on the Protection of Competition is aimed to distinguish the legal regime of a coordination of economic activity from the one of vertical agreements and in particular avoid application of the conditions under which vertical agreements are allowed while assessing legality of a coordination of economic activity. And furthermore, “exemption of actions under vertical agreements from scope of coordination of economic activity should facilitate antimonopoly authorities to conduct more reasonable economic evaluation of vertical agreements and their impact on competition in each specific case” [6].

It seems that the strict distinction between vertical agreements and a coordination of economic activity should be assessed critically. Even though a single distributorship agreement from the point of view of the stipulated restrictions may be deemed allowed in accordance with Article 12 of the Federal Law on the Protection of Competition, the system of distributorship agreements containing similar vertical restraints may result in anticompetitive effect on market, identical to the effect of cartel agreements, and thus requires suitable qualification.

The further development of the norms on vertical agreements is seen is necessity to develop a detailed act of secondary legislation similar to the EC Guidelines on the Vertical Restraints which would contain clarifications and explanations on the conditions under which agreements may be allowed as well as evaluation criteria for assessing anticompetitive and procompetitive effects of the vertical agreements.

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