

COMPARATIVE LEGAL PRINCIPLES FOR THE FORMATION OF A GROUP OF PERSONS IN THE RUSSIAN COMPETITION LEGISLATION

KOMPARATÍVNE PRÁVNE PRINCÍPY TÝKAJÚCE SA ZALOŽENIA SKUPINY OSÔB V RUSKOM SÚŤAŽNOM PRÁVE

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ABSTRAKT

Príspevok analyzuje hlavné kritéria systematizácie skupiny osôb existujúcich v právnej doktríne, ktoré slúžia pôvodným kritériám na určenie založenia skupiny osôb pre účely súťažného práva.

ABSTARCT

The article analyzes the main criteria systematization group of persons, existing in the legal doctrine, and serves original criteria for determining the formation of a group of persons for the purposes of competition law.

The specifics of the category of «group of persons» is the opposition of the autonomous legal personality of each of its members to the general interest (overall objective) the group's activities on the commodity market. The unity of the economic purpose of allowing a group of persons in commercial turnover implement a common commercial policy, in some cases allows a group of persons to act as only one participant of the transaction, and independent members within the group are not considered as separate parties to such a transaction¹. In The European Union has a regulation on the «single economic factory» which is determined on the grounds possibility of the fulfilling of their functions in circulation as an autonomous economic entity (self-sufficient or functionally complete joint venture - *full-function joint ventures*)². This approach represents one of the options to implement the doctrine of a «single economic entity», according to which the relationship of dependency or control between several independent, legally separate companies determine the existence in them of the common economic interest, that causes them to implement the agreed activities in the market which allows to consider them as a consolidated entity.

From the point of view of competition law it means that, firstly, such a single economic entity should take full responsibility for violations of antitrust prohibitions and restrictions (even solidary shared within the group of persons), and, secondly, the relations of the subjects forming a group of persons should not be subjected to the restrictions and prohibitions antitrust laws that apply to a single business entity as a whole. It is with the latter provision is related limiting the spread of the prohibitions contained in paragraph 1 in article 101 of the Treaty on

¹ See: AVDASHEVA S.B., SHASTITKO A.E. Economic analysis of associates in terms of Antimonopoly regulation. Russian-European centre for economic policy. M. 2005. P. 14-15.

² P. 11-15 Commission notice on the concept of full-function joint ventures under Council Regulation (EEC) No 4064/89 // The Official Journal: OJ C 66 of 02.03.1998.

the functioning of the European Union³ to any variants of agreements between two or more persons, in the aggregate components of a single economic entity.

The most important distinctive feature of the corporate management within the group of persons is the lack of internal unity of the economic entity, which is essentially a set of Autonomous legal personality of persons United on the basis of corporate subordination criteria for the determination of which need to be studied and formalization. In such conditions, the methods of corporate governance, traditionally used within a single legal entity and based on the norms of the law depart on the second plan, and the greatest importance is the actual system of relations between members of the group, which is based on the attributes of the current economic power (or dependence), reflected in the establishment of specific forms of domination of a single legal entity by another (others).

Such dominance is expressed in real possibility of adoption by a single company decisions to be borne by other companies in the system of groups of persons subordinate position. This dominance allows the determination of results of managerial activity, directed towards the Commission of individual members of the action giving rise to the consolidated effect, satisfying, ultimately, the economic interests of all members of the group; shapes the policy of the group in General. Essentially this domination is a kind of corporate control, which must be regarded as an attribute and one of the most important functions of the control group of persons⁴.

The notion of control is the basis of the European Antimonopoly legislation⁵, uses a set of property (first of all stock) and moral (economic content of structural relations between the companies) monitoring tools⁶. It seems that this approach is the most accurate in relation to the definition of content of the corporate subordination within a group of persons. In accordance with the subordination of some members of the other group is made on the basis of **two types of the power**:

1) **a corporate power**, based on the relationship, has been installed norms of the corporate legislation: a) participation based on the financial component (shares, interests) and as expressed in the possibility of establishing control through the formation of the bodies of management of the Corporation in the form of the General meeting of shareholders and the Board of Directors, and b) the management of the legal person in the form of establishment of control over the activities of the individual or collegiate Executive body the Corporation, as well as control over the formation of the composition of the Board in an economic society.

2) **an economic power**, which is based on the economic (business) relations, has determined the position of economic dependency of one or more members of the group from the other. Such a provision in the economic turnover the most frequently arise in the relations on long-term supplies (especially in large trading networks), distributor relationship, franchising

³ Treaty on the Functioning of the European Union (TFEU)). Signed in Rome 25.03.1957.

⁴ This approach is close enough understanding of control within the Concept of corporate governance adopted in the doctrine and the corporate laws of the States of the Romano-Germanic legal family. (See, for example: Hopt K. The European system of corporate governance after the Enron // *Corporate lawyer*. 2005. N 1. C. 35 - 39; N 2. C. 29 - 33).

⁵ See: AVDASHEVA S.B., SHASTITKO A.E. Economic analysis of associates in terms of Antimonopoly regulation. Russian-European centre for economic policy. M. 2005. P. 17.

⁶ See: pp. 11-15 explanations of the European Commission on competition «On the concept of functional complete joint ventures» (Commission Notice on the concept of **full-function joint ventures** under Council Regulation (EEC) № 4064/89 on the control of concentrations between undertakings) // <http://www.hartpublishingusa.com/updates/Korah/ff-joint.pdf>, pp. 91-94 Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings

//<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:095:0001:0048:EN:PDF>,
//<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:115:0058:0199:EN:PDF>

contracts and commercial representation and other signs of economic power in the European legislation are based on the structural economic ties between companies, as well as on the content and structure of contractual relations between them. Priority is given to the economic component of the relations between economic entities, not legal form, indirect of such communication. On this principle in the European law is built on the concept of the acquired control underlying the determination of the participant of the transaction on economic concentration, leading to sustainable changes in the structure of the entities involved in the transaction.⁷ Such an approach allows to detect the presence of the so-called instrumental companies forming part of the corporate veil even in cases where they are from the formally legal point of view, have the status of subsidiaries in relation to the ultimate parent company. Criteria for identifying instrumental of the company are set in order to determine its self-sufficiency (functional completeness - full function). In case the company can be recognized as a full function, respectively, transactions with its participation are regarded as independent transaction Autonomous legal entity. If certain criteria instrumental company does not match the characteristics of the enterprise full function, the participants of the transaction is presumed to its owners, i.e. participants of the group (in particular, the parent company), that is the basis for the possibility of removing «corporate cover and bring to responsibility not only an instrument company, but also its co-owners.

Criteria for assessing the company as instrumental and not full function, is the number of signs in the presence of which each parent may be regarded as a participant of the transaction, even when such transactions are made only on behalf of an instrument company. Among these signs of clause 28 explanations of the European Commission on competition «On the concept of functional complete joint ventures», in particular attributes: 1) the objective of creating an instrument company; 2) the lack of implementation of its independent activity; 3) the existence of the company in the form of instrumental of Association; 4) evidence of actual committing transactions owners instrument company (the parent companies or any of them), and not by the company; 5) a significant diversification in instrumental activities of the company, which allows to make the conclusion, that actually deals were made not own it, and its parent companies; 6) implementation of enterprise functions commonly performed by similar companies in a particular commodity market; 7) effective access to such markets; 8) analysis of the content of the transactions made by the company during starting a period its existence; 9) analysis of the composition of the company's counterparties, which should not parent companies; 10) the duration of functioning of the company and the stability of its existence, the joint venture will not be considered to operate on a permanent basis, if it is established for a short finite time).

As you can see, the criteria for the differentiation of the «self-contained» company from the «instrumental», based on the contents of structural economic relations between economic entities and, accordingly, the criteria for the presence or absence of the economic power of one subject over another, have expressed an evaluative character and can be applied even in the absence of precisely regulated legal criteria. The possibility of using economic criteria is based on transparency and openness of markets, high level of discipline and responsibility of the participants, as well as on the necessity and possibility of conducting a thorough and rigorous analysis of the activity of each participant in a particular market, based on the highest skills appropriate regulatory authorities, in particular, on the training of the members of the European competition Commission), largely difficult, and sometimes it is impossible in mod-

⁷ P. 5 and 7 Commission notice on the **concept of undertakings concerned** under Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings)
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:1998:066:0014:0024:EN:PDF>. P. 147 Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings

ern conditions of Russian economic markets. Probably, this explains the absence of necessity in the allocation in the European legislation (as well as in Anglo-Saxon law) category «a group of persons», because antitrust restrictions are defined not by the formal legal regulation, and through the identification of economic criteria, based on the principles of establishing effective control over activity of the enterprise and determine its ability to carry out independent economic activities.

Despite this, in the modern Russian commodity market the actual use of economic power enough expressed. However, the practice of Russia's business turnover in the present period of time not been formed in order to use the signs of economic power as criteria in determining the effects of interaction of subjects of economic activity as members of the group; The use of economic criteria economic power, similar to the European approach, in the current Russian economic and legal space, may give rise to the provisions of legal uncertainty and substantially increase the cost of enforcement, due to the absence in the Russian legal system prerequisites for the parallel use of elements of economic analysis for the regulation of competition.

In this sense, the needs of the business turnover in Russia in a greater degree will correspond to the normative-legal approach to defining criteria of a group of persons, based on the attributes of the establishment of corporate power of one is an independent legal entity over another. Therefore, it is necessary to proceed from the fact that the category of «group of persons», constituting an element of the system of competition law, is based on the corporate legal criteria for determining the content of the corporate subordination, constituted the core of the relations between the members of the group of persons.

The criterion of control over property, used in the European competition legislation for the qualification of the need for prior Antimonopoly control over transactions on the economic concentration as a group of persons⁸, which is an indirect analogue of the characteristic corporate control, used in the Russian Antimonopoly legislation in article 9 of the Russian Federal law on protection of competition⁹, is built on the relation of the rights of corporate participation and management of the various individuals during the analysis of the totality of enterprises in transactions, the effects of the economic concentration.

Such criteria in the Regulation of the Council of the EU merger (the «EC Regulation») are arranged on five main levels. The first level is the basic unit of analysis «of the transaction on concentration, which represents the economic entity whose activity is analyzed (part «A» of paragraph 4 of article 5 of the EC Regulation).

The second level criteria analysis is actually corporate criteria, which are expressed in the possession or disposal of capital stocks (shares) or business assets other economic entities by economic entity and the same assets of the economic entity whose activity is analyzed, other economic entities. Such ownership can be carried out both directly (subject «In» owns more than 50% of assets subject «A») and indirectly (for example, the subject of «In» owns more than 50% of the assets of «C», which, in turn, owns more than 50% of assets subject «And»). Among such criteria include: 1) ownership of more than 50% of shares and (or) business assets; 2) more than 50% of the voting rights in the management of the company; 3) the right to appoint more than half of the members of the Supervisory Board composition of the steering bodies; 4) the right of succession in respect of property of the enterprise; 5) the right to manage the Affairs of the enterprise (paragraphs I to IV of part «b» of paragraph 4 of article 5 of the EC Regulation). Quite clearly, that all the listed criteria are the contents of the corporate rights to participate and management companies.

⁸ See: article 5 of Council Regulation (EC) mergers hereinafter «EC Regulation») no 139/2004 of 20 January 2004 (Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) // <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:024:0001:002:en:PDF>

⁹ The Russian Federation Federal law from 26.07.2006 № 135-FZ «On competition protection» // Collection of legislation of the Russian Federation as at 31.07.2006, N 31 (1 h), article 3434.

These corporate criteria are the basis for determining the depth of disclosure of the composition of the members of mergers, regulating the third, fourth and fifth level of such criteria. EU regulation provides that the depth of the composition of participants of a merger determined on the basis of these criteria, respectively, determined by their presence in three more consistently existing groups of people: *the third level* - the subsidiaries of a person «A» for which «A» owns property or has the rights specified in part «b» of paragraph 4 of article 5 of Regulation (EC, in respect; *the fourth level* - those enterprises for which the companies in the third level have the rights or powers listed in part «b» of paragraph 4 of article 5 of Regulation (EC); the fifth level - those enterprises for which the companies in the levels of the first four have the rights or powers listed in part «b» of paragraph 4 of article 5 of the EC Regulation.

For the Russian competition legislation is characterized by a considerable reduction in the levels determine the depth of disclosing of a group of persons, which on one level is less than determined by Regulations of the EU. Simplification of the process of determining the composition of the group of persons installed third Antimonopoly service, entails and simplification of its list, which is regulated by the new wording of the Order of the Federal Antimonopoly service of the RF №293¹⁰.

Group of persons in the Russian competition legislation is formed in several stages.

The first level of the formation of a group of persons is connected with the definition of the base of a business entity of commercial circulation, whose activities are subject to evaluation by antimonopoly bodies. Such an entity may be characterized as the basic element group of persons». He is put in the basis of evaluation of the formation of the group as a benchmark for the application of the basic objective criteria. The first level has a purely subjective content. The list of subjects of this level is determined by the exclusive list of economic entities contained in the norms of article 9 of Russian Federal law on protection of competition.

The group of persons in Russian competition law has built indirectly similar to the European regulation on mergers; where as a first level of analysis is the disclosure of the group also used economic entity of the market, the suspect in the management of a group of persons. Despite the fact that article 9 of the Russian Federal law on protection of competition based not on the principle of establishing levels in defining criteria of a group of individuals, however, this principle still really laid into the Foundation of establishing groups of persons. The First level of disclosure of a group of individuals can be described as «subjective level».

Further development of the group entities is performed on the principle of accession to the underlying subject element other subjective elements on the basis of a system of criteria for the various contents.

The second element of the subjective level in the formation of a group of persons connected with the establishment of other participants of the group associated with the base different groups of legal relations, in particular: property, liability laws, labor, institutional and families.

The second level of the formation of a group of persons in the Russian legislation connected with the use of objective criteria content arising out of content relations arising or existing between members of the group; and this level can be described as «object layer» formation of a group of persons. These criteria are expressed corporate content, based on the existence of an entity-corporate, obligatory-corporate and organizing-corporate relation between the members of the group of persons. Entity-corporate relationships arise from the participation of

¹⁰ See: Order of the Federal Antimonopoly service of the Russian Federation (FAS) of Russia dated 20.11.2006 N 293 "On approval of the form of submission of the list of entities in the same group of persons" // Rossiyskaya Gazeta, N 286, 20.12.2006 (in the wording of order of the FAS of Russia dated 29.11.2012 N 724/12 "On amending the Annex to the order of the FAS of Russia dated November 20, 2006 № 293 "On approval of the form of submission of the list of entities in the same group of persons" // Rossiyskaya Gazeta, N 39, 22.02.2013.

other persons in the basic society (paragraph 1 and 3 of part 1 of article 9 of the Russian Federal law on protection of competition). Obligatory-corporate relations are based on the relative presence of different legal relationships, in most cases, on the basis of agreements between subjects: executive agreements (paragraphs 1, 2 part 1, and article 9 of the Russian Federal law on protection of competition) or labor contract (item 2 of part 1 of article 9 of the Russian Federal law on protection of competition). The largest volume in the criteria for the formation of a group of persons occupies organizational relations (paragraph 3 - 6 of part 1 of article 9 of the Russian Federal law on protection of competition). In article 9 of the Russian Federal law on protection of competition criteria for determining the groups also have the contents of the corporate rights of ownership and control. It appears that a significant reduction in the number of grounds on which a person considered in relation to the same group, while under the control of the same person («odd reason»¹¹ referring to the group of persons), is a significant innovation of the Antimonopoly legislation, introduced in accordance with the third Antimonopoly package of amendments to the Russian Federal law on protection of competition.

The structural composition of such criteria is also close the system of the composition of the criteria used in the Regulations of the EU:

1) sign to the ownership or disposition of more than 50% of shares or assets subject (paragraph 1 of part 1 of article 9 of the Russian Federal law on protection of competition) corresponds to the grounds of paragraph I of part «b» of paragraph 4 of article 5 of the EC Regulation;

2) the criterion of the right to exercise more than 50% of the voting rights (paragraph II of part «b» of paragraph 4 of article 5 of Regulation (EC) corresponds to sign a preferential opportunities in the formation of the Executive bodies of the entity (item 5 and 6 of part 1 of article 9 of the Russian Federal law on protection of competition);

3) the right to appoint more than 50% of members of the Supervisory Board and Executive bodies of the company (paragraph III of part «b» of paragraph 4 of article 5 of Regulation (EC) correlates criterion of the ability to control more than 50% of the vote in determining the quantitative composition of the collegial Executive body or Board of Directors (Supervisory Council, the Board of the Fund), as specified in point 4 of part 1 of article 9 of the Russian Federal law on protection of competition;

4) criterion management capabilities of the undertakings (paragraph IV of part «b» of paragraph 4 of article 5 of Regulation (EC) corresponds to the sign of the realization of functions of the sole Executive body of the Corporation (paragraph 2 of part 1 of article 9 of The Russian Federal law on protection of competition);

5) the basis of legal succession (paragraph III of part «b» of paragraph 4 of article 5 of Regulation (EC) corresponds to the exclusive list of family relations, affecting the formation of a group of persons, that is regulated by paragraph 7 of part 1 of article 9 of the Russian Federal law on protection of competition.

The only difference aggregate corporate criteria established by part 1 of article 9 of the Russian Federal law on protection of competition, from the EU Regulation is the presence of indications of the possibility of the existence of contractual relations of the corporate content, in particular the possibility of the presence of the constituent Treaty, and organizing content, specifying the rights and obligations of its members (shareholders). It seems that this can be a joint agreement establishing the possibility to determine decisions of the management bodies of the company in favor of the minority shareholders that should serve as the basis for incorporating the latest in a group of persons. This opportunity to confirm the existence of same practices in a number of European legal orders, in particular in France.¹²

¹¹ See: DIANOV V., YEGORUSHKIN A., KHOKHLOV E. Response to «Third Antimonopoly package». Moscow: Statute. 2012. P. 16.

¹² See: AVDASHEVA S.B., SHASTITKO A.E. Mentioned work. P. 19-20.

Special group of kinship (family) is relations between members of the group of persons (section 7 of part 1 of article 9 of the Russian Federal law on protection of competition). Third level (the level of the integral criteria for the formation of a group of persons) determining the composition of the group of persons in the Russian competition legislation provides for the application of complex evaluation criteria interactions between the subjects which have no direct relations, determined on the basis of criteria to be used on the second level. Membership of one group of persons on this level is determined on the basis of the availability of indirect signs of corporate control, having a centralized (section 8 of part 1 of article 9 of the Russian Federal law on protection of competition) and decentralized (item 9 of part 1 of article 9 of the Russian Federal law on protection of competition), built on the basis of the multi-polar or joint (group) control.

Problems of qualification and interpretation of the formation of a group of persons in a modern economic turnover are of purely applied value. Russian Antimonopoly legislation does not directly links the category of «group of persons» and «economic concentration», while the consequences of the actual control over the activities of economically independent subjects of entrepreneurial turnover in the European competition law are regulated by the Commission it is for the economic concentration. However, analysis of the peculiarities of the content of public legal relations within the group of persons shows that the basis of its formation in the conditions of modern market economy lie criteria of corporate management of the various contents.

KLÚČOVÉ SLOVÁ

skupina osôb, protimonopólna právo, ochrana súťaže, hospodárska činnosť, horizontálna integrácia, vertikálna integrácia.

KEY WORDS

group of persons, antimonopoly law, protection of competition, economic activity, horizontal integration, vertical integration.

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