
The Constitutional Foundations of Antitrust Regulation: A Comparative Analysis

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Abstract:

This article is devoted to the study of the constitutional foundations of antitrust regulation. As an subject for this study, the authors have chosen the rules of the Constitution of the Russian Federation, the constitutions of foreign countries (USA, Western Europe), which have served as the source for adopted on their basis legislative acts on the protection of competition and the restriction of monopolistic activity in commodity markets.

Based on the use of the comparative legal method, the authors have identified five stages of development of the constitutional basis of antitrust regulation, and models of antitrust legislation.

The Antimonopoly provisions of the Constitution of the Russian Federation, decisions of the Constitutional Court of the Russian Federation on the issues of Antimonopoly regulation are presented. This article discusses the controversial aspects of the topic, the constitutional principles of the state antitrust policy.

As a result of this study, the authors have come to the conclusion that the constitutional right to fair competition and protection from unfair competition is one of the social and economic human rights that can be found in the legal positions of the Constitutional Court of the Russian Federation.

Keywords: *Constitutional basis, anti-monopoly regulation, legislation, protection of competition, restriction of monopolistic activities, Constitutional Court of the Russian Federation, constitutional-legal concept, legal position.*

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1. Introduction

Antimonopoly regulation is implemented in the legal forms of state regulation of market relations, in the form of a set of legislative acts that restrict the activities of monopolies in order to create and support fair competition, suppression of monopolistic activity and unfair competition. The constitutions of states occupy a special place among these laws, provisions, legislation. Today Antimonopoly legislation exists in more than 100 countries.

In our country, the importance of this topic is apparent because in the national economy of the USSR monopoly was expressed in the most extreme forms and caused great harm to the economy. In modern Russia there are still threats of unfair competition, while methods of state regulation of natural monopolies remain imperfect.

The Decree by the President of the Russian Federation dated December 21, 2017 №618 "On the main directions of the state policy for the development of competition" that included the National plan for the development of competition for 2018-2020, requires active promotion of competition as a priority item for all branches of government and the Central Bank. In particular, it requires the presence in all sectors of the economy of at least three economic entities, one of which must be private.

The main principles of the procompetitive state policy in the Decree are the reduction of the share of state companies in the economy, assurance of the freedom of economic activity, support the development of small and medium-sized enterprises, and consideration for the development of competition in state investments.

2. Literature review

The study of the constitutional foundations of antitrust regulation in English scholarly literature has intensified since the late 50-ies of XX century (Carabiber, 1964; Kaysen and Turner, 1964). In 2013 Nachbar tried to justify the concept of "Antitrust Constitution".

Unlike most scholars of industrialization and nation-building in the US who were convinced that the "Progressive era" meant either an attack on large corporations or their government regulation, Berk insists that the legislation adopted at that time led to regulated competition. Louis Brandeis developed the concept of regulated competition and made it the subject of public debate. Members of Congress have translated many of Brandeis' proposals into legislation. The Federal Trade Commission established at that time registered businesses and professional associations. Many of Brandeis' proposals were based on the ideas of scientific management of social processes and on innovative techniques for calculating

production costs, the implementation of which could lead American capitalism in a different direction.

Recently, there have been works showing a sharp increase in the geography of antitrust regulation: the introduction into Iranian antitrust policy and law (Mina Hosseini, 2015), the study of the Ethiopian (Husen Tura, 2014) and Colombian antitrust law (Gutiérrez-Rodríguez, 2008), antitrust and competition law within the BRICS (Lianos, 2016).

Over the past decade and a half, thanks to the efforts of Russian constitutionalists Bondar (2017), Hajiyev (2009), Zorkin (2013) "Constitutional Economy" has been firmly established as a discipline of social sciences. Supporters of this discipline postulate that when solving the most important economic problems, it is necessary to take into account not only economic laws, but also constitutional provisions. According to Ruzanov (2015), one of the most striking examples of the impact of the constitutional doctrine on the economic system of society is the Antitrust law.

Plotnikova (2016) considers Antimonopoly branches as subjects for the protection of the constitutional right to conduct business in the Russian Federation. At the same time, these branches are not specified in the Constitution of the Russian Federation and have no constitutional legal status.

According to the heads of the Federal Antimonopoly Service of the Russian Federation Artemyev and Sushkevich (2007), the antitrust policy of the state, like no other form of public interference in private affairs, is under constant criticism by scholars of economics. Critics of antitrust laws include well-known economists, lawyers and philosophers like Posner (2004). The main objects of their criticism are:

- the economic consequences of Antimonopoly regulation (it is argued that such regulation always or often harms social welfare);
- the ethical and legal philosophy underlying antitrust regulation (it is claimed that it violates property rights and freedom of contract and leads to inequality of rights of citizens).

3. Methods of conducting research

This study of the constitutional foundations of antitrust regulation uses the methodology of comparative legal, formal as well as historical and legal analysis, methods of comparative analysis of scholarly paradigms in jurisprudence. Methods of legal modeling and methodological potential of the integrated jurisprudence were used.

4. Results

The stages of development of the constitutional basis of antitrust regulation are as follows:

1. The initial stage of legislative restriction of monopolistic behavior in the markets. One of the first antitrust laws in modern history ("Act for the prevention and suppression of combinations formed in restrict of trade") was adopted in 1889 in Canada. Under sections 1,8 Article 1 of the Constitution of the United States, antitrust laws are within the jurisdiction of the state. In July 1890 the US Congress passed the Sherman act that is traditionally associated with the beginning of Federal anti-monopoly legislation in the US. Article 1 stipulated that any contract, an association in the form of a trust or in any other form, or a contract for the purpose of restricting commerce or trade between states or with foreign States, was illegal.

As the professional judge and prominent American legal scholar Posner points out, the Sherman Act (1890) was an attempt to solve the problem of monopolies through criminal and civil sanctions against contracts and other combinations. It aimed to restricting trade monopolization, as well as conspiracies and attempts at monopolization. In early court decisions, the law was used to prohibit cartels. Although sanctions for violations were initially very weak, the law was quite effective.

2. The development of the Antitrust laws of the United States (1900-1970-ies). The Clayton Antitrust Act of 1914 was adopted as an extension of the Sherman Act, with the objective to restrict illegal trade that reduced competition. The Federal trade Commission act of 1914 (FTC) instructed this agency to enforce antitrust laws. The Celler-Kefauver Act of 1950 and the Hart-Scott-Rodino Act of 1976 are amendments to the American antitrust legislation that were adopted for its improvement.

3. Consolidation reinforcement of antitrust provisions in European constitutions and legislation of the world (1950-1970-ies.). In the early 1920s antimonopoly legislation in Western countries was formed as antitrust. Antitrust provisions are contained in the Rome Treaty of 1957 on the establishment of the EEC. Part 3, section 1 of the Rome Treaty (article 85) prohibits any agreement between enterprises capable of affecting trade between States parties that is intended to restrict competition within the common market and establishes a list of such unlawful agreements.

According to Aleshin and others, it was from the Rome Treaty that the Russian legislator took the institution of prohibition of abuse of a dominant position in the commodity market. In the Basic Law for the Federal Republic of Germany of 1949 the legal norm p.16 paragraph1 article 74 establishes that the competing legislative competence between the Federation and federal lands extends to the prevention of abuse of market power. More detailed provisions on competition are contained in the Constitutions of the individual German states. It should be noted that a number of

Constitutions of foreign countries include similar provisions, in particular, in articles 41, 43 of the Constitution of the Italian Republic of 1947. In 1947 Japan adopted the Law "On prohibition of private monopolies and fair trade", that contributed to the dissolution of conglomerates "zaibatsu" that had occupied a dominant position in the economy until 1945.

4. The liberalization of competition law following the economic policies (1970-1980-ies) provided for the rejection social and political goals in antitrust policy, mergers and acquisitions.

5. The formation of the international system for the regulation of competition (since the early 1990s) has included the legislative reinforcement of the foundations of competition and antitrust policy in 100 countries, the globalization of world economic relations and the establishment of comprehensive rules of international trade on the basis of WTO principles. The formation of Antimonopoly legislation in Russia and other post - socialist states began only in this period, - later than in other countries. The basis of the Antimonopoly legislation of the Russian Federation includes the provisions of the Constitution of the Russian Federation of 1993, that in particular, support competition and freedom of economic activity, restrict monopoly, and form legal basis of a single market. The Constitution of the Russian Federation for the first time includes such concepts as "private property rights", "freedom of economic activity", "unfair competition", "monopolization", "free movement of goods, services and financial means", and "business activity".

According to the Constitution of the Russian Federation (article 8), the integrity of economic space, guarantees the free movement of goods, services and financial resources, the support of competition and freedom of economic activity are guaranteed. The enforcement of these principles has determined the role of the State in economic relations. In a market economy, the State establishes general rules of conduct for economic entities, resolves disputes between them and fights monopolistic activities. The foundations of the economic system are developed and implemented economic rights and freedoms established in the constitution. Article 34 of the Constitution of the RF states that everyone has the right to freely use his or her abilities and property for entrepreneurial and other economic activities not prohibited by law. At the same time, economic activities aimed at monopolization and unfair competition are not allowed.

The Constitution of the Russian Federation (article 71) stipulates the establishment of the legal basis of a single market as the exclusive competence of the Federation. Current Antitrust legislation consists of the provisions of the Constitution of the Russian Federation, the Federal law "On competition", Federal laws issued in accordance with the Constitution, decrees of the President of the Russian Federation, and decrees of the Government of the Russian Federation.

The Constitution of the Russian Federation declares that principles and norms of international law and treaties are an integral part of the Russian legal system (part 4 article 15). In this regard, it is particularly important to coordinate the rules of Antitrust law as established in international treaties. The cooperation of the CIS States in the field of antitrust regulation is based on the provisions of the Agreement on principles of approximation of economic legislation (1992), agreements on the establishment of the Economic Union (1993) and on the implementation of an agreed upon antitrust policy (2000).

The Treaty of the CIS countries "On carrying out the agreed-upon antitrust policy", December 23, 1993, defines the principles, goals and objectives of the antitrust policy, as well as the General rules of competition of economic entities of the States that are parties to the Treaty. To implement the Treaty the interstate Council for Antimonopoly policy was established and the statute on it was approved.

The first Russian laws in the field of antitrust included the Law of the RSFSR "On competition and restriction of monopolistic activity in commodity markets" (1991), Federal laws "On natural monopolies" (1995), "On advertising" (1995), "On protection of competition in the financial services market" (1999). These laws have a common goal – to ensure competition policy and control the concentration of capital. During the validity implementation of these regulations more than 800 court decisions and more than 3,500 decisions of the Federal Antimonopoly Authority and its territorial bodies were adopted annually.

At present the basis of the Russian antitrust law is the Federal law of July 26, 2006 № 135-FZ "On protection of competition". This law contains restrictions on the freedom of business and freedom of contract for large or dominant economic entities. The definition of the latter is determined by the share of a company in total sales in the market or by the total share of the market by several largest (in terms of sales) companies. Such entities, with some exceptions, are prohibited from establishing, maintaining a monopolistically high or monopolistically low price for the goods; withdrawing goods from circulation if the result of such withdrawal was an increase in the price of the goods; imposing on the another party the terms of the contract that are unfavorable to it or not related to the subject matter of the contract.

Besides that, such entities are prohibited from reducing or ceasing by economic or technological means the production of goods if there is a demand for these goods or if there are orders for its delivery are placed if there is a possibility of its profitable production; economically or technologically unjustified refusal or evasion from signing of the contract with separate buyers (customers) in case of availability of production or supply of the relevant goods; economically, technologically and otherwise unjustified establishment of different prices (tariffs) for one and the same product, unless otherwise provided by Federal law; establishing by a financial institution of unreasonably high or unreasonably low price of financial services; creating discriminatory conditions; creating obstacles for access to the market or

withdrawal from the product market to other economic entities; violating pricing procedures established by regulatory legal acts.

In addition, the Federal law "On protection of competition" introduces control over mergers of organizations and the sale and purchase of large blocks of shares of companies, as well as a ban on price fixing among economic entities, a fixing of market shares and some other practices.

In accordance with article 71 of the Constitution of the Russian Federation, federal energy systems, nuclear energy, federal transport, communications, information and communications are under the exclusive jurisdiction of the Russian Federation and are governed by Federal laws. In addition, according to the Constitution of the Russian Federation (art. 71, "g"), the establishment of legal groups for a single market, financial, currency, credit, and customs regulation, money issue, the principles of pricing policy, federal economic services are under the exclusive jurisdiction of the Russian Federation. Therefore, article 4 of the Federal law "On natural monopolies" of 1995 provides an exhaustive list of areas subject to federal regulation. The state, on the one hand, sets for itself the goal of constant maintenance and development of competition in the market, and on the other, it strives to ensure that competition takes place in a civilized way and in good faith.

The first problem is provided for in the context of Antitrust law, the second - in the unfair competition law. In Russia the legal regulation of unfair competition is part of the Federal law "On protection of competition". The essence of competition is to attract customers or potential customers of another business entity. No one has the right to the monopolization of the market.

In addition, the provisions defining Antimonopoly requirements in the implementation of business activities are contained in other acts: articles 10 and 1033 of the Civil code, article 17 of the Law of the Russian Federation "On subsoil" of 1992, article 32 of the Federal law "On banks and banking activities" of 1990, article 5 of the Federal law "On the supply of products for federal state needs " of 1994, articles 15, 17, 20 of the Federal law "On communications" etc.

The constitutional provisions on antitrust regulation are refined in the legal decisions of the Constitutional Court of the Russian Federation. In particular, the Constitutional Court of the Russian Federation determined that regarding the state's obligation to guarantee the unity of economic space, the Constitution (para. "g" art.71) refers to the establishment of the legal framework of a single market to the jurisdiction of the Russian Federation, because without the priority, direct action of laws that enshrine these legal foundations (the Civil code, laws in the field of antitrust policy and protection of competition, pricing, financial, currency, credit, customs regulation, etc.), on the territory of the whole state, the freedom of economic activity can not be implemented (Resolution of March 4, 1997 N 4-P).

The prohibition of monopolization and unfair competition implies the possibility of applying by the state measures against persons who violate antitrust laws. In particular, the Federal law "On protection of competition" of 2006 imposes on the Antimonopoly authority the power to issue orders on transfer to the federal budget of income received as a result of violation of the Antimonopoly legislation. At the same time, as established by the Constitutional Court of the Russian Federation in the Decision of June 24, 2009 N 11-P, the Antimonopoly authorities is not entitled to transfer to the federal budget income obtained by the economic entity in violation of the Antimonopoly legislation, without establishing its guilt and without specifying the amount to be transferred from the business entities participating in such offense in the group.

The conservative function of the provision of part 1 article 34 is relevant with the provisions of articles 8 and 45 of the Constitution. The decision of the Constitutional Court of the Russian Federation of 19 December 2005 No. 12-P indicates that the proclamation of the Russian Federation as a democratic legal state (part 1 article 1 of the Constitution) guaranteed freedom of economic activity and affirms the right of everyone to freely use their abilities and property for entrepreneurial activity not prohibited by law. It obligates the state, within the meaning of part 1 article 45 of the Constitution in conjunction with its articles 2, 17 and 18, to create the most favorable conditions for a market economy both by directly regulating by state action and through the promotion of free economic activities based on the principles of self-organization, balance between private and public interests, corporate interaction and cooperation, in order to develop the government economic policy relevant to the interests and needs of the society.

As the Chairman of the Constitutional Court of the Russian Federation V.D. Zorkin concluded, the Constitutional law allows to exceed the Civil legislation that defines business activity as the activity directed only in systematic profit making. The federal legislator, in particular, has no right to create provisions that promote unfair competition (part 2 of article 34 of the Constitution). Within the meaning of part 3 of article 55 of the Constitution, restrictions imposed by the legislator regarding licensing shall be contained only in federal laws adopted within the framework of the exercise of the powers provided for in article 71 of the Constitution.

5. Discussions

Two models of antitrust legislation are discussed in the scholarly literature:

- the American, that prohibits trusts and other associations aimed at restricting trade between states, at restraining competition, and at dictating the market and consumers. It also prohibits the use of unfair methods in competition. This system is well designed from the point of view of legislative technique;

- the European system that bans not the monopoly itself but the abuse of monopoly power, is characterized by a legal scrutiny of monopolies in order to prevent their abuse.

Russian antitrust legislation is currently similar to the European model, but in order to improve it, it must incorporate effective methods tested within the framework of the American model. At the same time, Jung Youngjin and Hao Qian (2003) discuss a third model of Antitrust law that they call the "new economic Constitution of China". Van Uytsel (2008) has identified in Japanese anti-monopoly law the elements of law relating both the US and the European Union.

According to Hajiyev (2009), the construction of a theoretical constitutional and legal model of the relationship between public authorities and business in the Russian Federation is one of the objects of research in the field of Constitutional economy.

Constitutional principles of antitrust policy is currently under discussion (Verzun 2016). Article 34 of the Constitution of the Russian Federation focuses the unity of two opposites – freedom of entrepreneurship and its state regulation – and the associated restriction of rights. The requirements provided by part 2 of article 34 of the Constitution of the Russian Federation in the most general form is the principle of antitrust regulation of the economy. In conjunction with article 8 of the Constitution of the Russian Federation that supports competition. This principle should abet the implementation of a truly free economic environment, and becomes a factor in a positive development of the economy. For this purpose, another constitutional principle of state Antimonopoly regulation was formulated – the inadmissibility of economic activity aimed at monopolization and unfair competition. However, a provision of the Constitution of the Russian Federation (item 2 of Art. 34) is an exception to the principle of the freedom of economic activity (article 8, paragraph 1) and stipulates that such freedom is not absolute.

Referring to part 2 of article 34 of the Constitution of the Russian Federation, Bondar (2017) indicates that this constitutional requirement is reflected in the development of antitrust legislation. That legislation that includes the Federal law "On protection of competition on financial services market", stipulates that the Central Bank of the Russian Federation together with federal executive authorities, executive authorities of constituent subjects of the Russian Federation and bodies of local government may not adopt regulatory legal acts and (or) may not take actions that restrict competition on the market of financial services. However, the constitutional basis of antitrust legislation is not highlighted by this author as an institute of a special part of the Economic Constitution.

Legal literature has suggested that the right to entrepreneurship is one of the equivalent powers of the constitutional status of the individual, as a subject form of concretization of the concept of economic freedom. At the same time, attention is

drawn to the dual nature of the constitutional right to the free use of abilities and property for entrepreneurial and other economic activities not prohibited by law. As Zorkin (2013) believes, demonstrating its publicly-legal content of the provision of part 1 of article 34 of the Constitution of the Russian Federation acts in the sphere of relations between the state and the individual, determining the level of guaranteed economic freedom. When this rule reveals its private content, it manifests its close relationship with the private norms of Civil law and therefore can act in the sphere of private relations. From the point of view of Bondar (2017), duality arises because the Constitution combines within the framework of social and economic rights two contradictory principles: the principle of market freedom and the principle of social justice.

It should be noted that the concept of "competition" refers to constitutional and legal concepts. The very concept of "related constitutional and legal norms" came from the concept of development of constitutional legislation. Its supporters noted that the constitutional legislation has both an exclusive scope that is regulated by the rules of constitutional law (rules on the federal structure of the State, the system of state power, attributes of the state), and areas that are adjacent to other legal branches. Administrative, civil, labour and other branches of legislation regulate to different degrees the relations to which the provisions of constitutional legislation also tend.

According to Sidelnikov, the right to competition is a constitutional right of economic entities for independent and equal competition with other economic entities, a non-discriminatory and free access to the market and a voluntary exit from it. This right is implemented within the framework of general public relations, aimed at acquiring competitive advantages, as a result of that there is a satisfaction of the demand of the population in quality goods (works, services), as well as the effective development of the economy.

However, Trubinova (2015) is sure that this unreasonably includes the conditions necessary for the competition of economic entities, i.e. the right to competition in this definition means competitiveness. This formulation of the right to competition is fair for perfect competition, but not for the level of development of productive forces and industrial relations in the monopolistic form of competition that is characteristic of the level of development of productive forces in Russia.

Radyukova and Yakunina (2010) came to the conclusion that the history of the development of monopoly formations in Russia shows that privatization has not led to the development of competition. Today natural monopolies are a structural element of the national economy, a key component of the economic system as a whole. In our estimation, this provision is very controversial and contrary to antitrust provisions of articles 8, 34 of the Constitution of the Russian Federation. Antimonopoly bodies remain debatable (Knyazeva, 2011). Constitutional scholarship shows that state regulation of the economy should be carried out on the principle of subsidiarity.

6. Conclusions

The provisions of the Constitution occupy a fundamental place in the hierarchy of national legislation. Those provisions include the regulation of competition and monopolies. The basic provisions of the Russian Constitution on competition are based on a guarantee of the principle of freedom of economic activity. The constitutional principle of a single economic space and the free movement of goods, services and financial resources should be considered as an important fundamental provision.

The constitutional right to fair competition and protection from unfair competition should be recognized as a social and economic human right. It can be defined in the legal decisions of the Constitutional Court of the Russian Federation.

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