

Russian Supreme Court Rules in Favor of Minority Shareholder's Claim for Lost Profits Caused by Majority Shareholder's Failure to Make MTO

24 July 2018

On 24 May 2018, the Supreme Court of the Russian Federation upheld decisions of lower courts requiring compensation of lost profits of a minority shareholder of a public joint stock company caused by failure of the majority shareholder to make a mandatory tender offer for the acquisition of shares.



Background.¹ A shareholder of PJSC Irkutskenergo (the “Company”), K.A. Aleksandrov (the “Plaintiff”), filed a claim with the *arbitrazh* court seeking damages from the Company’s shareholder LLC EuroSibEnerg-Hydrogeneration (the “Defendant”).

The Defendant acquired 40.285% of the Company’s shares at a price that was significantly higher than the average weighted price per Company share on the Moscow Exchange (the “Transaction”). As a result of the Transaction, the direct shareholding of the Defendant in the Company exceeded 30%, and together with the shares held by its affiliates, 75% of the total number of the Company shares (the Defendant and its affiliates acquired more than 90% of shares in the Company). Pursuant to Article 84.2 of the JSC Law,² the Defendant was required to make a public offer to the shareholders of the Company for the acquisition of shares (mandatory tender offer), however, the Defendant never did so.

The Plaintiff attempted to sell his shares to the Defendant, in particular, he sent a letter to the Defendant demanding that his shares in the Company be bought out at the Transaction price. However, the Defendant refused. In light of this, the Plaintiff sold his shares in the Company to a third person on the Moscow Exchange at a price that was significantly lower than the Transaction price. The Plaintiff brought an action for compensation of lost profits equal to the difference between the price at which the Plaintiff sold his shares on the Moscow Exchange and the Transaction price.

Position of Lower Courts. The courts of all three instances supported the position of the Plaintiff, stating that the Plaintiff demonstrated sufficient evidence to hold the

¹ Case docket for Case No. A19-17165/2016 is available [here](#).

² Federal Law No. 208-FZ on Joint Stock Companies dated 26 December 1995.

Defendant liable for damages (including breach by the Defendant of its obligations, losses, causal connection between the breach and the losses, and the amount of losses). The courts also found that the Plaintiff rightfully exercised his discretion to determine the price of the shares pursuant to Article 84.2(4) of the JSC Law and the Defendant could not provide any documents to refute the amount of damages.

Ruling of the Supreme Court of the Russian Federation. The Supreme Court of the Russian Federation upheld the findings of the lower courts, stating the following:

- due to the Defendant's fault, the Plaintiff could not return his investments whereas the Defendant and its affiliates had expanded their corporate control; therefore, there are grounds for granting the Plaintiff's claim and holding the Defendant liable;
- the compensation of damages will protect the Plaintiff's rights, who intended to accept the public offer (if it had been made) and took measures to require the Defendant to make a mandatory tender offer, and the Plaintiff will be put in the position he would have been had the Defendant properly performed its obligation to acquire the Plaintiff's securities at a fair price.

Therefore, the Supreme Court of the Russian Federation has for the first time accepted compensation of lost profits as a remedy for the failure to make a mandatory tender offer. Please note that the Russian laws, as a measure of liability for the failure to make a mandatory tender offer, directly provide that acquirer of a large shareholding will not be able to vote more than 30% (50% or 75%) of the shares held by it and its affiliates (Article 84.2(6) of the JSC Law) and will face an administrative fine.

* * *

Please do not hesitate to contact us with any questions.

MOSCOW

Alyona Kucher
ankucher@debevoise.com

Svyatoslav Skopintsev
saskopintsev@debevoise.com