

The Russian Federation
The Roundtable “Challenges and co-ordination of leniency programmes”
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Leniency program is one of the incentives for violators to stop their illegal actions with respect to the possibility of mitigations from punishment, to prevent repeated commission of violations and to begin to conduct economic activities voluntary. It is also one of the effective methods of proving cartels.

In the Russian Federation, leniency program for violation of the antimonopoly legislation has been in force since 2008. From the beginning of the program, a number of changes have been made to improve it, taking into account the best world practices. Over the past 10 years, the program has undergone some significant qualitative changes. The latest changes were made in April 2017. According to the amendments¹, imposition of a minimum fine for the second and third persons, who admitted to participate in a cartel, became possible both in respect of a person who voluntarily reported on an unacceptable agreement (cartel) to the competition authority, as well as of legal entities belonging to the same group of persons, if they are named in the application.

Work on the improvement of the program continues. First of all, every change is aimed at encouraging market participants to use this instrument more actively.

In Russia, leniency program is regulated by the Code of Administrative Offenses of the Russian Federation, by the Criminal Code of the Russian Federation and partially by the Federal Law No. 135-FZ of July 26, 2006 "On Protection of Competition", therefore it does not constitute a holistic document. Currently the FAS Russia has developed a package of amendments to the current legislation, which synchronizes these documents.

According to the current leniency program, a person that has voluntarily applied to the antimonopoly body to report about the conclusion of an anticompetitive agreement or the implementation of concerted actions, shall be relieved of administrative liability, when the following conditions are met²:

¹ The Federal Law No. 74-FZ of 17.04.2017 “On Amendments to the Code of Administrative Offenses of the Russian Federation”:

<http://static.kremlin.ru/media/acts/files/0001201704170014.pdf>

² Paragraph 1 of the Note referring to the Article 14.32 (Conclusion of an Agreement on Limitation of Competition, the Commission of Coordinated Actions That Limit Competition and the Coordination of Economic Activities) of the Code of Administrative Offenses of the Russian Federation

- 1) as of the time of the person's report the antimonopoly body did not have relevant information and documents concerning the administrative offence committed;
- 2) the person has refused to take part or to continue taking part in the agreement or to implement or continue implementing the concerted actions;
- 3) the information and documents that have been presented are sufficient for the purpose of establishing the event of the administrative offence.

Relief from administrative responsibility shall be granted to the person that was the first to comply with all the above-mentioned conditions.

Russian legislation also provides for the mechanism of mitigation of administrative liability.

Economic entities that can not be relieved of administrative liability (that is, if they were not the first to comply with all the conditions), can take actions for mitigation of administrative liability.

In particular, while imposing a penalty for a legal entity for participation in cartels, the following are deemed as circumstances mitigating administrative liability³:

- 1) the voluntary provision of information about an administrative offence by the person that has committed the administrative offence to a body empowered to carry out proceedings in a case of the administrative offence;
- 2) the assistance of the person that has committed an administrative offence rendered to a body empowered to carry out proceedings in a case of the administrative offence in establishing the circumstances that are to be established in the case of the administrative offence;
- 3) the prevention of harmful circumstances of an administrative offence by the person that has committed the administrative offence;
- 4) voluntary compensation by the person that has committed an administrative offence for inflicted damage or voluntary elimination of inflicted harm;
- 5) the voluntary performance by the person that has committed an administrative offence before the issuance of a decision in a case of the administrative offence of an order for elimination of committed offence issued by a body responsible for state control (supervision).

³ Paragraphs 2-7 Part 1 Article 4.2 (Circumstances Mitigating Administrative Responsibility) of the Code of Administrative Offenses of the Russian Federation

Moreover, other circumstances mitigating administrative liability should be taken into account⁴:

1) the person that has committed the administrative offence is not an organizer of competition-restricting agreement or agreed actions and/or has received binding directions to take part in them;

2) the person that has committed the administrative offence has not commenced to perform the competition-restricting agreement concluded by the person.

Currently, the leniency program and mechanisms for mitigating administrative liability are successful tools for investigating cartels and other anticompetitive agreements.

The positive result of using the leniency program in the Russian Federation is expressed in statistics, according to which from 2010 to 2017 the number of applications received by the antimonopoly authority increased almost six-fold⁵.

Such statements become one of the main evidence in cases of violation of antimonopoly legislation, using which the FAS Russia makes decisions.

The number of economic entities that took advantage of the opportunity to mitigate administrative liability exceeds the number of entities submitting applications for the release of administrative liability.

The example of the case using both programs is the case of a cartel on price maintenance at tenders for the supply of clothing for the Russian Ministry of Internal Affairs, which existed for several years. In fact, the cartel united all companies operating on this market. By the decision of the FAS Russia 32 legal entities were recognized as participants in the cartel. Along with other evidences, there were used three applications for mitigation of administrative liability received from cartel participants by the FAS Russia. Taking into account the order of the applications received and the requirements for the relevant applications, only one company got the release of administrative liability. The applications of the second and third companies were considered in the framework of mitigation of liability, as a result of which the amount of administrative penalties for them was reduced.

According to the Russian legislation, the main marker is a written application of an economic entity on the release of administrative liability to the FAS Russia or its regional offices. The procedure for the adoption of relevant applications is determined by the FAS Order of 26.09.2008 No. 369⁶.

⁴ Paragraph 3 of the Notes referring to the Article 14.32 of the Code of Administrative Offenses of the Russian Federation

⁵ In 2010, there were 19 applications, in 2017 – 118 applications

⁶ <https://fas.gov.ru/attachment/138491/download?1504613686>

According to the Order, one of the FAS Deputy Heads and the Head of the FAS Anti-Cartel Department are personally obliged to receive applications regarding the facts of anticompetitive agreements or concerted actions that restrict competition and are unacceptable in accordance with the antimonopoly legislation of the Russian Federation (hereinafter - the Applications).

Heads of structural departments of the Central Office and Regional Offices of the FAS Russia should immediately inform the above-mentioned persons in case they receive the Applications.

Acceptance, registration and storage of the Applications, according to the rules for recording and storing documents for official use, is organized by the FAS Anti-Cartel Department.

The moment of receipt of such an application is fixed in a special journal, and this information is strictly recorded. The applicant receives a record on the copy of his application and a unique registration number stating that such an application has been accepted.

In case the applicant informed the antimonopoly authority that the information provided by him is a commercial secret, this information is assigned as "for official use only". In the future, the disclosure of information for other (third) parties is possible only by a court's decision.

As part of the leniency program, information distribution on the possibility of filing an application to the competition authority is carried out through all available means of public communication.

In particular, on the FAS Russia's website there is a special section "Report on the cartel"⁷. This page contains information about the responsibility for participation in a cartel, the possibility of obtaining release or mitigation under Russian legislation, about the persons in the FAS Russia in charge of interaction with the applicants, as well as other useful information.

In addition, a special website anticartel.ru was created. On this website, one can find information on why cartels are dangerous and how to deal with them. It is designed for different audience. Here one can find some reference materials in an accessible language, ask questions one is interested in, study anti-cartel practices and special aspects of Russian anti-cartel legislation. One of the important tasks of this project is to try to collect all the Russian anti-cartel practices, to summarize foreign experience and create a unified working information base.

⁷ <https://fas.gov.ru/pages/activity/antimonopoly-regulation/soobshhi-o-kartele!.html>

Therefore, information about the mechanism for implementing the leniency program and ways to report on participation in these violations to the competition authority are actively disseminated on television, radio and in other media.

Thus, the system of reporting to the competition authority about participation in the cartel - the system of markers - is a part of the leniency program.

Currently, the FAS Russia is actively formalizing the work of the system of markers.

Thus, for example, now in Russian legislation there is no marker that allows a member of a cartel to contact the competition authority anonymously and find out whether there is already an applicant for the leniency program, having received thus preliminary immunity.

In 2017, the FAS Russia prepared relevant draft documents. Special Regulations of the FAS Russia are expected to be approved in the future. These Regulations will describe the potential benefits from the marker system for marker applicants, who has the right to receive the marker, what steps should be taken to initiate the process and what are the requirements for obtaining it, at what point the marker is no longer a proposal for a leniency program, what is the process of obtaining a conditional proposal for a leniency program and what exactly is required for this step from the materials submitted by an applicant, what should the marker contain.

Besides, it is notable that according to Russian legislation the antimonopoly body can decide to release only from administrative liability and only legal entities. This follows directly from the Notes referring to the Article 14.32 (Conclusion of an Agreement on Limitation of Competition, the Commission of Coordinated Actions That Limit Competition and the Coordination of Economic Activities) of the Code of Administrative Offenses of the Russian Federation.

The issue of release from criminal liability of individuals (official persons) is within the competence of law enforcement bodies⁸. In addition, under Russian legislation participation in cartel agreements may, in certain cases, entail criminal liability for individuals in accordance with the Article 178 of the Criminal Code of the Russian Federation (Restriction of Competition). Thus, a person using the program, which is the first one to report on an anticompetitive agreement, is not relieved from criminal

⁸ The authority, which performs criminal prosecution, is the Ministry of Interior Affairs of the Russian Federation (the MIA). Enhancing the effectiveness of performance in relation to prevention and suppression of violations of the antimonopoly legislation, in 2004, the Regulation on Interaction between the MIA and the FAS Russia was adopted. The Regulation provides for such tools of cooperation as exchange of information between the authorities, assistance provided by the MIA to the FAS Russia's public servants with carrying out inspections of commercial and non-profit organizations in order to suppress illegal actions, which interfere in performance of official duties by employees of the FAS Russia, initiation by the MIA of legal proceedings based on materials provided by the FAS Russia, etc. The FAS Russia also provides assistance to investigation.

liability, which may be a certain deterrent for participants of a cartel, taking into account the greater severity of criminal sanctions⁹.

Nowadays, the FAS Russia has prepared a draft law on amendments to the Criminal Code of the Russian Federation, including to the Note referring to the Article 178 of the Criminal Code, proposing to specify the requirements for the first applicant in order to make the program more attractive for violators to use the program.

In addition, the FAS Russia considers that there is a need for harmonization of national leniency programs. However, it is also necessary to remember the specifics of each individual jurisdiction and the degree of development of the antimonopoly legislation.

For instance, in the territory of the Eurasian Economic Union (EAEU) one can notice the overall harmonization of the leniency program. At the same time, nowadays not all EAEU member states have implemented this program into their national legislation, which, in turn, may become a problem in the situation of identifying a cartel in the cross-border market of the member states.

In this case, the potential participant of the cartel will have less incentive to file the application for leniency, as being mitigated of liability on the territory of one country, he can still be liable on the territory of another country.

The FAS Russia believes that the effectiveness of the interaction of antimonopoly bodies could be improved by adopting an international act on combating cartels that could unify the terminology, sanctions and approaches.

In 2017, the CIS countries noted the special need to consolidate efforts to combat international cartels. The Heads of the Governments of the CIS countries signed the Statement on the Consolidation of the Efforts of the World Community to Effectively Counter International Cartels, which was circulated as an official document of the 72nd session of the UN General Assembly.

This document strongly condemns the activities of cartels in all its forms and manifestations, confirms the need to create a global international mechanism for combating cartels by developing and adopting an appropriate international document. It could be the Anti-Cartel Convention, the draft of which was developed by the FAS Russia jointly with Russian federal executive authorities. The draft Convention was approved in general within the framework of the EAEU and in 2017 it was adopted as a basic project for elaboration by the authorized bodies of the EAEU member states for a further promotion on international platforms.

⁹ Sanctions also provide compensation of the harm caused by the crime