The Russian Federation
Roundtable on «Criminalization of cartels and bid rigging»
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Summary

The Criminal Code of the Russian Federation provides for criminal liability for restricting competition by concluding a cartel prohibited by antimonopoly legislation. Sanctions can take the form of fines, prohibition of engaging in certain activities or occupying certain positions, community service or imprisonment for up to 7 years. The Criminal Code of the Russian Federation provides for sanctions limited to individuals, there is no criminal liability for legal entities in the Russian Federation.

Administrative liability is provided for both individuals and legal entities in accordance with the Code of Administrative Offences of the Russian Federation. Administrative penalties include fines (provided for individuals and economic entities), as well as disqualification (applicable only to individuals).

The Civil Code of the Russian Federation in conjunction with the Law on Protection of Competition allow a person who has suffered from an antimonopoly violation to recover both actual damage and property benefit.

In accordance with the legislation of the Russian Federation, offenders have the opportunity to apply for a leniency programme (exemption from liability) entrenched in Notes to Article 14.32 of the Code of Administrative Offences (administrative liability) and in Note to Article 178 of the Criminal Code (criminal liability).

In order to ensure economic security of the Russian Federation, to counter the challenges and threats to economic security, to prevent crises in the resource-based, production, scientific, technological and financial sectors, as well as to prevent a decline in the quality of life of the population, Order of the Government of the Russian Federation No. 1314-r of June 17, 2019 «Interdepartment programme for exposing and suppressing cartels and other competition-restricting agreements for 2019 - 2023»[1] was approved.

[1] http://government.ru/docs/37183/ (document is available only in Russian)

Criminalization of cartels and bid rigging

1. Criminal liability for conclusion of cartels in the Russian Federation

The current legislation of the Russian Federation provides for criminal liability for restricting competition by concluding a cartel prohibited by antimonopoly legislation.

In 1993[2], Article 154.3 «Unlawful price increase or price fixing» was introduced into the Criminal Code of the Russian Soviet Federative Socialist Republic (1960), which prohibited unlawful price increase or price fixing executed as a result of monopolistic activity by creating obstacles for other economic entities to enter the market, recalling products, restraining goods from being sold or by other elimination, as well as the same actions «committed upon a preliminary collusion between citizens-entrepreneurs, as well as economic entities, representative government bodies or government agencies».

Later, prohibition on restriction of competition was entrenched in the criminal law when the current Criminal Code of the Russian Federation of 1996 was adopted.

Article 178 of the Criminal Code of the Russian Federation prohibits restriction of competition by concluding an agreement (cartel) between competing economic entities if this act caused major damage to citizens, organizations or the state or resulted in large-scale income extraction, which is illegal in accordance with the antimonopoly legislation of the Russian Federation.

Sanctions (taking into account aggravating or especially aggravating circumstances) can take the form of fines, prohibition of engaging in certain activities or occupying certain positions, community service or imprisonment for up to 7 years. The Criminal Code of the Russian Federation provides for sanctions limited to individuals, there is no criminal liability for legal entities in the Russian Federation.

It should be noted that there is a principle of inadmissibility of dual liability for the execution of the same offence or crime in the Russian Federation. In this regard, one of the conditions for bringing a person to criminal liability is infliction of a large-scale (particularly large-scale) damage to citizens, organizations or the state, or generation of income in a large (particularly large) amount. According to Notes 1 and 2 to Article 178 of the Criminal Code of the Russian Federation, large-scale income is recognized as income, the amount of which exceeds fifty million rubles,

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[2] Federal Law of the Russian Federation No. 5304-I of July 1, 1993 «On Amendments and Additions to the Legislative Acts of the Russian Federation in Connection with the Regulation of Liability for Illegal Trade»

and particularly large-scale income exceeds two hundred and fifty million rubles. Large-scale damage exceeds ten million rubles, and particularly large-scale damage - thirty million rubles. Thus, exceptionally subject to the existence of one of the indicated circumstances, the qualified person is subject to criminal liability, which does not exclude bringing a legal entity to administrative responsibility.

2. Administrative liability for conclusion of cartels in the Russian Federation

Administrative liability is provided for both individuals and legal entities. In accordance with Part 1 of Article 14.32 of the Code of Administrative Offences of the Russian Federation, the conclusion by economic entity of an agreement recognized in accordance with the antimonopoly legislation of the Russian Federation as a cartel, with the exception of cases provided for in Part 2 of this Article, or participation in it is subject to an administrative fine on individuals in the amount of forty to fifty thousand rubles or disqualification for a period of one to three years; for legal entities - from three to fifteen hundredths of the amount of the proceeds of the offender from the sale of goods (work, services) in the market where an administrative offense was committed, or the amount of expenses of the offender for the purchase of goods (work, services) in the market where an administrative offense was committed, but not less than one hundred thousand rubles.

According to Part 2 of Article 14.32 of the Code of Administrative Offences of the Russian Federation, the conclusion by economic entity of an agreement that is unlawful in accordance with the antimonopoly legislation of the Russian Federation, if such an agreement leads or can lead to an increase, decrease or price fixing at the auction[3], is subject to administrative fine on individuals in the amount of twenty to fifty thousand rubles or disqualification for a period of up to three years; for legal entities - from one tenth to one second of the initial cost of the subject of bidding, but not more than one twenty-fifth of the total amount of the proceeds of the offender from the sale of all goods (works, services) and not less than one hundred thousand rubles.

Thus, administrative penalties include fines (provided for individuals and economic entities), as well as disqualification (applicable only to individuals).

3. Civil liability in the Russian Federation

Article 15 of the Civil Code of the Russian Federation and Part 3 of Article 37 of the Law on Protection of Competition allow a person who has suffered from an antimonopoly violation to recover both actual damage and property benefit. In 2017,

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[3] Paragraph 2 Part 1 Article 11 of the Federal Law «On Protection of Competition»

the FAS Presidium prepared Guidelines on the issues of determining the amount of losses incurred as a result of violation of antimonopoly legislation[4] that summarize the existing methods for determining losses in Russian and foreign practice and are informative and advisory in nature.

Anyone who believes that as a result of corresponding actions (inactions), agreements or acts he inflicted damages is in the position to take legal action for damages that were inflicted by anticompetitive actions (inactions), conclusion of anticompetitive agreement or participation in it, as well as adoption by the authority of an anticompetitive act.

In practice, two types of private actions for damages on violation of antimonopoly legislation are distinguished: 1) proceedings based on a decision of an administrative authority in the field of competition protection; 2) proceedings in which the claimant independently substantiates and proves violation of antimonopoly legislation.

Overview of enforcement practice shows that virtually in all cases, actions for damages (as well as unjust enrichment) are initiated after the competition authority has made a decision on violation of antimonopoly legislation. Existence of such a decision is not essential to uphold action for damages, but it relieves claimant from the necessity to prove that violator has committed actions that contravene antimonopoly legislation.

If a person initiates legal action for damages, competition authority may be brought into the proceedings as a non-party intervener at the request of a party to the case or at the initiative of the court. When representatives of the competition authority act as a third party, they provide the court with a written opinion and a copy of the decision on violation of the antimonopoly legislation. If a person initiates legal action for compensation for losses in the absence of a fact of violation of the antimonopoly legislation established by a decision of the authority, representatives of the competition authority provide a written opinion on the presence or absence of signs of violation of the antimonopoly legislation within the scope of the particulars of the claim filed. In this case, issue of initiating a case on violation of antimonopoly legislation is considered if there are signs of violation.

It is important to note that these Guidelines of the FAS Presidium, which give a broad interpretation of losses in relation to civil law, are not used and cannot be used in criminal proceedings to qualify actions under Article 178 of the Criminal Code of the Russian Federation.

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[4] Guidelines of the FAS Presidium No. 11 of 16.10.2017: https://fas.gov.ru/documents/587995 (document is available only in Russian)

4. Leniency programme (and exemption from liability) in the Russian Federation

In accordance with the legislation of the Russian Federation, offenders have the opportunity to apply for a leniency programme (exemption from liability) entrenched in Notes to Article 14.32 of the Code of Administrative Offences (administrative liability) and in Note to Article 178 of the Criminal Code (criminal liability).

Thus, according to Note 1 to Article 14.32 of the Code of Administrative Offences of the Russian Federation, a person (group of persons) who has voluntarily declared to the FAS Russia or its regional offices that he/she has entered into an agreement that violates antimonopoly legislation or participated in concerted actions that are prohibited in accordance with the antimonopoly legislation of the Russian Federation, is exempted from administrative liability for administrative offences when the following conditions are met: 1) at the time of application the competition authority did not have relevant information and documents regarding the committed administrative offense; 2) person refused to participate or continue to participate in the agreement, to carry out or continue to carry out concerted actions; 3) submitted information and documents are sufficient to establish an administrative offense - person who was the first to fulfill all the conditions stipulated by this note shall be exempted from administrative liability.

Note 3 to Article 178 of the Criminal Code of the Russian Federation contains a provision indicating that a person who has committed a crime under this article is exempted from criminal liability if he/she was the first among accomplices to voluntarily report this crime, actively contributed to its disclosure and investigation, compensated or otherwise made amends for the damage caused and if his/her actions do not contain other corpus delicti.

It should be noted that leniency programme is quite actively applied at the stage of dawn rides and in cases of violation of antimonopoly legislation. In 2019, the FAS Russia and its regional offices received a total of 147 applications based on the Note to Article 14.32 of the Code of Administrative Offences of the Russian Federation, 92 of which were first-in cartel leniency applications. At the same time, based on enforcement practice, an application submitted within the framework of a programme extremely rarely becomes the reason for initiating an investigation. In other words, most commonly the application arrives at the competition authority at the stage of investigation.

At the present time, the FAS Russia does not hold any information about exemption from criminal liability on the basis of Note 3 to Article 178 of the Criminal Code of the Russian Federation.

5. Interaction between competition authority and law enforcement agencies in the Russian Federation

In order to ensure economic security of the Russian Federation, to counter the challenges and threats to economic security, to prevent crises in the resource-based, production, scientific, technological and financial sectors, as well as to prevent a decline in the quality of life of the population, Order of the Government of the Russian Federation No. 1314-r of June 17, 2019 «Interdepartment programme for exposing and suppressing cartels and other competition-restricting agreements for 2019 - 2023»[5] was approved.

The programme is designed to combine the efforts of federal executive bodies, General Prosecutor's Office of the Russian Federation, Investigative Committee of the Russian Federation, state authorities of the constituent entities of the Russian Federation, local governments and civil society institutions in order to ensure economic security, protect national interests, implement strategic national priorities of the Russian Federation and provide an integrated approach to creating suitable environment for establishment of mechanisms for exercising control in the procurement of goods, work and services to meet state and municipal needs, as well as to prevent conclusion of anticompetitive agreements at auctions and product markets, to combat inappropriate and inefficient use of state (municipal) property, budget funds, and misappropriation of state property and public funds, corruption, shadow and criminal economies.

In the framework of the programme were developed draft federal laws that are currently submitted for consideration to the State Duma of the Federal Assembly of the Russian Federation, methodological recommendations on interaction between the FAS Russia and law enforcement agencies in order to identify, expose and investigate anticompetitive actions[6], as well as a whole range of activities aimed at improving efficiency of the joint work of law enforcement agencies and competition authority.

Currently, several forms of interaction between law enforcement agencies and competition authority have emerged in terms of exposing and suppressing cartels.

A) Consistent (law enforcement agencies - competition authority).

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[5] http://government.ru/docs/37183/ (document is available only in Russian)

[6] Order of the FAS Russia No. 1073/19 of 08.08.2019 «On Approval of the Methodological Recommendations» (together with the «Methodological Recommendations on the interaction between the FAS Russia and law enforcement agencies in order to identify, expose and investigate anticompetitive actions (Article 178 of the Criminal Code of the Russian Federation)»)

During the consideration of the criminal case materials, law enforcement agencies identify signs of violation of the antimonopoly legislation and transfer copies of these materials to the competition authority in order to make a decision on initiating a case of violation of the antimonopoly legislation. Information exchange mechanism usually is implemented as follows: 1) Main Directorate for Economic Security and Anti-Corruption Enforcement of Ministry of Internal Affairs of the Russian Federation or its regional offices declassify the materials of law enforcement activities and transfer them to the investigating authorities for verification in accordance with Article 144 of the Code of Criminal Procedure of the Russian Federation; 2) investigator sends the materials of the preliminary investigation or the materials of the criminal case (in accordance with Article 161 of the Code of Criminal Procedure of the Russian Federation) to the competition authority with a request to give an opinion on the presence or absence of evidence of violation of the antimonopoly legislation and make a decision on initiating a case of violation of the antimonopoly legislation in accordance with Article 11 (Prohibition of competition-restricting agreements of economic entities) or Article 16 (Prohibition of competition-restricting agreements or concerted actions of federal executive bodies, public authorities of the subjects of the Russian Federation, local authorities, other agencies or organizations exercising the functions of the said bodies as well as state off-budget funds and the Central Bank of the Russian Federation) of the Law on Protection of Competition; 3) competition authority provides expert opinion upon request of the investigator; 4) taking into account this opinion, the investigator decides on the initiation of a criminal case; 5) competition authority decides on the initiation of an antimonopoly proceeding (if a decision is made on a case of violation of the antimonopoly legislation this decision is sent to the investigator); 6) investigator decides to bring charges based on the decision made by the competition authority.

B) Consistent (competition authority – law enforcement agencies).

Specified form of interaction is characterized by the fact that the competition authority makes a decision on violation of the antimonopoly legislation and, if there are signs of violation of Article 178 of the Criminal Code of the Russian Federation (Restriction of competition), sends offense report to law enforcement agencies in accordance with Article 144 of the Code of Criminal Procedure of the Russian Federation (Procedure for considering offense reports). In accordance with Part 1 of Article 144 of the Code of Criminal Procedure of the Russian Federation, the investigator of the internal affairs agency who has received an offense report has to check it and make a decision within three days (term can be extended up to 10 or 30 days according to the Part 3 of Article 144 of the Code of Criminal Procedure of the Russian Federation) from the date of receipt of the report.

C*) Parallel.*

According to the FAS Russia, this form of interaction is the most effective as it implies parallel activities of law enforcement agencies and competition authorities in order to expose, investigate and suppress cartels. For example, conducting joint inspections (dawn rides/investigative actions), parallel analysis and exchange of information.

One of the striking examples of this form of interaction is exposure and suppression of pharmaceutical companies cartel in the Republic of Dagestan, which was accompanied by a collusion of cartel members with auction participants for the supply of medical products and medicines.

Thus, on the basis of the results of dawn rides conducted by the FAS Russia and Office of the Federal Security Bureau in the Republic of Dagestan, a case was initiated against the Ministry of Health of the Republic of Dagestan, Dagestan Republican Oncology Early Treatment Clinic, «Regionfarma», «Medfarmasnab», «Globalmedteh» and «Dagmedtekhnika». Simultaneously with the initiation of a case on violation of antimonopoly legislation, Office of Criminal Investigation of the Ministry of Internal Affairs in the Republic of Dagestan launched a criminal investigation under Paragraph A of Part 2 of Article 178 of the Criminal Code of the Russian Federation. At the same time, Public prosecution office of the Republic of Dagestan carried out coordination of activities of the departments.

Based on the results of the consideration of the case on violation of antimonopoly legislation, a decision was made which established that «Regionfarma», «Medfarmasnab», «Globalmedteh» and «Dagmedtekhnika» concluded and implemented verbal anticompetitive agreement (cartel), which led to price fixing at auctions for the right to conclude state (municipal) contracts for the supply of medicines, medical devices, provision of services for maintenance, service and repair of medical devices, installation and bringing into service set of medical devices for healthcare organizations in the Republic of Dagestan, Office of Criminal Investigation in the Republic of Dagestan and the Ministry of Health of Republic of Dagestan from 2015 to 2018. At the same time, the FAS Russia established that these economic entities also entered into and implemented verbal anticompetitive agreements with two customers - the Ministry of Health of the Republic of Dagestan and the Dagestan Republican Oncology Early Treatment Clinic.

This case was the largest in terms of the number of auctions at which anticompetitive agreements were implemented. Thus, according to the decision of the FAS Russia, anticompetitive agreements of the Ministry of Health of the Republic of Dagestan, Dagestan Republican Oncology Early Treatment Clinic, «Regionfarma», «Medfarmasnab», «Globalmedteh» and «Dagmedtekhnika» led to price fixing during 1010 procurement procedures in 2015-2018. Total income of the cartel participants was estimated to be more than 2 billion rubles.

The decision of the FAS Russia was fully supported by the courts of three instances.

It should be noted that regardless of the chosen form of interaction with the FAS Russia, the investigator independently resolves issues regarding all necessary investigative activities and provided that collected evidence is sufficient to draw up conclusion to indict, does that and with the consent of the head of the investigating authority, immediately transfers the case to the prosecutor. The prosecutor considers the received criminal case and takes one of the following decisions: 1) on the approval of the indictment and on sending the criminal case to court; 2) on returning the criminal case to the investigator for further investigation in order to change the scope of charges, designation of defendants or redrafting the indictment and eliminating identified shortcomings with their written instructions; 3) on sending the criminal case to a higher prosecutor for approval of the indictment, if it is referred to the jurisdiction of a higher court. Following approval of the indictment, the prosecutor sends the criminal case to the court, which informs the defendant. Sentencing for the criminal case falls within the exclusive competence of the court, which resolves, inter alia, the following issues: whether it was proved that there was an act commissioned by the defendant; whether it was proved that the act was committed by the defendant; whether the defendant is guilty of committing this crime, as well as the issue of what punishment should be imposed on the defendant.

In addition, we note that according to the «Judicial Review of the Antimonopoly Cases and Cases of Administrative Violations in the Specified Field»[7], transferred to the competition authority criminal case evidence obtained in the manner prescribed by law may also serve as evidence in antimonopoly cases (subject to the provisions of Article 161 of the Code of Criminal Procedure). It should be borne in mind that materials (copies of materials) of criminal cases can be used as evidence while considering cartels, regardless of the presence or absence of a sentence, as within the antimonopoly framework the fact of the presence or absence of violation of the antimonopoly legislation is established, not the fact of committing a crime.

6. Statistics and examples of criminal proceedings

Overview of investigative and judicial practice shows that commission of a single crime under Article 178 of the Criminal Code of the Russian Federation is extremely rare. Offences that usually come together with restriction of competition include the ones provided for in the following Articles of the Criminal Code: 159

[7] Approved by the Presidium of the Supreme Court of the Russian Federation 16.03.2016: http://www.vsrf.ru/Show_pdf.php?Id=10734 (document is available only in Russian)

(swindling), 204 (bribery in a profit-making organisation), 285 (abuse of official powers), 285.1 (spending budgetary funds for the wrong purposes), 286 (exceeding official powers), 290 (bribe-taking), 291 (bribe-giving). Additional labelling process provided for in Article 178 of the Criminal Code may also be required in conjunction with abuses of authority in fulfilling the state defense order (Article 201.1 of the Criminal Code), abuses in the procurement of goods, work, services to meet state and municipal needs (Article 200.4 of the Criminal Code) and bribing an employee of a procurement department, procurement manager or member of a procurement commission (Article 200.5 of the Criminal Code).

Reportedly, in 2019 the FAS Russia prepared and transferred materials of 157 cases to law enforcement agencies for consideration under Articles 144 and 145 of the Code of Criminal Procedure of the Russian Federation, 96 of which concerned Article 178 (restriction of competition) of the Criminal Code. Based on materials of the FAS Russia, 37 criminal proceedings were initiated in 2019, including 22 in accordance with Article 178 of the Criminal Code. In 2019, the preliminary investigation agencies of the Investigative Committee of the Russian Federation and the Ministry of Internal Affairs of the Russian Federation initiated 24 criminal cases on restriction of competition (at the initiative of law enforcement agencies, as well as based on materials sent by competition authority), 7 of which were sent to the court with an indictment. Analysis of imposed sentences indicates that the following sanctions were applied to individuals: imprisonment, fine, disqualification from holding a position in government bodies, local government bodies, state and municipal institutions, state corporations.

On July 31, 2019, the Samara District Court imposed sentences on seven persons based on the materials of the Samara OFAS Russia in the Office of Criminal Investigation of the Russian Federation in the Samara Region. The court found these persons guilty of committing a crime at electronic auctions from 27.01.16 to 24.01.17, which is provided for in Part 2 of Article 178 of the Criminal Code of the Russian Federation. It was established that as a result of the implementation of the anticompetitive agreement participants earned large-scale income in the amount of more than 52 million rubles.

In particular, one of the participants was found guilty of convicting an offence stipulated in Part 3 of Article 30, Subparagraph A and C of Part 2 of Article 178 of the Criminal Code and was sentenced to 3 years 6 months of imprisonment in a penal colony.

As an example of the initiation of a criminal case based on the results of consideration of materials transferred by the FAS Russia, it is worth to describe criminal case against the former Mayor of Vladivostok.

On April 9, 2019, the Tver District Court of Moscow convicted the former Mayor

of Vladivostok, I.S. Pushkarev, who ensured the victory of MUPV «Roads of Vladivostok» during procurement for road construction through bribes. He was found guilty of committing crimes under Part 6 of Article 290, Part 3 of Article 285 and Paragraph A of Part 2 of Article 204 of the Criminal Code, and was sentenced to 15 years imprisonment with a 500 million rubles fine and disqualification from holding a position in government bodies, local government bodies, state and municipal institutions, state corporations for a period of 10 years.

His brother A. Pushkarev was convicted subject to Part 5 of Article 291 and Paragraph A Part 2 of Article 204 of the Criminal Code to 8 years suspended prison sentence on 5 years probation and 500 million rubles fine, and the former Director of «Vladivostok Roads» Municipal Unitary Enterprise A.V. Lushnikov was convicted to 10 years imprisonment with a 500 million rubles fine and disqualification from holding a position in government bodies, local government bodies, state and municipal institutions, state corporations for a period of 10 years.