

Unprecedented Russian Law Enforcement: Obligation to Return Unlawfully Gained Income When Using a Leniency Program

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The Regional office of the Federal Antimonopoly Service of the Sverdlovsk region has recently issued a decision ordering a leniency applicant to return unlawfully gained income. The Appeal Board of the Federal Antimonopoly Service (the "FAS") has now reconsidered this decision on appeal.

Background of the case

The ground for initiating the case was the claim of one of the market participants, received by the Federal Antimonopoly Service.

During the consideration of the case, the FAS established the fact of Krust LLC having entered into an anticompetitive agreement. The agreement's purpose was the cooperation, of Krust LLC and another entity, in procurement procedures for the supply of technical means for disabled people, namely: cooperation at the decision-making stage in participation in tenders, bid rigging and rendering assistance within the execution of contracts. Factually, one party to the agreement was abstaining from submitting price proposals. So, the state contract was concluded with another party to the anticompetitive agreement, with a slight decrease in the starting price.

The Code on Administrative Offenses of the Russian Federation (the "**Administrative Code**") allows release from liability for an anticompetitive agreement (the so-called leniency program). The provisions of the administrative leniency programme are included in the special note to Article 14.32 of the Administrative Code. Under the Administrative Code, legal entities engaged in restrictive agreements, or concerted practices, have an opportunity to take part in a leniency programme, under which companies that:

(i) voluntarily report their own participation in anticompetitive agreements, or concerted practices, to the Federal Antimonopoly Service;

(ii) cease their participation in the agreement, or concerted practice; and

(iii) provide the FAS with documents and information, sufficient to establish the fact that the offence was committed;

are fully relieved from administrative liability. Full immunity is possible in respect of all anticompetitive agreements.

During the case consideration, Krust LLC voluntarily reported its participation in the anticompetitive agreement and asked for the immunity under the leniency program. The company had met all requirements indicated in the Administrative Code and it was fully relieved from administrative liability.

At the same time, in its decision, the Commission of Regional office of the Federal Antimonopoly Service of the Sverdlovsk Region instructed Krust LLC to transfer its unlawfully-gained income to the federal budget: the amount of RUB 17,7 million (approx. EUR 270 thousand). Income was calculated on the basis of payment orders, in execution of the agreements, in respect of which, the anticompetitive agreement was concluded.

Thus, despite of the fact that Krust LLC participated in the leniency program, provided all necessary information to the authority and was fully relieved from the administrative liability, it nevertheless faced serious financial losses, due to the decision of the Regional office of the FAS.

Krust LLC did not agree with this prescription and decided to appeal thereof to the Appeal Board of the FAS.

The Appeal Board of the FAS

The Appeal Board of the FAS reconsiders the decisions and prescriptions of regional offices, when they contradict the uniformity in the application of the Competition Law.

While considering the case, the Appeal Board of the FAS made a few important conclusions:

1. In accordance with the Guidelines of the FAS as of July 08, 2016 "On issuing prescriptions to transfer income received from monopolistic activities to the federal budget", the prescription to transfer income to the federal budget, received as a result of violation of the Competition Law, should be issued only in the case when it is impossible to calculate the administrative fine, based on the amount of the offender's income from the sale of goods (services) on the market in which the violation was committed;
2. Such prescription could not be issued in respect of an entity relieved from administrative liability, under the leniency program provided by the Administrative Code. According to the Appeal Board of the FAS, such prescription eliminates the mechanism of exemption from administrative liability.

In view of the above, the Appeal Board of the FAS abolished the prescription of the Regional office of the Federal Antimonopoly Service of the Sverdlovsk region and the decision clause providing issuance of a specified prescription.

We hope that this decision of the Appeal Board of the FAS will become a precedent for the regional offices of the FAS.