

Increasing Role of Criminal Enforcement as a Trend in the Russian Anti-Cartel Policy and Practice

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Although criminal liability for cartels was introduced into the Russian criminal law more than twenty years ago (in 1997), it is fair to note that, nowadays, this system does not work appropriately, nor effectively. Over the years, criminal sanctions in Russia for cartels have been very rarely used in practice. Every year, the FAS^[1] renders more than a hundred, or several hundred, decisions on violation of Part 1 Article 11 of the Competition Law^[2] (cartel agreements), while only in very few cases is criminal procedure initiated and an even smaller number of cases are finally transferred to the court for further hearings. This has led to the situation that, throughout the existence of a special Article of the Criminal Code^[3], which provides for criminal liability for cartels^[4], there have been only a handful of cases where cartel participants have been prosecuted.

For example, from 2011 to 1st half of 2019, the FAS rendered 1,783 decisions on cartels under the Competition Law, while only in 76 cases were criminal proceedings initiated and in just 11 cases criminal case files were sent to the court by the criminal enforcement bodies for hearings^[5].

Criminal investigation of cartels is carried out by the Ministry of Internal Affairs and its divisions, which runs criminal investigations based on the received file from the FAS, and other evidence. Only cartels that caused a certain amount of unlawful income, or damages, are subject to criminal prosecution. Difficulties in criminal enforcement may have been caused by a number of reasons, such as: certain differences in wording of *corpus delicti* under the Criminal Code and the Competition Law, certain questions of cooperation with the FAS in the criminal investigation, specifics of investigation, necessary evidence, absence of established practice, etc.

Specifics of this kind of criminal cases also are that often cases are investigated in relation to several (or other) offences, where the cartel agreement goes together with other crimes (more commonly-investigated ones) such as, for example, abuse of powers, bribery, etc.

According to the FAS estimates, the damage from anticompetitive agreements amounts to about 1.5-2% GDP annually. The necessity of fundamental changes in criminal enforcement of cartels has become obvious for Russian state authorities over recent years. Throughout 2017-2019, the aim was formalized by different regulatory acts of the President and the Government of the Russian Federation, wherein the development of measures aimed at timely detection of cartels, strengthening of liability and ensuring coordination of efforts between law enforcement bodies for cartels counteraction were emphasized.

Following this, we can observe how efforts directed to the criminal prosecution of cartel participants have been intensified. For example, the special Guidelines on organization of interaction between the FAS and other law enforcement bodies in relation to detection, uncovering and investigation of competition restriction crimes were issued by the FAS on August 8th, 2019. The Guidelines describe organizational, methodological and procedural aspects of cartels' investigations and the relevant criminal proceedings, including the FAS cooperation with the law enforcement bodies.

What is more important is that as a result of all activities: in just the latest few months, at least three criminal cases have been completed and the courts have announced judgements. Below are brief descriptions:

1. On July 31st, 2019, the Samara District Court announced the judgement in a criminal case in relation to officials of SMT LLC, GE Healthcare LLC, the Ministry of Health of the Samara Region^[6]. Violations were committed during auctions in relation to technical support of the medical equipment for 23 health care facilities in the Samara Region. The court concluded that, inter alia, there had been attempt to form a cartel by certain defendants. As a result, the defendants were sentenced up to 3.5 years' imprisonment (although some received suspended sentences).
2. At the end of December of 2019, the Moscow District Court of St. Petersburg announced the judgement in a criminal case in relation to top-executives of several suppliers of medical products and pharmaceuticals: Medlon LLC, NikaMed LLC, Medlon-DV LLC^[7]. These officials were found guilty for having concluded a cartel agreement during auctions for supply of medical products and pharmaceuticals for local health care facilities during 2014-2017. As a result, the defendants received up to 2.5 years of suspended sentences, with a probation period of 2 years and with an additional penalty in the form of a criminal fine. The court also banned the defendants from engaging in entrepreneurial activities related to the procurement of medical equipment and medicines for 2 years.
3. On January of 2020 the Volzhsky District Court of Saratov found the founder and CEO of HydroSpetsProm LLC guilty of creation and operation of a cartel under Part 1 Article 178 of the Criminal Code^[8]. The court established that, in order to ensure the unlawful win in an electronic auction and to obtain contracts for construction of the kindergarten, officials of HydroSpetsProm LLC and SMP-377 LLC entered into the cartel and fixed prices in the auction.

Moreover, following this trend the FAS developed a set of amendments^[9] to the Criminal Code, the Criminal Procedure Code^[10] and the Competition Law that have already been brought into the State Duma, the lower chamber of the Russian Parliament, for further consideration.

The main objectives of the proposed amendments are to clarify the current legislative provisions, to bring the wording of *corpus delicti* under the Criminal Code in accordance with the Competition Law (in order to simplify the process of criminal investigation), to differentiate liability basing on the circumstances of the crime as well as to generally strengthen the criminal liability. Herewith, in addition, it was proposed to double the amount of damage/income, which makes a cartel criminally punishable. Thus, the Article 178 of the Criminal Code could be completely amended. In terms of investigation procedure, it was proposed to introduce alternative investigation powers for the Investigative Committee of the Russian Federation (currently, the Ministry of Internal Affairs is empowered to conduct the investigation).

In the second bill, the FAS, inter alia, intends to obtain additional powers. These include, for example, powers of seizure of things and documents during the inspections conducted in respect of anticompetitive agreements' alleged violations, the possibility of transferring materials of the law enforcement intelligence-gathering activities from law enforcement bodies to the FAS, etc. Extra powers are intended to improve the FAS strength to fight against cartels. However, the proposed amendments are being widely debated in the business and professional community, as this may lead to increase of pressure on business.

Thus, considering a number of measures regularly taken by the state authorities, which are aimed at improvement of criminal enforcement for cartels violations and constant attention to this problem, we think that an increase of criminal proceedings/judgments in this area may be expected in future.

[1] Federal Antimonopoly Service.

[2] Federal Law "On Protection of Competition" dated July 26, 2006 No. 135-FZ.

[3] Criminal Code of the Russian Federation dated June 13, 1996 No. 63-FZ.

[4] Article 178 of the Criminal Code.

[5] According to the FAS statistics included into the explanatory note to the bill on amendments to the Criminal Code (see the bill on the official web site: <https://sozd.duma.gov.ru/bill/848246-7>) (link in Russian).

[6] <http://en.fas.gov.ru/press-center/news/detail.html?id=54251>.

[7] <http://en.fas.gov.ru/press-center/news/detail.html?id=54691>.

[8] <http://en.fas.gov.ru/press-center/news/detail.html?id=54707>.

[9] <https://sozd.duma.gov.ru/bill/848246-7>, <https://sozd.duma.gov.ru/bill/848392-7> (links in Russian).

[10] Criminal Procedure Code dated December 18, 2001 No. 174-FZ.