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INVESTIGATIVE POWER IN PRACTICE

Contribution from the Russian Federation

- Session IV -

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More documentation related to this discussion can be found at: oe.cd/invpw.

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Investigative Powers in Practice

- Contribution from the Russian Federation –

1. In accordance with the legislation of the Russian Federation, the antimonopoly authority conducts scheduled and unscheduled inspections. Scheduled and unscheduled inspections are carried out in the form of on-site and documentary inspections.
2. In 2009, a number of amendments to the current legislation were adopted, which clarified the conceptual framework of the Federal Law dated July 26, 2006 No. 135-ФЗ “On Protection of Competition” (hereinafter - the Law on Protection of Competition). Article 25.1 of the Law on Protection of Competition (“Conducting inspections by the antimonopoly authority”) appeared to specify in which cases the antimonopoly authority has the right to conduct scheduled and unscheduled inspections, including unscheduled on-site inspections (dawn raids) in relation to enterprises suspected in cartel activities (without prior notification).
3. The grounds for conducting a scheduled inspection is the expiration of three years from the day the legal entity or organization is established, the state registration of an individual entrepreneur or the end of the last antimonopoly authority’s conduct of a scheduled inspection of the entity.
4. Scheduled inspection is carried out not more than once every three years.
5. At the same time, in practice, a situation arises where all organizations included in the inspection plan cannot be inspected due to the lack of personnel and technical capabilities of the antimonopoly body.
6. In addition, in relation to, for example, small and medium-sized businesses, it seems obvious that the conduct of inspections is inappropriate.
7. In this regard, in its control activity, the antimonopoly authority has switched to a risk-oriented approach, according to which all organizations fall into three categories of risk: medium, moderate and low.
8. The moderate risk category includes retail chains with their income from the sale of goods of more than 400 million rubles (\$ 6 million) and business entities that are natural monopolies or carry out regulated activities with a gross revenue of over 10 billion rubles (\$ 153 million). With respect to them, scheduled inspections may be conducted no more than once every three years.
9. The moderate risk category includes business entities with revenues exceeding 10 billion rubles operating in the areas of production and sale of pharmaceuticals and medical products, the provision of medical services, telecommunications services, transportation services, housing and communal services, transportation of oil and oil products through pipelines, etc. Scheduled inspections of such organizations are conducted no more than once every five years.
10. For business entities whose activities are classified as low risk, scheduled inspections are not conducted.

11. In 2012, the list of grounds for carrying out unscheduled on-site inspections was expanded. The powers of the FAS Russia regarding electronic evidence have also changed. By that time, the antimonopoly authority had already quite often come across the fact that cartel members were fixing their agreements in electronic form and exchanging information via e-mail. In order to legitimize work with all documents that are created in electronic form, amendments were made to the Law on Protection of Competition, which clarified the rights of the antimonopoly authority to copy electronic media.

12. The grounds for an unscheduled inspection are:

- materials received from law enforcement agencies, other state bodies, local authorities, public associations, the Commissioner under the President of the Russian Federation for the rights of business-owners, authorized persons for the rights of business-owners in the constituent entities of the Russian Federation and indicating signs of violation of antimonopoly legislation;
- reports and statements of individuals, legal entities, media reports, indicating signs of violation of the antimonopoly legislation;
- expiration of the term for executing a prescription issued as a result of the consideration of a case on violation of the antimonopoly legislation, or when exercising state control over economic concentration;
- instructions from the President of the Russian Federation and the Government of the Russian Federation;
- detection by the antimonopoly authority of signs of violation of antimonopoly legislation.

13. If the grounds for the inspection is the messages and statements of individuals, legal entities, media reports indicating signs of violation of the antimonopoly legislation or detection by the antimonopoly authority of signs of violation of the antimonopoly legislation, then an unscheduled on-site inspection of a small business entity is carried out after consultation with the prosecutor's office at the place of such a subject's activity, except of an unscheduled on-site inspection of a natural monopoly and unscheduled on-site inspection of compliance with the prohibition on the conclusion of a cartel agreement.

14. Before conducting an inspection, the antimonopoly authority notifies the entity being inspected: during scheduled inspections - no less than three working days prior to the inspection, during unscheduled ones - no less than twenty-four hours.

15. At the same time, the antimonopoly legislation provides that prior notification is not allowed in the case of dawn raids for identification of compliance with prohibitions on agreements restricting competition of economic entities and agreements restricting competition or coordinated actions of federal executive authorities, state authorities of the constituent entities of the Russian Federation, local governments, other authorities performing the functions of specified bodies or organizations, as well as state extra-budgetary funds, the Central Bank of the Russian Federation.

16. This is explained by the fact that violation of these prohibitions leads or may lead to the most serious, negative consequences for competition, and failure to notify the inspected person about the inspection will allow the antimonopoly authority to be more likely to detect all necessary documents and information.

17. As of today, unscheduled on-site inspections are one of the main tools in the fight against cartels, and each of the inspections is effective. In other words, during each of the inspections, the antimonopoly authority discovers necessary evidence (direct or indirect) sufficient to initiate a case of violation of the antimonopoly legislation.

18. For example, during one of the inspections an explanatory note “On the situation in the market of locking and sealing devices” was discovered. The specified note of 4 manufacturers actually consolidated the reached anticompetitive agreement on the establishment and maintenance of prices, as well as on the division of the market between manufacturers; coordination of economic activities of these entities by the Single Consolidation Center (ECC). The ECC has developed and implemented a system for controlling the accounting, storage and disposal of locking and sealing devices of each manufacturer on each road. Each manufacturer in real time could receive information on all deliveries with an accuracy of one device. At the same time, in the regions of the railways, a certain amount was assigned to each representative.

19. According to the explanatory note, the main agreements were: non-reduction of minimum prices for products, lack of competition, compliance with the agreed sales volumes.

20. As a result, on March 26, 2018, the FAS Russia found 4 manufacturers and the ECC guilty of organizing and participating in the cartel on the commodity market of locking and sealing devices. The cartel in the market existed from 2008 to 2017, and led to the establishment and maintenance of prices for the devices, as well as the division of the commodity market. In addition, the ECC is recognized as the coordinator of economic activities of these economic entities.

21. It is worth noting that the initiation and consideration of the antimonopoly case affected the twofold reduction in purchase prices for the devices for final consumers and became the reason for the restoration of competition in the market of locking and sealing devices.

22. However, inspections are not the sole power of the antimonopoly body to obtain evidence. It is necessary to single out such forms as obtaining explanations, requests for documents (information), and a leniency program.

23. Returning to the changes in the legislation of 2012, it should be noted that from that moment, in accordance with Article 25 of the Law on Protection of Competition (“Obligation to submit information to the antimonopoly body”), the right of the antimonopoly body to receive the necessary documents, explanations, information, respectively, in written and oral form was corrected (including information constituting a commercial, official, other secret protected by law), including acts, contracts, certificates, business correspondence, other documents and materials in the digital form or in the form of recording on electronic media.

24. At the same time, the antimonopoly body during investigations is often limited in obtaining information constituting a secret protected by law.

25. In particular, when conducting investigations, the FAS Russia often encounters the need to obtain information about subscribers of telecom operators, for example, information about the last and first name of subscribers, the belonging of subscriber numbers, the names of subscribers - legal entities, the ownership of dynamic and static IP addresses, the contracts with subscribers (their copies) and a number of other information.

26. At the same time, a serious challenge for the antimonopoly authority was the transfer of violators to the Internet caused by the development of the digital economy. The first cartels that use computer programs to implement collusion were revealed by the FAS Russia.

27. Thus, the FAS Russia issued a decision, which the two companies recognized as violating Clause 2 of Part 1 of Article 11 of the Law on Protection of Competition, which resulted in the conclusion of an anticompetitive agreement that led to the maintenance of prices at the auctions.

28. The antimonopoly authority found that in order to implement a pre-developed strategy of behavior, 2 companies in terms of electronic auctions, in which they participated, set a reduction limit for auction robots - 0.5% with an action step of 0.5% and submitted the same price offers. The first company was recognized as the winner of the auction, as the company's bid for the price was received earlier. The difference between the time of submission of price offers in all cases was 0.003 seconds.

29. These procurement participants for the supply of medical consumables for the needs of state health care institutions were found guilty of maintaining prices at the respective auctions through the use of special software - auction robots set up to automatically maintain the maximum price with participation in 14 auctions totaling more than 195 million rubles (\$ 3 million).

30. The bulk of evidence in cartel cases is electronic, and such major IT companies as Google, Apple, Lenovo and others sometimes act as violators of the Russian antimonopoly legislation.

31. The antimonopoly body in the framework of the exercise of its functions and the implementation of various types of control is empowered to obtain information constituting a secret protected by law. This follows from Paragraph 1 of Article 25 of the Law on Protection of Competition.

32. Recently, however, the FAS Russia and its regional offices, when sending to communications providers requests for provision of information about subscribers, face refusals to execute these requests with reference to Article 63 of the Federal Law of July 7, 2003 No. 126-FZ "On Communications" providing for the possibility of obtaining information constituting secrecy of communication, only on the basis of a court decision.

33. In order to solve this problem, the antimonopoly body prepared changes to the current legislation, which proposes to fix the right of the antimonopoly authority to receive personal data and data about subscribers of communication services in the Law on Protection of Competition.

34. It is worth mentioning separately the first stage of procurement digitization, that is, the transfer of auctions into electronic form, which simplified the process of identifying and proving anticompetitive agreements (cartels). Using the extensive database of the Unified Public Procurement Information System, electronic trading platforms, the antimonopoly authority has developed a multi-parameter system for identifying and proving collusions. This innovative method of identifying cartels in electronic trading is based on an analysis of trading results, which is conducted on an ongoing basis using electronic resources.

35. The system works on the basis of a specific algorithm of actions:
1. identification of bench marks (the first signs of a violation);
 2. sending requests to Internet providers, telecom operators, certification centers, banks, tax authorities, etc.;
 3. analysis of the information received, allowing to identify from 1 to 50 parameters that are evaluated by the antimonopoly authority in the aggregate. As a result of the introduction and successful use of this system, the process of identifying and proving collusion has become almost remote.
36. Obvious advantages from the introduction of an electronic auction system have led to the fact that since July 2018, all competitive methods of conducting procurement have been converted to electronic form. Thus, the antimonopoly authority will be able to apply the developed system to all competitive procurement procedures, without exception.
37. At the same time, according to expert assessments, the damage from anticompetitive agreements on commodity markets and trades is 1.5–2% of the size of Russia's GDP annually. The main negative consequence of collusion in bidding is an increase in budget expenditures due to the lack of real competition at auctions and tenders (at the same time, about 30 trillion rubles (\$ 457 billion) are allocated from the budget for public procurement and procurement of companies with state participation, which suggests hundreds of millions of damages from cartels to budgets of all levels).
38. Anticompetitive agreements have become one of the threats to the state's economic security and have begun to change qualitatively: the life of a cartel has increased on average to 2–3 years, and if previously the number of auctions covered by a cartel's activity was an isolated incident, now collusions are widespread on hundreds of auctions. Thus, today, the cartelization of competitive spheres of economic activity is one of the key challenges to the development of competition in Russia.
39. In this regard, as well as in order to better and systematically combat cartels, the FAS Russia is developing a program ("Big Digital Cat"), which allows automatic detection of suspicious activity of economic entities in the bidding process through online open screening (at the first stage) and closed (at the second stage) data. The software should allow to automatically receive the amount of necessary data and analyze it for compliance with specified criteria.
40. To this end, a special division for digital investigations was created within the structure of the Anti-Cartel Department of the FAS Russia, which, among other things, implements this project.
41. Despite the well-developed toolkit of the FAS Russia for cartel investigations, the need to protect the freedom of competition in the new economy leads to building the capacity of the antimonopoly body in conducting unscheduled on-site inspections, solving issues of more rapid processing of large amounts of information, improving the evidentiary process.