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Working Party No. 3 on Co-operation and Enforcement

USE OF MARKERS IN LENIENCY PROGRAMS

-- Russian Federation --

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*More documents related to this discussion can be found at:
<http://www.oecd.org/daf/competition/markers-in-leniency-programmes.htm>*

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1. Introduction

1. Leniency programs exist in many competition agencies' enforcement practices. The program has a positive effect both on competition authority and on a company participated in a cartel. From the one hand, it helps a competition authority to identify and suppress criminal cartel's activity, to collect direct evidence, which could confirm the existence of illegal practices. From the other hand, this is a civilized way for a company to overcome a difficult situation.

2. In the Russian Federation cartel's activity is regulated by the Federal law "On Protection of Competition"¹ and the Administrative Code of the Russian Federation", which establish liability for cartel agreements in the form of fines and disqualification². Moreover, under specific circumstances criminal liability is foreseen for individuals³. In this context the areas of responsibilities are divided between federal executive authorities of the Russian Federation: the Federal Antimonopoly Service (the FAS Russia) is responsible for the administrative enforcement and the Ministry of the Internal Affairs - for the criminal one. In 2008 for combating cartels a special department – Anti-Cartel Department was added into the structure of the Russian competition authority.

3. Leniency program in the Russian Federation came into force in 2008 and from that time, it has become a very important tool in fighting against anticompetitive practices. During the whole period of its existence it has been amended several times. Nowadays the development of leniency program is still going on. This topic will be discussed below.

2. Leniency program in the Russian Federation

4. The leniency program has been developed and successfully implemented in the Russian Federation. Unlike many foreign practices, in the Russian Federation the program contains both absolute release from administrative liability and relief of administrative liability.

5. In accordance with the Russian legislation a person that voluntarily reports to the federal antimonopoly authority on concluding an agreement prohibited by the antimonopoly legislation of the Russian Federation or on exercising concerted actions prohibited by the antimonopoly legislation of the Russian Federation is relieved from administrative liability provided the following conditions are met as a whole:

1. at the time of the person filing an application, an antimonopoly body does not have relevant information and documents on the committed administrative offence;
2. the person refuses to participate or further participate in the agreements or to exercise or further exercise concerted practices;
3. the person has submitted information and documents are sufficient to establish the event of an administrative violation.

¹ Article 11 of the Federal Law dated July, 6, 2006 № 135-FZ «On Protection of Competition».

² Article 14.32 of the Federal Law dated December, 30, 2001 № 195-FZ « Code of Administrative Violations of the Russian Federation ».

³ Article 178 Federal Law dated June, 13, 1996 № 63-FZ «Criminal Code of the Russian Federation».

6. The first person who meets all conditions listed above shall be relieved from administrative liability. It should be noted that the joint applying for absolute release from administrative liability is impossible.

7. The Russian legislation also establishes the tool of mitigation of administrative liability.

8. Economic entities which failed to use the mechanism of absolute release from administrative liability (e.g. to be the first to meet all the requested conditions) could take actions to mitigate the administrative liability. In particular, such an action could be assistance of the person, committed an administrative offence, to an authority empowered in establishing the circumstances of the offence.

9. Nowadays the leniency program has proved its worth as an effective tool of cartels' and other anticompetitive agreements' investigation.

10. In particular, as a result of the existence of leniency program in the modern form the FAS Russia received: 19 applications in 2010; 23 applications in 2011; 13 applications in 2012; 29 applications in 2013. Such applications have become one of the key evidence when the FAS Russia made decisions on cases of violation of antimonopoly legislation.

11. The number of economic entities which used the possibility of relief of administrative liability exceed that ones which applied for full release.

3. Release from criminal liability

12. The system of release of an individual from criminal liability has its own requirements and conditions which are not fully coordinated with release from administrative liability. This procedure is established in the Criminal Code of the Russian Federation and the Criminal Procedure Code of the Russian Federation⁴.

13. In accordance with the Russian legislation, a person can be released from criminal liability if he or she assisted in exposure of the crime, compensate for the damage or in any other way recover the damage which was caused by the criminal behavior, or his or her actions do not contain elements of a crime⁵.

14. Moreover if some of the requested conditions for release cannot be met, it is possible to conclude an agreement on cooperation with prosecutor after a criminal investigation has been opened. After all the requirements of such an agreement has been met, acknowledgement of guilt, assistance to exposure of a crime and absence of aggravating circumstances, amount of penalty cannot exceed a half of a maximum length or amount of the most severe punishment for a certain crime⁶.

4. Level of development of marker system

15. In the framework of the Russian legislation, the key marker is a written application from an economic entity on release from administrative liability, received by the FAS Russia or its Regional Offices. The FAS Russia issued an Order dated 26 September 2008 № 369 in which the procedure of receiving of such applications is defined.

⁴ Federal Law dated December, 18, 2001 № 174-FZ «The Criminal Procedure Code of the Russian Federation».

⁵ Article 178 Federal Law dated June, 13, 1996 № 63-FZ «Criminal Code of the Russian Federation».

⁶ Article 62 Federal Law dated June, 13, 1996 № 63-FZ «Criminal Code of the Russian Federation».

16. In accordance with this Order, one of the Deputy Heads of the FAS Russia and the Head of the Anti-Cartel Department are responsible for receiving application on the facts of agreements or concentered practices, that restrict competition and are prohibited by the antimonopoly legislation of the Russian Federation.

17. Heads of Departments of the Central Office and Regional Offices of the FAS Russia should immediately inform the persons empowered if they receive such applications. The process of receiving, registration and keeping the documents for official use only is organized by the Anti-Cartel Department.

18. The moment of receiving of an application is recorded in a special register. Applicant has a special mark on a copy of its application and a unique register number.

19. If an applicant informs an antimonopoly authority that its application includes a commercial secret, such a document obtains a classification code "for official use only". The disclosure of this information to the third parties is possible only in accordance with a relevant court's decision.

20. In the framework of implementation of leniency program, information concerning possibility to apply to antimonopoly authority is distributed with the help of all the possible tools of public communication.

21. In particular, the official web-site of the FAS Russia contains a special section "Report cartel collusion". On this page one can find an information on liability for participation in cartels, possibilities to obtain a release in accordance with Russian legislation, contact persons in the FAS Russia and other useful information.

22. Moreover, the FAS Russia created a special web-site www.anticartel.ru. This site is devoted to information about why cartels are dangerous and how to fight against them. It targets to a various audience. A person can find easy-to-read guidelines, ask questions, observe anti-cartel enforcement practice and relevant features of the Russian legislation. One of the major goals of this project is an attempt to bring together all the Russian anti-cartel enforcement practice, to sum up foreign experience and to create a unified useful database.

23. Information about mechanisms of implementation of leniency program and possibilities to relief from liability as well as ways to inform competition authority about participating in a cartel is actively distributed via television, radio and other mass-media.

24. Summing up, a system of applying to competition authority on participation in a cartel is a marker system that is a part of leniency program.

5. Examples of cases with use of marker system

25. In 2010 the FAS Russia investigated a case on military uniform supply for the Ministry of Internal Affairs of the Russian Federation. The cartel on maintaining a bid price on military uniform for the Ministry of Internal Affairs existed for several years and included many companies operating on that market. According to the decision of the FAS Russia, 32 companies were participants of the cartel.

26. For its proving applications on leniency program received from some of the cartel's participants were used along with other evidences.

27. Three applications were received on a matter. Taking into account the order of applications and meeting the requirements, only one company was fully released from administrative liability. Applications from the second and the third companies were considered in a framework of the program of relief of administrative liability. The amount of fine for those companies were decreased.

28. One more example is a case on import of Vietnam pangasius to the Russian fish market investigated in 2013. The FAS Russia found that a number of Russian import companies with participation of Vietnam Executive Committee on Seafood Export to Russian Market made an agreement on sharing the market of wholesale supply of pangasius, setting and maintaining prices in the territory of the Russian Federation. Two applications on this case were received.

29. One of the applicants was the first who met all the requirements and was released from the administrative liability. The second company actively assisted to investigation, but its application was received later. Thus, administrative fine of the second company was decreased in proportion to its assistance in the framework of the program of relief of administrative liability.

6. Conclusion

30. Actually the development of the marker system in leniency program is one of the priority fields of the FAS Russia's activity. As it was mentioned above, the Russian legislation provides both administrative and criminal liability for participating in a cartel, but the leniency program exists only in regard to the administrative enforcement. In other words, in case of all the requested conditions are met and the company is released from administrative liability, there are no absolute legal guaranties of release of the company's executives from criminal liability.

31. The "synchronization" of administrative and criminal legislation in the field of fighting against cartels and its further improvement in accordance with the best international practices and recommendations is now of high priority of the FAS Russia.

32. Currently, the FAS Russia takes active action in formalization of using the marker system in leniency program. Related drafts of legal documents have been developed. In future a special the FAS Russia's Regulation is supposed to be adopted on this matter. The Regulation will describe prospective benefits for marker's applicants from the marker system; who has a right to receive a marker; which steps should be taken to initiate the process and what are the requirements to obtain a marker; when the marker stops being a proposition of the leniency program; the procedure of obtaining of a conditional options of the leniency program and what is necessary for this step; what the content of the marker should be, etc.

33. Summing up, the FAS Russia sets a priority on development of the leniency program. Cartels are worldwide recognized as a serious crime, damaging consumers' interests and the economic system as a whole. In that context the Russian competition authority is under the process of creation of an efficient leniency program, which could motivate economic entities to come to the competition authority themselves, thereby creating a positive effect on their reputation and their financial conditions. Within the given context, the development of a marker system in leniency program is essential because, in fact, it helps to estimate the depth and the concentration of a cartel and the opportunities to turn a cartel domain to a pro-competitive course.