

The International Comparative Legal Guide to:

Cartels & Leniency 2010

A practical insight to cross-border Cartels & Leniency



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1 The Legislative Framework of the Cartel Prohibition

1.1 What is the legal basis and general nature of the cartel prohibition, e.g. is it civil and/or criminal?

The legal basis for the cartel prohibition in Russia is primarily the Federal Law “On Protection of Competition” (the “Competition Law”) (The Federal Law “On Protection of Competition” No. 135-FZ dated July 26, 2006 (as amended) initially published in the “Russian gazette” No. 162, 27.07.2006), the Code on Administrative Offences, the Criminal Code and the Code of Criminal Procedure. The nature of the cartel prohibition in Russia is both administrative and criminal.

1.2 What are the specific substantive provisions for the cartel prohibition?

The Competition Law prohibits actions or agreements which lead or may lead to the following:

- (i) control or fixing the prices, discounts, markups and extra charges;
- (ii) increasing, reducing or maintaining of prices at tenders;
- (iii) market sharing according to the territorial principle, volume of sales/purchases, range of products or types of sellers or buyers;
- (iv) economically or technologically unjustified refusal to enter into a contract with a particular customer or seller;
- (v) imposition of the contractual terms that are disadvantageous to the other party or are not related to the subject of the contract;
- (vi) economically, technologically or otherwise unjustified setting forth different prices on the same goods;
- (vii) reduction or discontinuance of producing of goods for which there is a demand, if it is possible to produce them on a profitable basis;
- (viii) foreclosure of commodity market; and
- (ix) establishment of conditions of the membership (participation) in a professional or other association if such a condition leads or may lead to restriction of competition.

1.3 Who enforces the cartel prohibition?

The Federal Antimonopoly Service of Russia including its territorial divisions (hereinafter “the FAS”) enforces the cartel prohibition under the Competition Law and the Code on Administrative Offences. All

criminal prosecutions are carried out by the Ministry of Internal Affairs and its divisions (hereinafter “the MIA”) under the Criminal Code and the Code of Criminal Procedure.

1.4 What are the basic procedural steps between the opening of an investigation and the imposition of sanctions?

The FAS starts an investigation on its own initiative basing on the information received from other state authorities, individuals and legal entities, public sources and as a result of inspections. The special Commission composed of the FAS officials is appointed for running the investigation and considering the materials. Under the Competition Law the Commission holds several meetings where parties have the right to submit written and oral clarifications. Upon the completion of the review and disclosure of the antimonopoly regulation’s violation, the Commission takes a decision on the issue of a mandatory regulation (normally the imposition of fines). The parties may appeal the Commission’s decision in the FAS or a court within 3 (three) months. In case of appealing in the court, the Commission’s decision is suspended till the court’s decision.

The regulation of criminal investigations is in the process of development. It is planned that the FAS will deliver the Commission’s decision with an investigation file to the MIA upon expiration of a three-month period for appellation. The divisions of the MIA will run criminal investigations basing on the received file from the FAS and other evidences procured under the Code of Criminal Procedure. The MIA will prosecute only cartel cases, which amount to serious or complex fraud.

1.5 Are there any sector-specific offences or exemptions?

The Competition Law is applicable to all sectors of economy and there are no sector-specific offences or exemptions in Russia.

1.6 Is cartel conduct outside Russia covered by the prohibition?

The Competition Law applies to agreements or other actions concluded or conducted in relation to a company conducting business in Russia or have any other influence on the state of competition in Russia. Herewith it is assumed that the extent of such influence will be assessed by the FAS in each particular case.

Under the Code on Administrative Offences foreign companies and officials may be fined for cartels in Russia. In addition, foreign officials may be imprisoned under the Criminal Code.

2 Investigative Powers

2.1 Summary of general investigatory powers.

Table of General Investigatory Powers

Investigatory power	Civil / administrative	Criminal
Order the production of specific documents or information	Yes	Yes*
Carry out compulsory interviews with individuals	No	Yes*
Carry out an unannounced search of business premises	Yes	Yes*
Carry out an unannounced search of residential premises	No	Yes*
■ Right to 'image' computer hard drives using forensic IT tools	No	Yes*
■ Right to retain original documents	No	Yes
■ Right to require an explanation of documents or information supplied	Yes	Yes
■ Right to secure premises overnight (e.g. by seal)	No	Yes

Please Note: * indicates that the investigatory measure requires the authorisation by a Court or another body independent of the competition authority

2.2 Specific or unusual features of the investigatory powers referred to in the summary table.

The FAS has only administrative investigatory powers under the Competition Law and the Code on Administrative Offences. In general, criminal investigatory powers are foreseen in criminal proceedings run by the MIA.

2.3 Are there general surveillance powers (e.g. bugging)?

The FAS has no surveillance powers (e.g. bugging). In criminal cartel investigations the MIA has the power to authorise surveillance under the Code of Criminal Procedure.

2.4 Are there any other significant powers of investigation?

The FAS officials are empowered to initiate and carry out scheduled inspections (once every three years) and unscheduled inspections of the activity of federal and municipal bodies, commercial and non-commercial organisations and individuals. Herewith the latter have to ensure the access of the antimonopoly officials to the examined territory, premises and documents as well as to provide the officials with the required documents, explanations and information. Failure or refusal to provide the requested data within the set period of time may entail imposition of administrative liability stipulated by the effective legislation.

The FAS is authorised to consider the cases involving violation of antimonopoly legislation irrespectively of the place of committing of the offence or place of residence of the offending person. This implies that the FAS will have the authority to determine what offences should be referred to its competence and initiate

proceedings against any Russian or foreign legal entity or individual.

2.5 Who will carry out searches of business and/or residential premises and will they wait for legal advisors to arrive?

The FAS may search only business premises during the inspections in accordance with the Competition Law. Searches of business and/or residential premises and other surveillance powers are in the competence of the MIA, which acts in accordance with the provisions of the Code of Criminal Procedure.

2.6 Is in-house legal advice protected by the rules of privilege?

In-house legal advisors are not protected by the rules of privilege in Russia.

2.7 Other material limitations of the investigatory powers to safeguard the rights of defence of companies and/or individuals under investigation.

During the investigation, the company and the individuals are protected by fundamental rights of defence. Also the commercial, official and other information protected by law which became familiar to the FAS is not to be disclosed safe for the cases set forth by the laws. For the disclosure of secrets the FAS officials are subject to the civil, administrative and criminal liability. In criminal investigations individuals do not have to respond to any questions if the answer would expose them or a member of their family to the risk of criminal prosecution.

2.8 Are there sanctions for the obstruction of investigations? If so, have these ever been used?

The Code on Administrative Offences provides for certain sanctions for the obstruction of investigations. Refusal of the inspected person or company to present requested by the FAS information and documents, submission of misleading information and documents, and failure to submit the requested data in due time entail fines.

The FAS regularly exercises its authority to bring the infringers to administrative liability.

3 Sanctions on Companies and Individuals

3.1 What are the sanctions for companies?

Any agreements prohibited by the Competition Law are void. In addition, the FAS may impose a fine in the amount from 1% to 15% of the company's turnover on the market where the violation occurred, herewith the minimum amount of the fine cannot be less than RUR 100,000 (approx. USD 3,400 or EUR 2,300). The fine imposes for conclusion and participation of cartel agreement.

3.2 What are the sanctions for individuals?

According to the effective Russian antitrust legislation individuals are subjects to both administrative and criminal liability.

Administrative liability in the form of a fine or disqualification may be imposed on officials of legal entities. The fine for officials of legal entities (e.g. general director) amounts from RUR 5,000 (approx. USD 180, EUR 120) to RUR 50,000 (approx. USD 1,700,

EUR 1,200) depending on character and gravity of violation. An alternative sanction for officials of legal entities is disqualification of up to 3 (three) years.

A violator of the antitrust legislation may face criminal liability - a criminal fine up to RUR 1 million (about USD 34,400 or EUR 23,000) and imprisonment up to 7 (seven) years with or without disqualification from 1 (one) to 3 (three) years.

3.3 What are the applicable limitation periods?

The Competition Law states the limitation period, which is 3 years from the date of breach or its completion or detection (in case of continuing breach). Before this, the limitation period was 1 year. The Criminal Code states a 10-year limitation period from the date of the crime commitment.

3.4 Can a company pay the legal costs and/or financial penalties imposed on a former or current employee?

There is liability either for legal entities or for individuals (officials of legal entities) in Russia. Herewith the legal entity should pay the legal costs and/or financial penalties imposed on it, but not on its employee. If the actions of the employee cause damages for the third party and the legal entity pay a relevant amount instead of the employee, the legal entity will have the right to recover this amount through legal proceedings.

4 Leniency for Companies

4.1 Is there a leniency programme for companies? If so, please provide brief details.

Under the Code on Administrative Offences legal entities taking part in restrictive agreements or concerted practices have the opportunity to participate in the leniency programme under which the companies that voluntarily reported to the antitrust authority about entering into anticompetitive agreements or executing concerted practices, refused to execute them and gave evidences about the cartel, are fully relieved from administrative liability.

Recently the *leniency policy* was amended in Russia. In accordance with the new provisions of the Code on Administrative Offences only the first company notifying the FAS and executing a number of conditions is relieved from the liability for participating in restrictive agreements and concerted practices. Other cartel members are to face “turnover fines”, and from the end of October the criminal liability may be imposed on the top managers of the offending companies. Before all the companies which participated in a cartel and reported the FAS thereof were able to take an advantage of the leniency programme.

4.2 Is there a ‘marker’ system and, if so, what is required to obtain a marker?

There is no ‘marker’ system in Russia.

4.3 Can applications be made orally (to minimise any subsequent disclosure risks in the context of civil damages follow-on litigation)?

The concrete procedural rules for implementation of the *leniency policy* are currently being worked out in Russia and are not completely established yet. Applications may first be made orally,

e.g. via phone indicated on the FAS Internet site. However a written application must be submitted to use the leniency programme.

4.4 To what extent will a leniency application be treated confidentially and for how long?

The FAS guarantees the confidentiality of a leniency application. At the same time the FAS may disclose the information regarding the leniency application to the participants of a case and in the final decision to the public.

4.5 At what point does the ‘continuous cooperation’ requirement cease to apply?

There is no detailed requirement for the applicant to preserve the ‘continuous cooperation’ with the FAS. Nevertheless the applicant should present the information and documents that are sufficient for indication the violation of the antitrust legislation.

4.6 Is there a ‘leniency plus’ or ‘penalty plus’ policy?

There is no ‘leniency plus’ or ‘penalty plus’ policy in Russia since the leniency programme rules are in the process of development.

5 Whistle-blowing Procedures for Individuals

5.1 Are there procedures for individuals to report cartel conduct independently of their employer? If so, please specify.

There are no specific procedures for individuals to report cartel conduct independently of their employer in Russia. Any individuals having the information about the cartel may apply to the FAS as is usual.

6 Plea Bargaining Arrangements

6.1 Are there any early resolution, settlement or plea bargaining procedures (other than leniency)?

In accordance with the provisions of the Competition Law the FAS terminates the cartel investigation if the violation of the antitrust legislation was ceased voluntarily. The FAS has a rich practice of termination proceedings in such cases.

7 Appeal Process

7.1 What is the appeal process?

There are both administrative and judicial procedures for the appeal process in Russia. An applicant may choose the administrative procedure appealing to the superior body and then take advantage of the judicial one in case of disagreement with the adopted decision or may submit a claim to the court directly without preliminary administrative procedure.

In compliance with the Competition Law provisions decisions and mandatory regulations of the antitrust bodies may be appealed in 3 (three) months from the day of adoption the decision and mandatory regulation. The decision of the territory antitrust bodies’ officials

which infringe the procedure rules are subject to appeal in this body, the decision of the territory antitrust bodies may be appealed to the FAS as well as to the court. In case of the appeal to the court of general jurisdiction or to the arbitrazh court (analogue to commercial courts of several European jurisdictions competent in resolving disputes in the field of commercial activity) performance of the mandatory regulation is suspended until the court decision comes into force.

A submitted appeal is to be considered by the antitrust body within 30 (thirty) days from the date of its registration. The term may be prolonged, but not more than for 30 (thirty) days if the head of the antitrust body decides there is a necessity for additional research and information.

Upon the appeal consideration a decision on compliance or noncompliance partly or in full of the decision of an antitrust body may be adopted.

The application on appeal of the decision and mandatory regulation adopted by the one of the territorial division of the FAS may be equally filled to the court of general jurisdiction or to the arbitrazh court. The procedure of submission, consideration and adopting decisions on the application is stipulated in the civil procedure and the arbitrazh procedure legislation.

7.2 Does the appeal process allow for the cross-examination of witnesses?

Russian civil procedural rules do not allow for cross-examination of witnesses.

8 Damages Actions

8.1 What are the procedures for civil damages actions for loss suffered as a result of cartel conduct?

Individuals and legal entities which have suffered losses as a result of cartel conduct are entitled to claim for damages in civil and commercial courts under the Civil Code. However it is a rare practice since claimants usually face problems to justify their claims before courts (in particular presenting the proof of damages).

8.2 Do your procedural rules allow for class-action or representative claims?

According to the Russian civil procedural legislation a civil case may be initiated by an application of a person acting in his/her name to secure rights, liberties and legal interests of other persons, indeterminate group of people or to protect interests of Russia, subjects of Russia, municipal bodies. All above said options can be performed by a procurator with some particular regulations. In cases set forth by the Russian legislation state and municipal bodies as well as organisations and individuals may claim to the court for the protection of rights, liberties and legal interests of other persons or indeterminate group of people.

According to the current amendments to the Russian arbitrazh procedural legislation it is allowed to file class actions with regard to commercial disputes (e.g. corporate disputes, disputes out of the activity of professional participants of the securities market). The number of represented persons must not be less than 5.

8.3 What are the applicable limitation periods?

The limitation period is 3 (three) years from the point in time when the claimant is aware of the defendant's infringement.

8.4 What are the cost rules for civil damages follow-on claims in cartel cases?

The amount of the state duty for filing the statement of claim for recovery of civil damages is in direct relation to the amount of civil damages sought by the plaintiff. However the cap is RUR 100,000 (approx. USD 3,420, EUR 2,260) for the disputes considered in arbitrazh courts (disputes between companies and those involving individual entrepreneurs) and RUR 20,000 for the disputes considered in the courts of general jurisdiction (disputes involving individuals). In accordance with the Russian civil procedural laws the successful party will recover from the losing party the state duty and reasonable amount of legal fees.

8.5 Have there been any successful follow-on or stand alone civil damages claims for cartel conduct?

Nothing to report.

9 Miscellaneous

9.1 Provide brief details of significant recent or imminent statutory or other developments in the field of cartels and leniency.

The most significant recent changes in the field of cartels and other spheres of the antitrust legislation were specified above and comprise of "the Second Antimonopoly Package". It significantly changed Russian antitrust legislation and set forth a number of measures that promoted to the development of competition in Russia. The introduction of these amendments resulted in the liberalisation of authorities' approach towards medium and small business and concentration on prevention and prosecution of serious violations of the antitrust legislation.

At the same time the Russian antitrust legislation is in continuous developing. Nowadays "the Third Antimonopoly Package" is working out which aims at providing for the more detailed regulation and resolving existing problems of both law and practice.

9.2 Please mention any other issues of particular interest in Russia not covered by the above.

None.

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