METHODS FOR IDENTIFYING AND PREVENTING CARTEL COLLUSION IN PUBLIC PROCUREMENT

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ABSTRACT
The study presents a survey of research results on the development of cartel collusion indicators in the framework of public procurement, which are based on the structural characteristics of the industry and the behavioral traits of economic agents. An overview of the methods used to identify cartel collusions. The paper shows and reveals the internal and external factors affecting the behavior of bidders. Methods and tools for identifying and preventing cartel collusion by participants in public procurement are suggested.

Keywords: cartel, collusion, public procurement, method, instrument, identification, prevention.

1. INTRODUCTION
One of the most pressing problems that creates obstacles to the development of economic relations, as well as barriers to increasing the number of companies that prevent the limitation of price increases and improve the quality of services provided are cartel collusion between subjects that restrict competition.

In turn, the creation of an effective mechanism for identifying and preventing cartel collusion, concluded in the framework of public procurement, depends on the level of its theoretical development of this problem. From the scientific point of view, the problems and methods for identifying and preventing cartels formed by participants in public procurement have not been sufficiently studied at the moment.

2. MATERIALS AND METHODS
As shown in the study of Khamukov M.A. (2016) identification of cartels (collusion), as well as other anticompetitive agreements, is a very laborious and complex process that requires high professional knowledge in the field of economics and jurisprudence, the use of various indicator systems that allow detailed study of various branches of the economy and commodity markets.

Cartels, being prohibited forms of cooperation of subjects, can not be the object of full-scale open economic research in real time. Economic assessments of cartels have to be considered post factum on the basis of decisions made by antimonopoly bodies or arbitration courts.

The results obtained in the empirical study of Lianos L. and Genakos C. (2012) indicate that only 3 out of 48 cartel cases reviewed in 2005-2011 use quantitative methods of econometric or simulation modeling. In all these cases, quantitative econometric analysis was provided by the parties, and the European Commission studied them in detail and on their basis made a decision. To date, the situation in this problem area has not fundamentally changed.

In order to identify cartels, Khamukov M.A. (2016) suggests using indicators that are based on the structural characteristics of the industry and the behavioral traits of economic agents. At the same time, the author considers the most important characteristics of the industry to be product homogeneity, inelastic (stable) demand, high entry barriers to the market, high concentration of the commodity market. Within the framework of possible behavioral signs of participants in collusion, the researcher identifies synchronous dynamics of prices for goods from competitors, stable market participants' shares, increased norm of profit of market participants, stable and long periods of price increase.

According to Khamukov M.A. (2016) structural characteristics of economic sectors, as a rule, are necessary conditions for the formation of cartels, and behavioral signs may indicate a cartel operating in a particular market.

In the context of a detailed analysis of information on possible collusion, Alyoshin D.A. (2016) proposes to test the hypotheses and get answers to the following key questions:

1) Is there a sharp change in the price behavior of economic entities? Whether the average price has changed; have the interdependencies between the prices of different economic entities changed?

2) Is the behavior of economic entities that are suspected of collusion with the behavior of competitors different?

3) Is the behavior of economic entities incompatible with competition?
4) Is the behavior of economic agents more compatible with collusion than with the behavior of competitors?

As shown in the paper by Ivashchenko K.A. (2015), when proving a cartel, the antimonopoly authorities use two categories of evidence: direct documents that point to violations are documents (contracts, agreements, protocols, statements, letters, etc.), testimonies - and indirect ones that indicate side facts that are in the cause-effect or other connection with the facts of the violation, such as the analysis of the behavior of economic entities, market analysis, mathematical examination.

An analysis of the world practice of combating cartels was carried out in the study of Chernenko T.I. (2016), which divided the methods of combating cartels into two main groups: the threat of sanctions and bringing to justice, as well as stimulating the disclosure of cartels.

In this Andronova S. (2013) notes that schemes to combat cartels can be criminal, civil, administrative or mixed. For example, in Canada, Israel and the United States, they consider particularly serious cartels as criminal offenses. Participants in cartels - legal entities can be fined, and individuals can be sentenced not only to fines, but also to imprisonment. Through a plea agreement, using a common guilty plea system, in these countries, legal entities and individuals can resolve the issue of responsibility for participating in the cartel through a plea agreement. In this case, applications must be approved by the court, which makes the punishment.

A participant in an anti-competitive agreement in the Russian Federation can be brought to administrative responsibility - penalty fines. A participant in the cartel agreement, voluntarily refused to participate in it and reported to the antimonopoly service about its availability is exempt from liability.

From the point of view of Khamukov M.A. (2016) restricting the use of data obtained using economic analysis, for example, for the purposes of antitrust proceedings, is the possibility of ambiguous interpretation of the results obtained. The findings of the economic study can be regarded as: evidence of companies colluding, parallel behavior, or an occasional coincidence of circumstances.

In our opinion, as a method of identifying cartels and explaining the behavior of participants, the results of the conducted case analysis can be used to discover the patterns of alternation of winners and the presence of participants whose role was to simulate competition. In addition to the above methods, it is also necessary to use econometric methods for identifying cartel collusion, namely, a meaningful analysis of the variance in the value of concluded contracts, as well as comparing the actual prices of contracts with those observed in the market according to the nomenclature of goods, periods and territories.

In our opinion, the effectiveness of counteraction to cartel collusion between participants in the placement of a state order depends on the analysis and identification of the aggregate of both internal and external factors affecting the behavior of bidders.

To the internal factors of the conduct of the participant in the placement of the state order is the corporate governance system adopted by the company. Thus, the relationship between managers of companies and owners on the issue of participation (nonparticipation) in collusion has a significant impact on the decision to join the cartel.

A significant role in deterring the participants in the placement of orders from violations of the antimonopoly legislation is played by the compliance of supplier organizations (internal control over the compliance of the company's activities with legislation). It should include the construction of a system of preventive measures associated with various policies and procedures to prevent violations, in particular, antitrust laws. The main purpose of compliance
is to eliminate the risks of loss of profits. Such risks include fines, loss of contracts and so on. In addition, compliance risks can lead to a deterioration in the reputation of the organization and limiting business opportunities.

External factors of possible participation in cartel collusion include state regulation of antimonopoly activities and the contract system, as well as measures of a stimulating (economic) nature that are aimed at creating an economic environment that positively influences economic activity and, as a result, prevents the emergence of cartels.

Thus, item 7, part 16 of the Strategy of Economic Security of the Russian Federation for the period until 2030, as one of the main tasks of the state policy in the field of ensuring economic security, noted "improving the mechanisms of budget planning, control over procurement for state and municipal needs, cartel collusion."

In the group of external factors it is necessary to allocate tools to combat collusion between the participants in the placement of the state order, which should be divided into the following groups: instruments of antimonopoly legislation; contractual system tools; legal instruments

2.1. Instruments of antimonopoly legislation

2.1.1. Legal and methodical support of combating collusion

Currently, the legislative and regulatory framework for combating cartels includes more than 20 documents. The key document in this area is the Federal Law of July 26, 2006, No. 135-FZ "On Protection of Competition". The basis of methodological support of the system of counteraction to cartels in Russia consists of information and reference collections, presentation materials, books, scientific articles, training films created on the basis of practical experience accumulated by Federal Antimonopoly Service (FAS Russia) employees.

2.1.2. Sources of collusion

An important step in the fight against cartels is to obtain information on possible anti-competitive agreements, the sources of which may be:

- Complaints of competitors, who suffer losses from anticompetitive actions of other companies;
- Statements of public structures, such as the Movement for Fair Purchases of the Public Popular Front, corporate associations: Association of Antimonopoly Experts, Association of Corporate Lawyers and others;
- Information of law enforcement bodies;
- Information of the Federal Financial Monitoring Service;
- Information of mass media;
- Own information obtained during market monitoring or bidding control, as well as information received in response to a request;
- "Turning in with guilt" under the program of exemption from liability;
- Information received during the checks of bidders.

Verifications of bidders are conducted in order to exercise control over compliance with antimonopoly legislation in cancers of state and municipal purchases. Antimonopoly bodies carry out planned and unscheduled inspections in the form of exit and documentary checks. The peculiarity of inspections for compliance with the requirements for the prohibition of anti-competitive agreements is that the preliminary notification of the audited person about the commencement of an unscheduled audit is not allowed.
The audit can be carried out not only within the framework of the initiated case on violation of the antimonopoly legislation, but also before its initiation, as part 2 of Art. 39 1. Federal Law No. 135-FZ dated July 26, 2006 "On Protection of Competition" provides that the basis for initiating and reviewing by the antimonopoly body of the case is, among other things, the result of the audit, which revealed signs of violation of the antimonopoly legislation.

2.1.3. Punishment for obstructing inspections by an official of the antimonopoly body
The obstruction of the lawful activity of an official of the FAS Russia in conducting inspections or evading such inspections entails the imposition of an administrative fine in the Russian Federation on citizens in the amount of five hundred rubles to one thousand rubles; on officials - from two thousand to four thousand rubles; on legal entities - from five thousand to ten thousand rubles.

Actions (failure to act), leading to the impossibility of conducting or completing the inspection, entail the imposition of an administrative fine on officials in the amount of five thousand to ten thousand rubles; on legal entities - from twenty thousand to fifty thousand rubles (Article 19.4.1 of the Code of Administrative Offenses of the Russian Federation).

2.1.4. Interaction between the antimonopoly service and law enforcement agencies
The prohibition, restriction or elimination of competition by concluding agreements restricting competition or carrying out concerted actions restricting competition, if these acts caused great damage to citizens, organizations or the state, or entailed the extraction of income on a large scale, are criminal offenses (Article 178 of the Criminal Code of the Russian Federation).

In order to increase the effectiveness of work to prevent and suppress violations of antimonopoly legislation, in 2004 the Regulations on the Interaction Procedure between the Russian Ministry of Internal Affairs and the Federal Antimonopoly Service were approved, which provides for the exchange of information between agencies, practical assistance to FAS Russia employees in conducting inspections, on the initiation of criminal cases on materials submitted to FAS Russia, and other.

Within the framework of this interaction, interdepartmental working groups have been established to coordinate actions and promptly resolve current issues related to the implementation of this Regulation.

2.1.5. Ways to prove the presence of cartel collusion
The fact of an anticompetitive agreement can be established both on the basis of direct evidence and a set of indirect evidence.

The direct evidence of collusion at the auction includes: the concluded anticompetitive agreements; contracts in writing; e-mail messages; minutes of meetings; correspondence of participants in the agreement, including in electronic form.

Indirect evidence of cartel collusion can be:

1) The lack of an economic justification for the conduct of one of the parties to the agreement, which creates advantages for the other party to the agreement, which does not correspond to the purpose of carrying out entrepreneurial activities - profit;

2) Conclusion of the supply contract (subcontract) by the winner of the auction with one of the bidders who refused active actions at the auctions themselves;

3) Use by bidders of the same IP-address (account) when submitting applications and participating in electronic trading;

4) The actual location of the parties to the agreement at the same address;
5) Registration of certificates of electronic digital signatures for the same individual;
6) Formation of documents for participation in trades of different companies by the same person;
7) The existence of mutual settlements between the parties to the agreement, evidencing the existence of mutual interest as a result of the implementation of the agreement.

As noticed Gubin H.P. (2017) legal entities (their officials), as well as individual entrepreneurs and individuals are required to submit to the antimonopoly authority on a reasoned request documents, explanations in writing orally, information (including information constituting commercial, official, other secret protected by law) required by the antimonopoly authority in accordance with the powers conferred on it for the consideration of applications, materials on violations of the antimonopoly legislation, cases of violation of the antimonopoly of the legislation, to exercise control over the state of competition.

When proving the commission of illegal activities, which include anticompetitive agreements, copies of documents and materials (including printouts of e-mail messages, information from hard disks and other media, the media themselves) can be certified by the relevant authority that received (including withdrawn) in the course of the above-mentioned documents and materials carried out on the basis of the law of verification, with observance of the requirements for the order and processing of the receipt (seizure) of evidence, which will meet the requirements of Part 2 of Article and 50 of the Constitution of the Russian Federation and part 3 of Article 64 of the Arbitration Procedural Code of the Russian Federation.

2.1.6. Analysis of the state of competition in the market under study
Analysis of the state of competition in the commodity market is one of the stages of proving the violation of the antimonopoly legislation under state and municipal purchases. The results of the analysis are also evidence in the case.

In accordance with paragraph 5 of part 3 of Art. 41 of the Law on Protection of Competition in the decision on the case of violation of the antimonopoly legislation should contain conclusions on the cases of violation of the antimonopoly legislation, made on the basis of circumstances established during the antimonopoly body's analysis of the state of competition.

The provisions of Part 5 of Art. 45 of the Law on Protection of Competition stipulates that in the case of a violation of the antimonopoly legislation, the antimonopoly authority shall analyze the state of competition in the amount necessary to make a decision on the existence or absence of a violation of the antimonopoly legislation.

The purpose of such an analysis is to prove the synchronism and uniformity of the actions of economic entities in the absence of objective economic reasons; and (or) evidence that the activities of economic entities are directed against their own interests; and (or) evidence that the actions of economic entities could not take place under any other conditions, except under the condition of collusion between them (proving "from the contrary").

At present, the procedure for conducting an analysis of the state of competition in order to establish the dominant position of an economic entity and to identify other cases of preventing, restricting or eliminating competition has been approved by Order No. 220 of the Federal Antimonopoly Service of Russia of April 28, 2010 "On Approving the Procedure for Analyzing the State of Competition in the Commodity Market".

2.1.7. The existence of a ban on cartels "per se"
In contrast to the analysis, the integrity of the behavior of dominant subjects or the control of concentration in mergers and acquisitions, which assess the result of such actions, since
negative consequences for the market may not occur, cartels everywhere are prohibited without exception in per se. Thus, cartel collusions (anticompetitive agreements) of competitors are prohibited from the moment of reaching such an agreement, regardless of its effect, the economic benefit of the cartel, the amount of damage, etc. This circumstance means that for qualifying the actions of market participants as violations of the rules of competition and application to them sanctions is sufficient to establish and prove only the fact of agreement between competitors (on the basis of direct or indirect evidence), which would correspond to the characteristics of the cartel. Negative effects for society and the state as a result of the creation of a cartel to the antimonopoly body are not required to prove.

2.1.8. Exemption from liability in case of voluntary disclosure of the cartel collusion

Disclosure of information on cartel collusion is a tool for preventing anticompetitive agreements and allows, other things being equal, to obtain the necessary evidence to the competent authorities (FAS Russia and the Ministry of Internal Affairs of Russia), and to reduce the costs of disclosing crimes while not reducing the level of warning.

As tools of the contract system, the authors propose to use the identification and monitoring of the "markers" of cartel collusion at the auction. Thus, monitoring the behavior of participants in the placement of government procurement at tenders is an important source of the formation of a set of collusion signs. As the "markers" for revealing cases of collusion in the auction, the following features can be used:

- The refusal of bidders to compete (for example, the application for participation in the auction, but the failure to price proposals during its holding);
- submission of bids on the auction from one IP-address or IP-addresses belonging to one person, a single contact phone or e-mail specified during registration on an electronic trading platform, etc.;
- Identical errors in the application documents or in letters submitted by different companies, for example, spelling mistakes;
- A slight decrease in the initial maximum contract price (0.5-3%);
- A significant difference between the price of the winner's application and other applications;
- The difference in prices from the results of trading from the market;
- The winner of the tender offers for a particular contract a price significantly higher than his offer on another, similar to the contract;
- after the filing of the application, a new, infrequently participating supplier has experienced a significant decrease in comparison with the previous price level, for example, there is reason to believe that the new supplier destroyed the cartel agreement in force;
- The winner of the auction attracts as a subcontractor the losing participant.

3. RESULTS OF THE STUDY

3.1. Instruments of legal impact

3.1.1. Legal liability for cartel agreements

Confirmation of the conclusion of a cartel agreement is the basis for the initiation of not only administrative but also criminal cases, the sanction of which usually affects the incentives of subjects to violate the antimonopoly legislation.
3.1.2. The limitation period for administrative offenses

According to Part 1 of Art. 4.5 of the Code of Administrative Offenses of the Russian Federation, in the case of an administrative violation for violating the antimonopoly legislation, it cannot be issued after one year from the date of committing an administrative offense.

In accordance with Part 6 of Art. 4.5 of the Code of Administrative Offenses of the Russian Federation, the statutory limitation period for bringing administrative responsibility for administrative offenses under Art. 14.32, begins to be calculated from the date of entry into force of the decision of the commission of the antimonopoly authority, which established the fact of violation of the antimonopoly legislation. The fact of appealing the decision of the commission of the antimonopoly authority in a judicial procedure does not prevent the proceedings on the case of an administrative offense.

According to Art. 41.1 of the Law on Protection of Competition, a case on violation of the antimonopoly law cannot be initiated and the initiated case is subject to termination after three years from the date of the violation of the antimonopoly legislation, and in case of a continuing violation of the antimonopoly legislation, from the day of the termination of the violation or its detection.

Thus, a comprehensive interpretation of the provisions of Art. 41.1 of the Law on Protection of Competition and Parts 1 and 6 of Art. 4.5 of the Administrative Code of the Russian Federation testify that the maximum period of limitation of bringing an infringer of the antimonopoly legislation to administrative liability under Art. 14.32 is four years (three years - the statute of limitations for the adoption by the commission of the antimonopoly body of a decision on the case of violation of the antimonopoly legislation and one year from the moment the commission decides to make a ruling on the case of an administrative violation).

3.1.3. Administrative responsibility for failure to provide or untimely provision of information, as well as submission of false information

At the moment in Part 5 of Art. 19.8 of The Administrative Code of the Russian Federation provides for liability for failure to submit or untimely submission of information to the antimonopoly authority (including at its request), as well as submission of false information. Such a duty follows from Art. 25 of the Law on Protection of Competition.

The sanction for the above violation is established in the form of imposing an administrative fine on citizens in the amount of one thousand five hundred to two thousand five hundred rubles; on officials - from ten thousand to fifteen thousand rubles; on legal entities - from fifty thousand to one hundred thousand rubles.

4. CONCLUSION

Thus, the methods and tools for identifying and preventing cartel collusion by participants in the public procurement placement can be used as part of antimonopoly control measures and use in antimonopoly proceedings, which will result in lower government expenditures, higher competition and efficient use of budgetary funds within the state and municipal procurements.

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