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Opportunities and limitations of regulation of concerted actions of Russian Federation market participants

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Abstract

The article deals with the modern system of state regulation of concerted actions by participants of market of real and financial sectors. In particular, the practice of management of various types of collusion of market participants is examined, and the constraints to identify and abuse of dominant market position are identified.

Keywords

Antimonopolist regulation, concerted actions, government regulation, national economy.

Introduction

Concluding various forms of agreements with terms to restrict competition is beneficial for market participants. At the same time, according to statistics, due to results of the U.S, the EU and Russian antitrust authorities

more than a few dozens of violations are revealed over the year, with even fewer of those being repressed after court hearings. Peculiarities of legal regulation of corporations are studied by E.M. Synkova and A.V. Bakhaeva¹.

¹ Synkova, E.M. (2011), "Regulation of information disclosure by corporations in

Current Russian antimonopoly legislation describes the whole range of effects from companies' actions restricting competition, which are reflected in damages to consumers or participants in adjacent markets.

Regulation of concerted actions of economic entities

According to Art. 8 of the Law No. 135 "On Protection of Competition" concerted actions of economic entities in the commodity market are considered all actions whose result corresponds to the interests of each of the market participants under the following conditions:

- their actions are known to each of them in advance;
- these actions are not the result of circumstances, equally affecting all economic entities in the commodity market.

the EU law" ["Regulirovanie trebovaniy k raskrytiyu informatsii korporatsiyami v zakonodatel'stve ES, Voprosy rossiiskogo i mezhdunarodnogo prava"], *Voprosy rossiiskogo i mezhdunarodnogo prava*, No. 2, pp. 95-113; Bakhaeva, A.V. (2012), "Abuse of dominant position in the EU competition law" ["Zloupotrebleniye dominiruyushchim polozheniem v antimonopol'nom zakonodatel'stve Evropeiskogo soyuza"], *Voprosy rossiiskogo i mezhdunarodnogo prava*, No 2, pp. 122-131.

According to Art. 11 agreements restricting competition or concerted actions are prohibited if they cause or may result in:

- 1) establishing or maintaining prices, discounts, allowances, extra charges;
- 2) increasing, decreasing or maintaining prices at auction;
- 3) dividing the commodity market on a territorial basis, the volume of sales or purchases of goods, assortment of goods or group of sellers or buyers (customers);
- 4) economically or technologically unjustified refusal to enter into contracts with certain sellers or buyers;
- 5) dictating contractual terms which are unprofitable for counterparty or do not relate to the subject matter of the contract;
- 6) economically, technologically and otherwise unjustified establishment of different prices (tariffs) for the same product;
- 7) reducing or halting the production of goods that have a demand or feature orders for supply, in case there is availability of their cost-effective production;
- 8) establishing barriers to entry into the commodity market or exit from the commodity market for other economic entities;

Table No. 1. Concerted actions restricting competition, which were revealed in 2008-2010*

No.	Participants	Type of violation	Market	Type of market	Investigation initiator	Number of participants in collusion
2008						
1	LLC. "Sibneft-Krasnoyarsknefteproduct" LLC "Fortuna Plus" JSC "Krasnoyarsknefteproduct"	Price collusion	oil products	regional	FAS	3
2	JSC "Oskolneftesnab" LLC "Starooskolskaya neftebaza"	Price collusion	oil products	regional	FAS	3
3	LLC "Kurskoblnefteproduct" LLC "Alexis"	Price collusion	oil products	regional	FAS	2
4	JSC "NK" Rosneft-Altainefteproduct " JSC "Altai-Gapromneft"	Price collusion	oil products	regional	FAS	2
5	LLC "Lukoil-North Zapadneftprodukt" LLC. "Pskov Oil Company" LLC "Pskofnefteprodukt"	Price collusion	oil products	regional	FAS	3
6	LLC "Lukoil-Nizhnevolzhsknefteprodukt" LLC "Gazprom mining Astrakhan"	Price collusion	oil products	regional	FAS	2
7	JSC "Khabarovsknefteproduct" "RN Vostoknefteproduct" LLC	Price collusion	oil products	regional	FAS	2
8	JSC "Electron"	Coordination of economic activity	selling cash-register equipment	regional	FAC	1
9	LLC "Lukoil-Yugnefteproduct" JSC "NK" Rosneft-Stavropol' LLC "Bashoyl CMS" LLC "Stavneft" PKP "Stavpromkomplekt" LLC	Price collusion	Oil products	regional	FAS	5
10	LLC. "TV channel" Ray" JSC "TV Services", JSC "KMatelekom" SP Kakurin AA	Price collusion	Cable TV	regional	FAS	4
11	FSUE "Research Dairy Plant Vereshchagin" PTK JSC "Northern milk" JSC "Sukhonskiy Dairy"	Coordination of economic activity	Dairy products	regional	FAS	4
12	JSC "Kuzbass Gazprom Neft" JSC"Tomsknefteproduct" BHK "	Price collusion	oil products	regional	FAS	2
13	JSC "IC" Annie " LLC. "The new leasing company" CJSC Moscow Commercial Bank "Mosprivatbank" LLC. "The new leasing company"	Coordination of economic activity	Leasing services	regional	FAS	4
14	LLC "Rusfinance Bank" JSC "GSK" Yugoria "	Coordination of economic activity	Loans	regional	consumer	2
15	9 participants of radio-taxi market	Price collusion	Radio-taxi	regional	consumer	9
16	JSC "Orenburgnefteproduct" LLC "TC" Petrol "	Price collusion	oil products	regional	FAS	2
17	LLC Unimilk" CJSC "Tandem"	Coordination of economic activity	Dairy products	regional	FAS	2
18	"Banque Societe Generale Vostok" JSC "Rosno" LLC "Renaissance Insurance Group" CJSC "Soyuz"	Coordination of economic activity	Consumer lending	regional	consumer	4

* "Official site of the FAS of Russia" ["Ofitsial'nyi sait FAS Rossii"], available at: www.fas.gov.ru

Table No 1. (Continue)

No.	Participants	Type of violation	Market	Type of market	Investigation initiator	Number of participants in collusion
19	Trading networks "AkBarsTorg", "Magnet", "Patterson", "Perekryostok", "Optowik"	Coordination of economic activity	Retail of goods	regional	FAS	5
20	JSC "Refenergo" JSC " Pool Energo "	Coordination of economic activity	Power energy	regional	FAS	2
21	Bank VTB 24, 12 insurance companies	Coordination of economic activity	mortgage	national	FAS	13
2009						
1	JSC "Silvinit" OJSC "Uralkali"	Price collusion	Potash chloride	national	consumers, authorities	2
2	OJSC "Airline" Avis Cupid " JSC "Airline" Wostok "	collusive bid	First aid flies	regional	FSS	2
3	LLC "Agroremstroj" LLC "MONOLITSTROY" LLC "Building enterprise SMU 30"	collusive bid	Metal roofing repair	regional	consumers	3
4	8 wholesale companies	collusive bid	Supply of vegetables to educational institutions	regional	Regional administration	8
5	company "Ikea Mos"	Coordination of economic activity	Rent of offices	regional	consumers	1
6	JSC "BASSO", LLC "Promsol"	exclusive agreement	salt	national	consumers	2
7	Sverdlovsk Railways, JSC "Visavi"	exclusive agreement	Cleaning of wagons	regional	FAS	2
8	JSC "Concern" Izhmash" LLC "Deryabin oruzhie"	exclusive agreement	Civil weapon	national	FAS	2
9	JSC "Makhachkala winery"	exclusive agreement	spirits	regional	FAS	2
10	JSC "Center for emergency rescue operations and environmental operation"	Coordination of economic activity	Maintenance of dangerous industry objects	national	consumers	1
11	JSC "Center for emergency rescue operations and environmental operation" GUMO "Mosoblpozhs pas"	market sharing	Maintenance of dangerous industry objects	regional	FAS	2
12	SJSC KB "Delta Credit"	Coordination of economic activity	mortgage	regional	FAS	1
13	JSC "Baltika brewery" and 6 Distributors	market sharing	Wholesale of beer	regional	FAS	7
14	JSC "PromSvyazBank" and 12 insurance companies	Coordination of economic activity	lending	regional	FAS	13
15	SJSC «Penzanefteprodukt» «Lukoil Nizhnevolzhsknefteprodukt» LLC	Price collusion	oil products	regional		2
16	LLC. "Soda chlorate"	market sharing	Potash chlorate	regional	consumer	2
17	OJSC "AK BARS" Bank Insurance Company "Russian"	exclusive agreement	Car lending	regional	FAS	2
18	JSC "Electroapparat" "Trade House Electroapparat" LLC	barriers to entry and exit from the market	Automated switchers	national	competitor	2
19	LLC "OPUS TD"	Coordination of economic activity	Wholesale of flooring	national	FAS	1

Table No 1. (Continue)

No.	Participants	Type of violation	Market	Type of market	Investigation initiator	Number of participants in collusion
2010						
1	SJSC "TekhnoNIKOL" LLC. "TechnoNIKOL Building Systems"	market sharing	Building materials	national	Consumer	2
2	ZAO NPP "Rusperforator" PCF "Perm Powder Mill" PCF "Plant Sverdlov" JSC "Promsintez" FSUE "Bryansk Chemical Plant. 50 Years of the USSR" JSC "Kalinowski Chemical Plant"	Price collusion	Industrial explosives	national	Consumer	6
3	Sberbank of Russia, MKB "Odinban" (LLC) FSUE "Russianpost" MUP "Information billing center" of the urban settlement Odintsovo Odintsovsky municipal district, Moscow region, MUP "Housing Authority"	Coordination of economic activity	Service payments	regional	Consumer	7
4	JSC "AIFASTrahovanie" JSC "SG MSK" LLC "SG" Admiral post" "Rosgosstrakh"	Coordination of economic activity	insurance	national	consumer	6
5	NOCHU DPO "School of Business Security" NOCHU "guardian"	Price collusion	Examination for getting security license	regional	Consumer	2
6	OOO "Rexam" JSC "PC" Baltika "	Coordination of economic activity	Aluminum tins	national	Consumer	2
7	"Kotlas Poultry" ASA "Arhselprom"	Price collusion	eggs	regional	FAS	2
8	Federal Highway Administration "Chernozyom" LLC "Road maintenance company 36"	collusive bid	Road building	regional	Consumer	2
9	LLC "Agrotorg" JSC "Trading House" Perekryostok" LLC "Real Hypermarket" LLC "Lenta", JSC "Dixy" PETERSBURG", LLC "Okay"	Price collusion	buckwheat	regional	FAS	5
10	LLC "Echo", "TD Holding" OOO "RESOURCE", LLC "Vladimir & Co." OOO "Alekona", LLC "Samara Niva" LLC "Agromir"	Price collusion	buckwheat	regional	FAS	7
11	"Munros M" branch of "Wimm-Bill-Dan" JSC "Lubinsky MKK", OAO "Вита"	Price collusion	milk	regional	FAS	4
12	JSC "Kyshtymskiy Mining Complex" JSC "Polar Quartz"	exclusive agreement	Gangue quartz in fractions	regional	FAS	2
13	LLC "Lukoil Yugnefteproduct" JSC "NK" Rosneft Stavropole	Price collusion	oil products	regional	FAS	2
14	OJSC "SUEK", JSC "Russian coal" JSC "Stroiservice"	Price collusion	Energy coil	regional	Consumer	3
15	JSC "ROSBANK" Insurance Company "RESO Guarante"	Coordination of economic activity	mortgage	regional	Consumer	2

Table No 1. (Continue)

No.	Participants	Type of violation	Market	Type of market	Investigation initiator	Number of participants in collusion
16	JSC "Mozyrsalt", LLC "BOD" JSC "MC Enterpris", JSC "TDS" "Group Pack", LLC "Grosser" Ooh "Eurotrust Expo", LLC "Guild +" LLC "SevzapRegionSol St. Petersburg" LLC "Evroservis Plus"	market sharing	salt	national	FAS	10

9) establishing conditions of membership (participation) in professional and other associations, if such conditions cause or may lead to prevention, restriction or elimination of competition².

The most time-consuming step in the process of revealing the fact of concerted actions restricting competition is the need to prove that the actions made by each of the participants were known to each other. According to paragraph 2 in the Resolution of the Plenum of the Russian Federation 03.06.2008 No. 30 "On some issues arising in connection with the use of antitrust laws by commercial courts" coherence in actions, among other circumstances, may be identified by the fact that they are made by various market participants on a relatively consistent and synchronous basis in the ab-

sence of any objective reasons. It should be noted that the degree of similarity is determined by the antitrust authority, with the decision being litigated in the commercial court.

For example, in the decision of the Altai Territory commercial court the legality of the conclusions made by the FAS Office of the Altai Territory were confirmed, and the actions of JSC "Rosneft-Altainefteproduct" and JSC "Altai Gapromneft" were found a price collusion based on such features as almost simultaneous increase in prices by the same value for different brands of gasoline in the city of Barnaul, from April 3 to May 30, 2009.

In 2008-2010 Russian antitrust authorities made decisions on such types of violations as the coordination of economic activity, barriers to entry and exit from the market, geographical market division, bid rigging, price collusion and refusal of independent action by entering into exclusive contracts to the supply of goods or services.

2 "Federal law No. 135-FZ "On the competition protection" (amended on 11/29/2010)" ["Federal'nyi zakon No. 135 FZ "O zashchite konkurentsii" (v redaktsii ot 29.11.2010)"], available at: http://fas.gov.ru/legislative_acts/legislative_acts_9498.html

Table No 2. Structure of cases when the concerted actions restricting competition were proven, 2008-2009.

Type of violation	Year		
	2008	2009	2010
Coordination of economic activity	9	5	4
Barrier to entry and exit from the market		1	
Market sharing		3	1
Collusive bid		3	1
Price collusion	12	2	8
Exclusive agreement		6	1

Table No 3. Contingency table of industry indices and type of competition restriction

Type of violation Branch	Coordination of economic activity	Barrier to entry and exit from the market	Market sharing	Collusive bid	Price collusion	Exclusive agreement
Retail and wholesale	1				2	
Consumer goods	2		1		3	
Industry	1	1	2		2	3
Market of raw materials	1		1		13	2
Services for state organizations				4		
Services for population	1				3	
Services for businesses	4		1			1
Financial services	7					1

Observing the structure of violations in 2008-2010, one may conclude that the most common violations include price collusions and coordination of economic activity.

Compared with 2008, there were a significant number of coordinated actions related to the coordination of financial institutions activities in 2010. Among 12 price collusion, identified in 2008, 11 were obtained by monitoring the prices of petroleum products.

Let us consider the table 3 showing contingency of dependence data on industry and type of violation in 2008-2010.

As can be seen from the data, identifying coordination of economic activities is typical of all industry types, barriers to the entry to market and market sharing are more typical of manufactured goods, and price collusion is most frequently detected in commodity markets. This phenomenon may be caused by the

Table No 4. Contingency table of violation type indices and number of violations

Number of violators	1	2	3	4	5	More than 5
Type of violation						
Coordination of economic activity	5	5		3	2	2
Barrier to entry and exit from the market		1				1
Market sharing		4				1
Collusive bid		1	1			1
Price collusion		11	4	2	2	4
Exclusive agreement		6				
Total	5	28	5	5	2	9

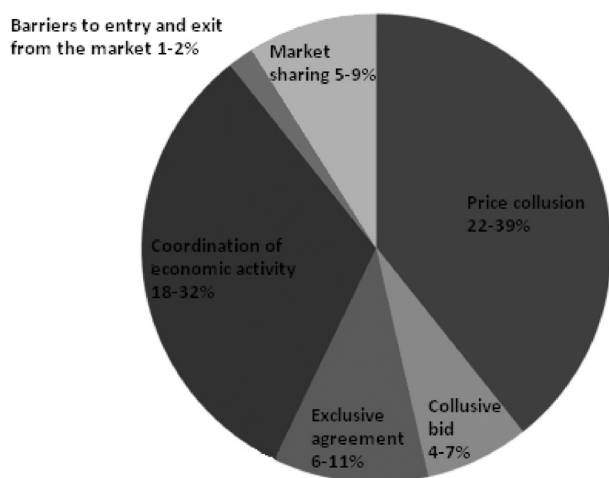


Fig. 1. Structure of revealed concerted actions restricting competition

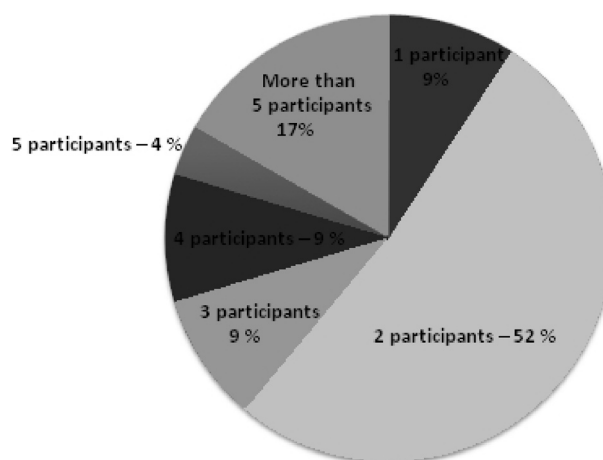


Fig. 2. Number of cases when violation was revealed

fact that the products of these industries are largely more homogenous and price changes in the absence of affecting economic factors may be more objectively proven. In addition, for socially important industry companies, one continually monitors the commodity producer prices, which could become the basis for evidences of price collusion.

The most common type of concerted action on the financial markets is the coordination of economic activities, for example, limiting the number of in-

surance companies, which are mandatory to sign a contract with, for example, while getting a mortgage.

Two companies are most commonly found violators of antitrust laws in frames of the concerted action. In particular, the most common case is to identify the collusion of two members on the same regional market (see Table 4 and Fig. 2).

In most cases it is the FAS that initiate investigation on concerted actions. Concerted actions are often detect-

Table No 5. Contingency table of violation type indices and initiator of investigation

Investigation initiator	Competitors	Authorities	Consumers	FAS
Type of violation				
Coordination of economic activity			8	10
Barrier to entry and exit from the market	1			
Market sharing			2	3
Collusive bid		2	2	
Price collusion		1	4	17
Exclusive agreement			1	5
Total	1	3	17	35

ed due to price monitoring by economic conditions being changed or during inspections initiated by press.

Based on the analysis of procedures to regulate concerted actions restricting competition, one may conclude that the antitrust authorities are more effective by revealing concerted action:

- on regional markets of raw material;
- committed by two market participants;
- reflected in establishing or maintaining the same level of prices;
- identified through monitoring.

Structure of violations over the period 2008-2010 indicates that since 2009 the number of violations detected in the national markets has substantially increased (from 1 to 6 cases).

Actions of companies related to synchronous rise in prices can be classified as abuse of dominant position, reflected in establishment of monopoly prices. To detect violations it is neces-

sary to establish the fact of collective dominance, as well as analyze pricing in order to prove that the set price exceeds the amount of costs and profits required for the production and sale of such commodity.

Bringing to justice members of anticompetitive agreements does not require the definition of its members' shares in a particular market. It should be noted that in all cases of the collusion detected in the national market of industrial or consumer goods it was possible to prove a dominant position of market participants. Thus, with respect

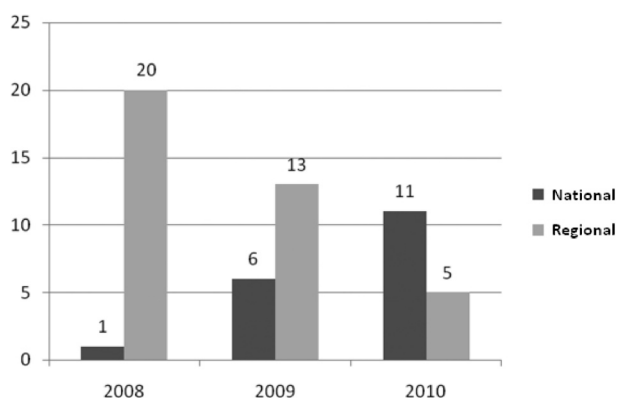


Fig. 3. Structure of concerted action cases in 2008-2010

to OJSC "Silvinit" and OJSC "Uralkali" in 2008, the Russian FAS took decisions on setting monopolistically high prices for potash chloride in the Russian Federation, to prove that it was necessary to identify collective dominance of these companies. JSC "BASSOL" and LLC "Promsol" are the only producers of salt in the territory of Russia. The text of the decision related to JSC "Electroapparat" stipulates that automatic switches are an innovation of manufacturer, therefore, the company has a monopoly on the market.

The situation is possible when concerted efforts to maintain prices are qualified as setting monopolistically high prices. For example, in 2010 the Russian FAS took a decision on the establishment of monopolistically high prices by "VimpelCom" OJSC "MegaFon", JSC "MTS" on the market of roaming services.

Under the current legislation, the fact of dominance can be proven in relation to one company, which occupies more than 35% of the market and not more than three companies covering more than 50 % of the market. Russian statistics takes into account factors of economic concentration for the significant volume of production within the borders of the Russian Federation. Assuming that

the commodity market is limited by the classifier code RCP (Russian classification of product) of particular product and geographic boundaries – by the administrative border of the Russian Federation, it is possible to compare the share of the largest company and the three largest ones.

As it can be seen from the graphs (Fig. 4), there are actually no cases where establishing a dominant position for engineering, chemical and food industries is possible for the largest market participant and impossible for the three largest market participants.

Correlation between shares of three largest enterprises producing significant amounts of different product brands of these industries.

The main difference between the case of establishing collusion associated with price increases and monopolistically high prices in frames of collective dominance is the ability to restrain violations before simultaneous price increase take place. An example of such collusion is a decision made in 2009 in respect of the concerted action of "Silvinit" and OJSC "Uralkali" – the main producers of potash fertilizers raw material and certain types of petrochemical products – on national potash market.

Correlation between shares of the largest producer and sum of three largest producers (on the basis of the given concentration data on 1101 engineering products).

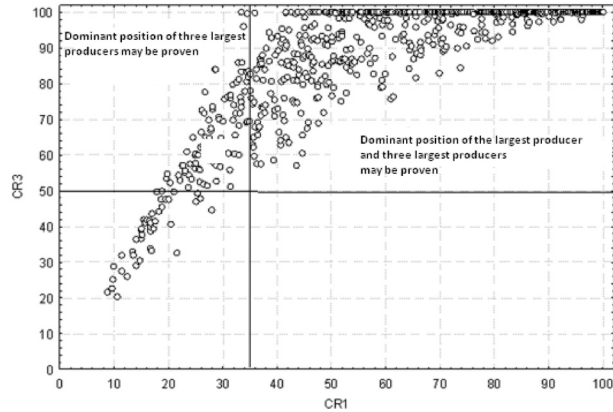


Fig. 4-a

Correlation between shares of the largest producer (CR1) and sum of three largest producers (CR3) (on the basis of the given concentration data on 648 food products).

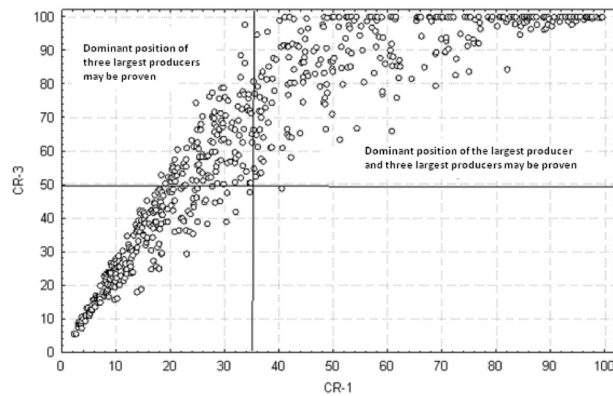


Fig. 4-b

Correlation between shares of largest chemical producer and sum of three largest producers (on the basis of the given concentration data on 395 food products).

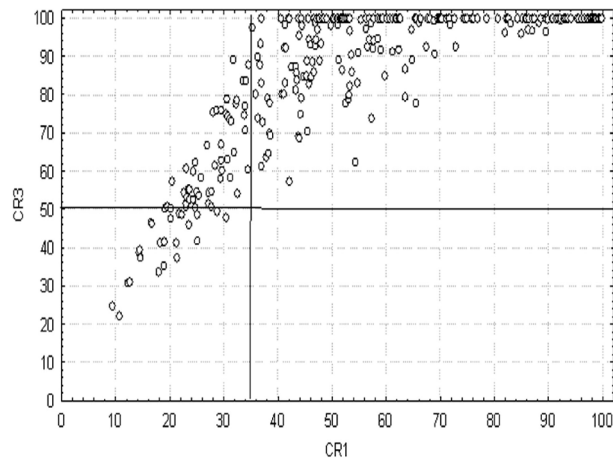


Fig. 4-c

With respect to these companies the decision was approved on the establishment of monopolistically high prices for potash in 2008.

In 2009, the actions of these companies to establish a synchronized price level were classified as consistent and restricting competition. In particular, the decision of the Commercial Court of Moscow indicates that the actions of "Silvinit" and OJSC "Uralkali" are beneficial for both parts, as the increase of potash prices by 20% from 3955 rubles to 4750 rubles per ton in the II half of 2009 was in the interests of the participants in this market. These actions are beneficial to market participants, since such a price increase would lead to an increase in profits of said business entities from the sale of potash.

By proving the evidences that efforts to increase prices were known to each of these business entities in advance, the arguments were given that these actions had been discussed at meetings with representatives of these companies and factories for the production of compound fertilizers in the Russian Ministry of Industry.

To demonstrate the lack of influence on the price level from external factors it is argued that the same level of prices was not justified by calculations based on the analysis of the cost of pro-

duction, neither it was due to economic factors. For this purpose, macroeconomic indicators were analyzed such as the number and size of fees, regulated tariffs, Russian statistics data on producer price indices in frames of activity in the Russian Federation in 2009.

The most important fact is that market participants used different approaches to establish collusion. Thus, the actions of "Uralkali" LLC were to deliver to customers the additional agreement to the supply contract specifying the new price level. The second participant of collusion made the proposal of price rising be delivered to buyers from the intermediary company. Thus, "Silvinit" LLC transferred to LLC "Mineral Trading" the entire amount of potassium chloride produced for domestic consumers in 2009, without the contract concluded between the companies containing terms of pricing. However, these actions of the company do not exclude the responsibility for setting the resale price of goods³.

Thus, in some cases, by detecting violations of the pricing order in markets with defect structures, more efficient method of control can be qualified as a set of price collusion attributes, and not facts of setting monopolistically high prices in terms of collective dominance.

³ Ibid.

Conclusion

The most important way to improve the regulation of coordinated action is a change in the legislation which allows regulating certain markets. About 14 % of all detected concerted actions refer to the coordination of activities in the financial markets. In order to reduce the possibility of such violations' extension, the Government Decree of April 30, 2009 No 386 adopted the "General exclusions in respect of agreements between credit and insurance organizations," including a list of illegal agreements among financial market participants, which significantly reduced the number of agreements in the financial markets in 2009 compared to 2008.

Virtually all of the violations in 2010 were related to the agreements in the mortgage market⁴. For example, the Office of the Federal Antimonopoly Service of the Komi Republic found that the "ROSBANK" and the insurance company "RESO Guarantee" signed an invalid agreement for mortgage lending on the property insurance market, according to which the bank's clients, in addition to compulsory insurance of purchased real estate under the law "On mortgage (mortgage)", were offered to voluntarily

insure their life and labor ability. At the same time customers purchasing additional services get reduced charges on property insurance.

To reduce violations of antitrust legislation the Russian FAS introduced draft amendments to the Government Decision of 30 April 2009 No 386, which covers relationships in the mortgage market. On December 3, 2010 the Russian Federation Government with its Resolution No. 968 amended the Government Decree of April 30, 2009 number 386, according to which the legal obligation to accept insurance on the credit period is allowed for mortgage agreements if it is possible to pay a premium by installments with an installment payment being made minimum once a year.

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Возможности и ограничения регулирования согласованных действий участников рынков Российской Федерации

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Аннотация

В статье рассматриваются современная система государственного регулирования согласованных действий участников рынков реального и финансово-

го сектора экономики. В частности, анализируется практика регулирования различных видов сговоров участников рынков и выявляются ограничения по выявлению и злоупотреблению доминирующим положением на рынке.

Ключевые слова

Антимонопольное регулирование, согласованные действия, государственное регулирование, реальный сектор экономики.

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