



Antimonopoly Legislation and Practice of the Federal Antimonopoly Service of the Russian Federation as Sources of Methodology for Detecting and Investigating Restrictions on Competition

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Abstract

Introduction: the article is devoted to the study of methods for identifying and investigating restrictions on competition. *Purpose:* to determine the nature and place of antimonopoly legislation and practice of the Federal Antimonopoly Service of the Russian Federation. The research is based on comparative legal, system-structural, descriptive-analytical *methods*. *Results:* in the course of the study, three groups of sources of methods for identifying and investigating restrictions on competition are identified, analyzed and generalized. The place of antimonopoly legislation and practice of the Federal Antimonopoly Service of the Russian Federation in the system of sources is determined. The specifics of the practice of the Federal Antimonopoly Service of the Russian Federation in relation to penitentiary institutions are highlighted. *Conclusions:* the author concludes that the antimonopoly legislation and practice of the Federal Antimonopoly Service of the Russian Federation are informational and theoretical in nature, while individual acts of the agency are methodological in nature.

Key words: restriction of competition; investigation of restriction of competition; investigation methodology; sources of private investigation methods; antimonopoly legislation; practice of the Federal Antimonopoly Service of the Russian Federation.

5.1.4. Criminal law sciences.

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Introduction

When analyzing the methodology for identifying and investigating restrictions on competition, well-established methodological approaches to the formation of private forensic techniques are used. These aspects in relation to the sources of private investigation techniques are most fully described by R.S. Belkin [1, p. 709] and N.P. Yablokov [2, p. 541], in re-

lation to forensic characteristics of crimes – by A.A. Bessonov [3, p. 20], in relation to crime mechanism models – by A.M. Kustov [4, p. 152], in relation to theoretical and practical views on the investigation of economic crimes – by A.V. Shmonin [5, p. 238].

Purposes of our research are the following:

1. Analysis of the sources of methods for identifying and investigating restrictions on competition.

2. Identification of groups of sources and disclosure of their information-theoretical and methodological nature.

3. Identification of signs of antimonopoly legislation and practice of the FAS of Russia, allowing to determine the nature and place of these sources in the general system.

4. Generalization of the specifics of the practice of the FAS of Russia related to the criminal prosecution of representatives of bodies and institutions of the penal system.

The empirical basis of the study consists of 235 criminal cases initiated in 2009–2024 under Article 178 of the Criminal Code of the Russian Federation “Restriction of competition” and in combination with other crimes, of which 65 cases (27.7%) were sent to court, 61 cases (25.9%) were suspended, 58 cases (24.6%) were terminated [6].

We surveyed 82 heads and employees of investigative departments. The representativeness of the sample is due to the high professional and educational level, as well as the personal participation of the respondents in the procedural control or investigation of criminal cases on restriction of competition. About 30% of the respondents mention analytical reviews containing both the practice of law enforcement agencies and the Federal Antimonopoly Service of Russia as sources available in investigative units.

The concept of a source in criminology meaningfully corresponds to its lexical meaning, which means the beginning of something, the document underlying scientific research [7, p. 290]. Scientists use this term regardless of its attribution to specific sections of criminology, but it is used more than others in the forensic methodology for investigating certain types (groups) of crimes (hereinafter referred to as the investigative methodology).

For example, R.S. Belkin notes that forensic recommendations of a private nature are formed on the basis of an exhaustive list of elements, including science, law and several types of practical activities [1, p. 710]. N.P. Yablokov integrates sources into the system of general provisions of the investigation methodology. The scientist notes their basic informational nature considering them “information sources of investigation methodology” [2, p. 542]. In turn, private methods of investigation, according to

N.P. Yablokov, are based on information-theoretical and methodological principles, which are essentially the results of scientific generalization of forensic characteristics, patterns of criminal activity and activities for its investigation [2, p. 544].

This paradigm corresponds to the position of A.M. Kustov who studies the formation of forensic science and practice in the historical aspect from the moment of its first legal consolidation to the present day. The scientist considers criminal law and criminal procedure legislation, science, law enforcement practice of relevant authorities and forensic medicine as the main sources [4, pp. 6–61]. Yu.P. Garmaev also mentions law, practice and science as sources in a generalized form [8, p. 28].

Analyzing features of the sources for forming forensic knowledge about the investigation of a particular group of crimes, A.V. Shmonin and E.N. Zemskova actually identify them with sources of the eponymous private investigation methodology and forensic recommendations [9, p. 155]. Among these, the authors identify law, investigative and judicial practice, science and technology, as well as legal positions of judicial and supervisory authorities related to the procurement of goods, works, and services to meet state and municipal needs [9, pp. 253–256].

Taking into account the noted positions of researchers, we consider law, scientific developments and practice to be the sources of the methodology for identifying and investigating restrictions on competition.

Key provisions

Analyzing the nature of crimes that restrict competition, it should be noted that antimonopoly legislation occupies a special place among legal sources. This group includes the Constitution of the Russian Federation (articles 8, 34, 74), the Civil Code of the Russian Federation, federal laws of the Russian Federation, current laws of the RSFSR aimed at protecting competition, as well as subordinate regulatory legal acts of the Government of the Russian Federation and the Federal Antimonopoly Service of Russia.

Thus, the federal law No. 135-FZ of July 26, 2006 “On protection of competition” contains:

– legal concepts used in the forensic characterization and methodology for detecting and investigating competition restrictions;

- a list of business entities and antimonopoly characteristics of a group of persons used to outline the circle of criminals when building versions;

- forms and features of a cartel agreement based on which the ways of limiting competition are determined;

- types of possible consequences from agreements that restrict competition, underlying forensic recommendations for assessing the category and amount of damage caused by a crime;

- types of control of one business entity over another and other conditions for the admissibility of agreements that restrict competition, which are circumstances that must be proven at the pre-investigation and initial stages and eliminate the criminality of the act, etc.

The law of the RSFSR No. 948-1 of March 22, 1991 “On competition and restriction of monopolistic activity in commodity markets” reveals the concept and types of affiliated companies that are used in the forensic characterization of competition restrictions.

From a legal and technical point of view, the regulatory legal acts of the FAS of Russia also relate to antimonopoly legislation and are issued in the form of orders, regulations or instructions. For example, the Procedure for analyzing the state of competition in the commodity market approved by the order No. 220 of the Federal Antimonopoly Service of Russia of April 28, 2010 contains provisions on which the methodology for detecting and investigating restrictions on competition is based when determining the situation and circumstances of crimes of the category in question, when forming typical investigative situations at the pre-investigation, initial and subsequent stages.

Important legal sources are acts containing the official interpretation of Russian legislation in the form of methodological recommendations, information letters and clarifications. This practice was established in connection with the amendments initiated by the FAS of Russia to the Criminal Code of the Russian Federation, the federal law “On protection of competition” and other laws of the Russian Federation through the so-called antimonopoly packages. For example, in the letter of the FAS of Russia No. IA/48801 of December 27, 2011 “On the application of the third package of the Antimonopoly Package”, the categories of economic enti-

ties involved in restricting competition and the types of anticompetitive agreements subject to criminal prosecution are deciphered.

We agree with the above opinion of N.P. Yablokov regarding the information-theoretical and methodological principles of the private investigation methodology. By their nature, the legal sources of methods for identifying and investigating restrictions on competition are not intended to assist an investigator in investigating restrictions on competition or to provide recommendations on specific issues of practice. That is why the antimonopoly legislation and acts of the Federal Antimonopoly Service of Russia are mostly informational and theoretical in nature.

However, there are exceptions to this rule, such as Methodological recommendations on the organization of interaction between the FAS of Russia and interested law enforcement agencies to identify, disclose and investigate crimes related to restriction of competition (Article 178 of the Criminal Code of the Russian Federation) (the document has not been published). This act is considered as a methodological source in connection with the coverage of tactical aspects of the interrogation of witnesses, suspects and the accused; search and seizure in business entities; involving employees of the territorial bodies of the Federal Antimonopoly Service of Russia as specialists and witnesses in criminal cases on restriction of competition.

Many scientists representing various branches of knowledge analyze antimonopoly legislation and practice of the FAS of Russia. The main areas of their research are legal regulation of competition and monopoly institutions, development and protection measures, and characterization of a wide range of crimes that infringe on competition.

Thus, the issues of improving state policy in the market sphere are considered by A.N. Varlamova, who in one of her works cites the doctrinal concept of competition. In our opinion, the author’s position is close to criminology, which defines competition in a narrow sense as “a process of competition in the market between business entities (groups of persons) for achieving advantages in order to obtain the most favorable conditions for the sale of goods within the limits established by law” [10, p. 13]. This definition can be used in forensic characterization along with the legal

one set out in the federal law “On protection of competition”.

D.A. Plekhanov provides classification of acceptable and unacceptable agreements under antimonopoly law [11, p. 106]. These provisions can be used in the methodology for identifying and investigating restrictions on competition in the development of common versions at the pre-investigation and initial stages of the investigation.

Changes in criminal legislation in the antimonopoly sphere at the present stage are analyzed by O.E. Derevyagina. The author’s research on elements of the cartel and her conclusion on the exclusion of self-employed persons and certain categories of auditors and appraisers from the list of subjects of competition restriction are significant for forensic characterization of competition restriction [12, pp. 7, 10].

A.Yu. Kinev and O.P. Frantskevich based on the practice of the FAS of Russia systematize cartels in the field of healthcare combining types of criminal activities and the nature of the participation of various individuals in them. Scientists include the following acts that infringe on competition: a traditional cartel, a cartel and an agreement with a customer, cartel coordination, an agreement between several cartels, multiple cartel agreements with elements of coordination and collusion with a customer [13, pp. 10–13]. A.V. Danilovskaya and A.P. Tenishev considering collusion at auctions actually refers to the methods of crimes committed in this area: cartel, cartels at auctions, collusion at auctions, collusion with the organizer (customer) of auctions [14, p. 122]. The system developed by scientists uses criminalistically significant signs of the situation (bidding) and the mechanism of commission (collusion), which makes it possible to apply it in the methodology for detecting and investigating restrictions on competition. However, the incompleteness of the author’s list is also obvious due to its spread only to the sphere of trade, which is one of the subsystems in the field of commodity markets.

There are currently no comprehensive scientific papers by criminologists based on the study of the practice of applying antimonopoly legislation and its use in the investigation of competition restrictions. Certain methodological and tactical aspects of the commission and investigation of crimes that restrict competition

are reflected in the works developing related private investigation techniques.

For example, in the work of V.V. Kryukov, “low efficiency of control ... creating prerequisites for abuse of official powers, illegal participation of officials in business activities” is noted as the causes and conditions contributing to the commission of crimes [15, pp. 18–19]. In fact, revealing the models of the corruption crime mechanism, N.N. Lashko calls assistance in the implementation of unfair competition methods as criminal acts committed by representatives of public authorities [16, p. 55]. E.N. Zems-kova, analyzing the acts committed in the field of procurement of goods, works and services for state (municipal) needs, identifies two generalized groups of crimes that restrict competition: collusion of bidders with representatives of the customer and collusion of bidders among themselves about the behavior and winners at the auction [17, p. 101].

Studying the methods of corruption crimes in the economic sphere, M.G. Mussov builds one of the classifications based on administrative barriers established by representatives of state authorities and local governments. On this basis, the researcher identifies three categories of crimes that, in our opinion, relate to the restriction of competition: those that make it difficult for an enterprise to enter the market, those that make it difficult for a product to enter the market, and those that make it difficult for an enterprise to operate [18, p. 113].

Thus, it should be noted that the antimonopoly legislation and practice of the FAS of Russia are used by scientists as an information and theoretical source mainly for the development of methods and models of the mechanism for committing crimes and are the basis for forming “methodological principles” of methods for detecting and investigating restrictions on competition.

Considering the functioning of the FAS of Russia as one of the activities aimed at identifying and investigating restrictions on competition, we make a reservation that it is not the practice itself that matters, but the results of its scientific processing using appropriate methodological tools: systematization, generalization, analysis, etc. This aspect in relation to private investigation techniques has been repeatedly noted in the works of criminologists.

Based on the concept of N.P. Yablokov, the practice of the FAS of Russia has been attrib-

uted by us to the information-theoretical principles of the methodology for detecting and investigating restrictions on competition based on the following criteria:

- it should be considered using the conceptual apparatus and methodology of criminology;
- it contains information about the criminal activity included in forensic characteristics and models of the competition restriction mechanism;
- it is not applied in its pure form in the process of identifying and investigating restrictions on competition;
- it acquires forensic significance after being used in investigative practice.

However, the issue of determining the practice of the FAS of Russia as an independent source and laying private investigation methods only on the practice of investigative authorities requires clarification.

R.S. Belkin, highlighting the issues of the formation of private forensic techniques, note both investigative and operational-investigative and expert practice as their sources [1, p. 709]. I.A. Vozgrin, on the contrary, when highlighting private principles of forensic methods of investigating crimes, point out that their practical value is based on the study of the experience of investigators, the content of which is both positive achievements and shortcomings [19, p. 272]. S.N. Churilov considers generalization of criminal and investigative practice containing forensically significant information, including on crime investigation activities, a fundamental principle [20, p. 15].

We back the point of view of Yu.P. Garmaev who criticizes the only use of “crime investigation activities” as a basis of private investigation techniques. The author cites as a source the “non-criminal” practice of specialized bodies exercising control over foreign economic activity [8, p. 35]. A similar concept is outlined by L.V. Bertovskii who also considers materials of inspections conducted by regulatory authorities as “sources of cognitively significant information” at the stage of initiating a criminal case [21, pp. 33, 34].

The materials of criminal cases indicate the active involvement and participation of territorial bodies of the FAS of Russia at the pre-investigation and initial stages. Antimonopoly authorities are often the sources of information on the

restriction of competition for law enforcement agencies. Before initiating criminal proceedings, they carry out administrative, verification and other procedures, the documents of which are attached to the materials of preliminary audit.

As an example, we will consider a criminal case initiated based on the materials of the Department of the Directorate of the State Courier Service of Russia in the Volga Federal District against managing directors of LLC “F” and LLC “T” who entered into a cartel agreement to maintain prices at auctions for the supply of medicines, medical devices, foodstuffs and the provision of services for the transportation of medicines for the needs of the National Medical Research Center Named after Academician E.N. Meshalkin and received income in the amount of four hundred and twenty-six million two hundred and seventy-four thousand five hundred and six rubles and thirty-four kopecks. In 2019, the Main Investigation Department of the Main Directorate of the Ministry of Internal Affairs of Russia in the Novosibirsk Oblast sent this criminal case to the court under paragraph “b” of Part 2 of Article 178 of the Criminal Code of the Russian Federation [22].

Turning to the specifics of the practice of the FAS of Russia in relation to representatives of institutions of the penal system, we note the following:

1. Only a part of the antimonopoly practice used in the investigation of criminal cases on restriction of competition is important for our research.

2. Institutions of the Federal Penitentiary Service of Russia are considered by the territorial bodies of the Federal Antimonopoly Service of Russia as an economic entity that is fully subject to the requirements of antimonopoly legislation.

3. The materials of inspections of the territorial bodies of the FAS of Russia, which include representatives of penitentiary institutions, contain traces of restrictions on competition, as well as corruption, official and other crimes.

4. For methods of detecting and investigating restrictions on competition, the practice of the FAS of Russia related to penitentiary institutions is a source of information on ways to restrict competition – cartel agreements in the commodity market when concluding contracts with a single supplier.

The above conclusions can be illustrated by a criminal case sent to the court by the investigative department for the city of Volzhsky of the Investigative Committee of the Russian Federation in the Volgograd Oblast under paragraph "a" of Part 2 of Article 178, Part 1 of Article 286, Part 1 of Article 293 and Part 3 of Article 159 of the Criminal Code of the Russian Federation against the head of the Capital Construction Department of the administration of the city of Volzhsky, director of LLC "K" and the head of the correctional facility. These citizens entered into a cartel agreement to cancel results of the electronic auction for the construction of a preschool educational institution and conclude a contract without competitive procedures with the sole contractor of the correctional facility, with the work being actually performed by LLC "K". The implementation of the cartel agreement entailed the receipt of income in the amount of one hundred and thirty million one hundred and sixty-six thousand four hundred and seventy-five rubles by the penitentiary institution. The investigation proved both complicity in restricting competition and negligence in the actions of the head of the correctional facility [23].

Thus, the practice of the FAS of Russia should be considered as a separate source of methodology for identifying and investigating restrictions on competition. We consider it important to note that not the entire range of antimonopoly authorities' competition protection activities is subject to study, but only the part related to criminal prosecution. In this case, the physical carriers of traces of competition restrictions are materials of inspections and cases of violation of antimonopoly legislation, individual legal

acts, analytical reviews on the state of competition, letters and other documents generated in the activities of territorial bodies of the FAS of Russia and used in criminal cases.

Conclusion

The general provisions outlined by N.P. Yablokov regarding the information-theoretical and methodological nature of the sources of private investigative techniques are fully applicable to the methodology for identifying and investigating restrictions on competition. The interim results of the study of legal sources, scientific developments and practices are reflected in the following conclusions:

1. Antimonopoly legislation, including regulatory legal acts of the Federal Antimonopoly Service of Russia, is an informational and theoretical legal source of methods for identifying and investigating restrictions on competition. Its provisions are used in the forensic characterization of competition restrictions; when forming typical versions; and when analyzing investigative situations and planning at various stages of the investigation.

2. Certain acts of the FAS of Russia containing recommendations for investigation, official interpretation of the legislation of the Russian Federation and other aspects are methodological in nature.

3. The practice of the FAS of Russia related to criminal prosecution, along with the practice of law enforcement agencies, is an independent information and theoretical source.

4. Antimonopoly legislation and practice of the FAS of Russia, as a result of scientific analysis, make it possible to form methodological principles for identifying and investigating competition restrictions.

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