

Abstract

As anti-competitive agreements amongst rivals harm both the national economies and the global market, there is a lively international debate on how to design a cartel offence because civil fines are insufficient to deter cartels. A criminal offence was adopted in Russia over twenty-five years ago, as part of its market liberalisation, having made Russia one of the earliest adopters. However, the offence remains unenforceable.

This thesis takes as its starting point the examination of Russia's cartel criminalisation. This research investigates how Russia's cartel offence is different from offences in other jurisdictions, how the motivation behind the introduction of the cartel offence in Russia affected cartel enforcement, what atypical characteristics of Russia's anti-cartel regime are, and identifies how it can be made more effective. This is an original contribution because none of these areas have been studied in the context of internationally recognised objectives and challenges of cartel criminalisation in the existing literature.

The thesis begins by introducing the peculiarities of Russia's cartel offence; then it goes on to identify what the motivation behind the introduction of criminal sanctions was and continues with examining the unusual effects-based nature of the cartel prohibition. Following a detailed examination of Russia's criminal offence, how the civil prohibition operates alongside the criminal regime and the multiple leniency programmes available, the thesis narrows its focus to bid-rigging and asks whether it should be treated differently. As the identified issues are very wide in scope, a stand-alone chapter then justifies and formulates suggestions for policy reforms.

The thesis identifies the principal shortcomings of Russia's criminalisation and the factors that caused them; also, it substantiates the focus on the enforcement of the offence against bid-rigging to address the identified issues. It concludes with a set of recommendations of how Russia's anti-cartel regime can be improved. This thesis is doctrinal in nature. In addition to applying primary and secondary sources, it uses unique interviews and case studies, and interdisciplinary methods from economics, socio-legal and political studies.

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Abbreviations

DOJ	US Department of Justice, Antitrust Division
CMA	UK Competition and Market Authority
EC	European Community
ECJ	European Court of Justice
ECN	European Competition Network
EU	European Union
FAS	Federal Antimonopoly Service of Russia
FTC	US Federal Trade Commission
FZ 135	Federal Law on Protection of Competition
GBP	British Pound
ICN	International Competition Network
NCA	National Competition Authority
OECD	Organisation for Economic Co-operation and Development
OFT	UK Office of Fair Trading
StGB	German Criminal Code
TFEU	Treaty on the Functioning of the European Union
UK	United Kingdom
UNCTAD	United Nations Conference on Trade and Development
US	United States of America
RUB	Russian Ruble

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Natalya Mosunova
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Chapter 1. Introductory Chapter

1.1. Background to the Project

It is believed that consumers benefit from competition when competing firms are forced by the competitive pressure to keep prices close to their costs while colluding firms, by agreeing not to compete, take away this pressure provided by competition and some of the resulting benefits to consumers, and thus gain monopoly profits at their expense. The OECD defines ‘hard-core’ cartels as ‘an anticompetitive agreement, anticompetitive concerted practice, or anticompetitive arrangement by competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by allocating customers, suppliers, territories, or lines of commerce’.¹ The OECD condemns hard-core cartels as unambiguously bad:

They cause harm amounting to many billions of dollars each year. They interfere with competitive markets and with international trade. They affect both developed and developing countries, and their effect in the latter may be especially pernicious. Their participants operate in secret, knowing that their conduct is unlawful.²

¹ Council OECD, ‘Recommendation of the OECD Council Concerning Effective Action against Hard Core Cartels’ (1998) C(98)35/FINAL-C/M(98)7/PROV 3.

² ‘Hard Core Cartels Third Report On The Implementation Of The 1998 Recommendation’ (OECD 2005) 7 <<https://www.oecd.org/competition/cartels/35863307.pdf>> accessed 29 July 2018.

Cartel agreements are estimated to increase prices by between 18.2% and 23%³ and affect markets worth tens of billions of US dollars.⁴ In addition to raising prices, cartels lead to restricted supply. Also, cartel members enjoy collective market power because their consumers cannot switch to a cheaper product or service, so some goods and services become unavailable to purchasers and unnecessarily expensive for others.⁵ UNCTAD finds that cartels typically form in markets of essential goods for which there are few substitutes and thus affect individuals' standard of living adversely.⁶ Consumers in developing countries and economies in transition are particularly sensitive to cartel harm, as monopoly prices also reduce the purchasing power of poorer consumers. For instance, reducing the price of food staples by 10% through better tackling of cartels could lift 500,000 people in Kenya, South Africa and Zambia out of poverty - according to the World Bank.⁷

International cartels badly affect both the State economies in which the members reside and the global market⁸ by dividing the market amongst themselves and preventing new competitors from entering, by setting predatory prices or using other

³ John Connor and Robert Lande, 'Cartel Overcharges and Optimal Cartel Fines', *Issues in Competition Law and Policy*, vol 3 (2008) <https://scholarworks.law.ubalt.edu/all_fac/720>; John M Connor, 'Price-Fixing Overcharges: Revised 3rd Edition' (2014) SSRN Scholarly Paper <<https://papers.ssrn.com/abstract=2400780>> accessed 21 August 2018; Florian Smuda, 'Cartel Overcharges and the Deterrent Effect of EU Competition Law' (ZEW 2012) <<http://ftp.zew.de/pub/zew-docs/dp/dp12050.pdf>> accessed 16 October 2017; Yuliya Bolotova, 'Cartel Overcharges: An Empirical Analysis' (2006) SSRN Scholarly Paper <<https://papers.ssrn.com/abstract=931211>> accessed 21 August 2018; Y Bolotova, JM Connor and D.J. Miller, 'Factors Influencing the Magnitude of Cartel Overcharges: An Empirical Analysis of the US Market' (2009) 5 *Journal of Competition Law and Economics* 361; Marcel Boyer and Rachidi Kotchoni, 'How Much Do Cartel Overcharge?' (2015) 47 *Review of Industrial Organization* 119; OECD, 'Hard Core Cartels' (2000) <<http://www.oecd.org/competition/cartels/2752129.pdf>> accessed 21 August 2018.

⁴ It is hard to estimate their cost accurately for global markets and particular jurisdictions but even rough estimates for the US commerce exceed billions of the US dollars a year. See JM Griffin, 'Criminal Cartel / Enforcement Status Reports' (2001) <<https://www.justice.gov/atr/speech/criminal-cartel-enforcement-status-reports>> accessed 29 July 2018.

⁵ OECD, 'Recommendation of the OECD Council Concerning Effective Action against Hard Core Cartels' (n 1).

⁶ UNCTAD, 'The Impact of Cartels on the Poor' (2013) TD/B/C.I/CLP/24/Rev.1 <http://unctad.org/meetings/en/SessionalDocuments/ciclpd24rev1_en.pdf> accessed 15 June 2018.

⁷ The World Bank Group., 'Breaking Down Barriers: Unlocking Africa's Potential through Vigorous Competition Policy' (2016) <<http://documents.worldbank.org/curated/en/243171467232051787/pdf/106717-REVISED-PUBLIC-WBG-ACF-Report-Printers-Version-21092016.pdf>>.

⁸ John M Connor, *Global Price Fixing* (2nd edn, Springer-Verlag 2007) 50.

anticompetitive strategies to force other firms out of the market.⁹ The economic harm of cartels can be summed up as maximizing cartelists' collective profits leading to losses of allocative efficiency and consumers' welfare. In some cases, these artificially high prices allow inefficient firms to stay in operation and prevent them from being driven out of the market by competition.¹⁰ Sometimes, academics draw parallels between cartels with theft and fraud as horizontal agreements can be seen as 'deliberate and secretive manoeuvres intended to maximise profit, carried into effect by means of sophisticated and obfuscating measures'.¹¹ Cartels are often very well organised institutions with the effective distribution of power among members, voting structure and mechanisms of detecting and deterring cheating,¹² and for this reason, the estimated probability of discovering a cartel is thought to be between ten and twenty per cent only.¹³

As cartels are seen as 'cancers on the open market economy',¹⁴ 'the supreme evil of antitrust',¹⁵ overcharging consumers many billions of dollars each year¹⁶ and one of the gravest economic crimes,¹⁷ they should be deterred to prevent all this harm. Many jurisdictions see deterring cartels and preventing economic harm as major justification

⁹ Louis Kaplow, *Competition Policy and Price Fixing* (Princeton University Press 2013) 24 <<https://press.princeton.edu/titles/10005.html>> accessed 30 July 2018.

¹⁰ M Furse, *Competition Law of the EC and UK* (5th edn, OUP Oxford 2006) 147.

¹¹ Christopher Harding and Julian Joshua, *Regulating Cartels in Europe* (Second Edition, Oxford University Press 2010) 7.

¹² Margaret C Levenstein and Valerie Y Suslow, 'What Determines Cartel Success?' (Social Science Research Network 2006) SSRN Scholarly Paper ID 299415 <<https://papers.ssrn.com/abstract=299415>> accessed 30 July 2018.

¹³ John M Connor, 'Global Cartels Redux: The Amino Acid Lysine Antitrust Litigation 1996' (Social Science Research Network 2009) SSRN Scholarly Paper ID 1408070 <<https://papers.ssrn.com/abstract=1408070>> accessed 30 July 2018.

¹⁴ Mario Monti, 'Why and How? Why Should We Be Concerned with Cartels and Collusive Behaviour? 3rd Nordic Competition Policy Conference Stockholm, 11-12 September 2000' <http://europa.eu/rapid/press-release_SPEECH-00-295_en.htm> accessed 30 July 2018.

¹⁵ *Verizon Communications Inc v Law Offices of Curtis V Trinko, Llp (Syllabus)* (2004) 540 US 398 (US Supreme Court) 408.

¹⁶ JM Connor and RH Lande, 'Optimal Cartel Deterrence: An Empirical Comparison of Sanctions to Overcharges Working Paper No 11-08' (2011) in Furse (n 10).

¹⁷ Bruce Wardhaugh, *Cartels, Markets and Crime: Normative Justification Criminalisation Economic Collusion* (Cambridge University Press 2014).

for cartel criminalisation,¹⁸ because corporate fines are capped to an amount which does not outweigh the benefits of collusion.¹⁹ Fines punish only corporations and thus cannot deter individuals even in countries where cartel fines are punitive in character and size.

Increasing fines up to an amount sufficient for ‘optimal’ cartel deterrence²⁰ is not a solution because increased fines would affect the interests of other stakeholders in the firm (employees, shareholders, suppliers, customers, creditors and tax authorities) and may lead to bankruptcy.²¹ Also, fines do not always guarantee adequate incentives for responsible individuals within the firm and thus do not guarantee cartel deterrence. Individual criminal sanctions are supposed to make those persons think more carefully before engaging in cartels,²² so prison sentences seem ‘the most effective deterrent for hard-core cartel activity.’²³ Criminal sanctions aim to punish the right people, because the decision to collude is made by particular employees, and these employees may leave the company at the moment a cartel is discovered or are just comfortable shifting all risks onto their company. However, ‘[t] here is no evidence to suggest that cartel criminalisation is being driven by any kind of surge in popular outrage or moral opprobrium associated with the act of forming a cartel.’²⁴ Yet many believe that a uniquely strong moral message²⁵ to potential violators and society supplements deterrent effect of criminal sanctions.

¹⁸ Andreas Stephan, ‘An Empirical Evaluation of the Normative Justifications for Cartel Criminalisation’ 37 *Legal Studies* 621, 625.

¹⁹ See more about deterrence problem in chapter 3

²⁰ Gary Becker, ‘Crime and Punishment: An Economic Approach’ (1968) 76 *Journal of Political Economy* 169.

²¹ WPJ Wils, *Efficiency and Justice in European Antitrust Enforcement* (Oxford, Hart, 2008) 181.

²² Stephan, ‘An Empirical Evaluation of the Normative Justifications for Cartel Criminalisation’ (n 18).

²³ Belinda A Barnett, ‘Criminalization Of Cartel Conduct - The Changing Landscape’ (2015) <<https://www.justice.gov/atr/criminalization-cartel-conduct-changing-landscape>> accessed 30 July 2018.

²⁴ Stephan, ‘An Empirical Evaluation of the Normative Justifications for Cartel Criminalisation’ (n 18).

²⁵ Barnett (n 23).

That is why many jurisdictions²⁶ have adopted criminal regimes for cartel offences, and the debate is focused on challenges that have appeared in the course of adopting a criminal regime in competition law rather than on whether criminalisation of competition law was ever a good idea.²⁷ Indeed, numerous failures have been revealed and examined in the UK,²⁸ Australia,²⁹ Canada,³⁰ and other jurisdictions.³¹ However, what happens in criminal enforcement of competition law in Russia is still a mystery, and many academics will be unaware that Russia even has a criminal cartel offence.

The motivation behind Russia's cartel criminalisation, its effectiveness and its consistency with the purposes of competition law have not been addressed in the existing literature. It is worth noting, that when many jurisdictions tolerated cartels for various reasons, in the USSR, setting prices at levels other than those prescribed by the State was grounds for prosecution for many decades, and justification of cartel harmfulness remains a very sensitive topic³² in contemporary Russia, as the wrongfulness of cartels is not clear. At first glance, Russian criminal cartel regimes employ a set of conventional tools. In Russia, the first criminal anticompetitive offence was introduced in 1992, the leniency programme in the criminal procedure – in 2009. Institutions to enforce competition laws have been created, and now they are represented by 84 regional offices of competition authorities so that their structure corresponds with the structure of investigating agencies at the same level. A great

²⁶ Andreas Stephan, 'Four Key Challenges to the Successful Criminalization of Cartel Laws' (2014) 2 *Journal of Antitrust Enforcement* 333.

²⁷ M Furse, *The Criminal Law of Competition in the UK and in the US. Failure and Success* (Edward Elgar Publishing 2012) 2.

²⁸ Furse (n 26); Peter Whelan, *The Criminalization of European Cartel Enforcement: Theoretical, Legal, and Practical Challenges* (Oxford University Press 2014).

²⁹ Caron Beaton-Wells, 'Cartel Criminalisation and the Australian Competition and Consumer Commission: Opportunities and Challenges', *Criminalising Cartels Critical Studies of an International Regulatory Movement* (C Beaton-Wells & A Ezrachi, Oxford, Hart 2011); Caron Beaton-Wells, 'The Politics of Cartel Criminalisation: A Pessimistic View from Australia' (2008) 29 *ECLR* 185.

³⁰ D Martin Low QC and Casey W Halladay, 'Redesigning a Criminal Cartel Regime: The Canadian Conversion', *Caron BeatonWells & Ariel Ezrachi (eds) Criminalising Cartels: Critical Studies of an Interdisciplinary Regulatory Movement* (Hart Publishing Oxford 2011).

³¹ Caron Beaton-Wells and Ariel Ezrachi (eds), *Criminalising Cartels: Critical Studies of an Interdisciplinary Regulatory Movement* (Hart Publishing Oxford 2011).

³² See Chapters 2 and 3

number of cartels are detected every year: in 2017 competition authorities reported the discovery of over 300 prohibited horizontal agreements.³³

Nevertheless, the Russian cartel offence remains virtually unenforced: the only ‘pure’ custodial sentence for cartel was reported in 2014; the previous statistics on the use of the anti-cartel criminal norm is estimated as inaccurate because anti-cartel norms were misapplied to other crimes.³⁴ Therefore, despite a great number of detected horizontal agreements, criminal sanctions for cartels in Russia do not work in the area in which they were designed for, and administrative fines for undertakings and individuals still prevail.³⁵

In addition to the unenforceability of the offence, there is evidence that the criminal offence is having a negative effect on the enforceability of civil anti-cartel enforcement. One of the recent examples is the criminal investigation against the Russian representative office of Siemens, Swiss company Diatech, two Russian undertakings and the Ministry of Health of Yakutia regarding the purchase of medical equipment for more than three times the market price.³⁶ In the course of the investigation, materials were sent to competition authorities who found that parties concluded the anticompetitive agreement on the tender and imposed fines on Diatech in the amount of 100 000 RUB (0.02 % of the tender price) and Siemens 23 518 665.20 RUB (6 % of the tender price). However, later the criminal investigation was closed for procedural reasons. When Siemens with Diatech appealed the civil decision of competition authorities to Moscow Commercial Court, the fact that the criminal case was terminated by the investigator became one of the grounds for the Commercial Court to reverse the decision of competition authorities to impose fines. The appeal court upheld the judgement. Therefore, although the equipment was purchased for three times the competitive price while the tender was organised for lowering prices,

³³ ‘ФАС России | Интервью с Андреем Тенишевым. Картели: Итоги Работы ФАС России За 2017 Год и Планы На 2018 Год’ <<https://fas.gov.ru/publications/14754>> accessed 30 July 2018 (FAS | Interview with Andrei Tenishev. Cartels: FAS Results for 2017 and Plans for 2018).

³⁴ Interview with Konstantin Aleshin, ‘Interview with Deputy Director of the Cartel Department of the Federal Antimonopoly Service of the Russian Federation’ (10 March 2015).

³⁵ 1411 fines were imposed in 2015 АЮ Кинев and АП Тенишев, ‘Об Уголовной Ответственности За Картели’ (2017) 1 Юрист 7 (On the Criminal Liability for Cartels) .

³⁶ *A58-3942/2014*.

none of the tenderers bore any responsibility, and the termination of the criminal investigation became the key point of the judgements.

The bigger picture of criminal and court statistics also raises a lot of questions. For example, in the year of Siemens and Diatech investigation, 184 cartels have been detected, but only one criminal case resulted in a custodial sentence, while nine unsuccessful criminal cases were initiated after 56 petitions to start them.³⁷ Considering that an imprisonment sentence is the most effective deterrent for hard-core cartel activity,³⁸ the question of 183 cartels deterred comes up.

Therefore, considering these signs of unenforceability of anti-cartel criminal sanctions, it is essential to examine the motivation of Russia's cartel criminalisation, the design of cartel prohibition and the cartel offence and to identify specifics of Russia's criminal cartel regime in order to suggest how to improve anti-cartel enforcement.

1.2. Scope and aim of the contribution

1.2.1. Research questions

The goal of this thesis is to employ doctrinal research methods to assess cartel criminalisation in Russia, to identify its deficiencies and to find how the policy can be reformed to make criminal enforcement of cartel laws efficient and consistent with the purposes of competition law. For these purposes, the research questions addressed by this thesis in substantive chapters are as follows:

Chapter 2. The design of Russian cartel offence differs significantly from cartel offences introduced in many other jurisdictions. It includes a number of conditions complicating the enforcement of the cartel offence or even making it unenforceable. The research question of this chapter is to identify the specifics of the design of Russia's cartel offence. The international Marine Hoses cartel is chosen as a means

³⁷ Interview with Aleshin (n 34).

³⁸ Barnett (n 23).

for comparison, to show that it constitutes an offence in a number of jurisdictions, but not in Russia. The chapter, therefore, clarifies through this example how the Russian offence differs from other jurisdictions.

Chapter 3. As cartel criminalisation, like any other offence, must be justified, Chapter 3 investigates the motivation for the criminalisation of competition laws in Russia. The findings of this chapter are necessary for understanding how the design of the offence came about, identifying the reasons for failures of criminalisation and re-determining the purpose of Russia's cartel criminalisation to improve the enforcement.

Chapter 4 examines how Russia's administrative anti-cartel regime is atypical and how these peculiarities affect cartel deterrence. Although most jurisdictions prohibit hard core cartels *per se*, there is evidence that Russian courts interpret cartel prohibition in two opposing ways: it can be either *per se* or effects based.

Chapter 5 draws attention to the differences of bid-rigging from other forms of cartels and investigates whether bid-rigging should be treated differently. This research question has a particular practical implication because the legislator is discussing a bill on separation of the bid-rigging offence from other forms of cartels. The current justification for this reform omits the essential normative attributes, distinguishing cartels on tenders from other forms of cartels, and primarily draws upon procedural arguments.

Chapter 6 seeks for solutions for each group of the identified deficiencies because its research question is which elements of policy should be reformed and what tools may be employed to make criminal cartel enforcement effective to address the gaps identified in chapters 2-5.

1.2.2. Limitations

As many aspects of cartel criminalisation in Russia have not been studied yet, a lot of very interesting areas remain outside the existing literature. The author has to focus on the most important aspects of cartel criminalisation based on the experience of other jurisdictions.

The author does not consider decriminalisation of cartels as a possible option, first of all, because an abnormal number of hard-core arrangements are discovered every year, and this statistic signals that financial sanctions may not be effective. Also, discussion of decriminalisation should include a credible survey of public attitudes towards markets, competition, horizontal agreements among competitors etc, to determine the extent to which Russians view them as morally objectionable. Unfortunately, this survey was not possible within the scope of a doctorate thesis. Administrative fines and their enforcement are investigated only to the extent that is necessary for an understanding of the structure of the criminal regime since the methodology for their calculation, relationship with civil enforcement and other aspects deserve particular attention in this research.

The author draws on the fundamental characteristics of Russian criminal law to the extent that is essential for understanding the offence in question. All other aspects of Russian criminal law which may relate to the effectiveness of cartel criminal regime in general, such as the balance of rights, the theory of punishments, judicial independence etc., are also beyond this research. Similarly, due to reasonable restrictions of PhD research and limited resources, the institutional issues are outlined only to the extent which is absolutely necessary to familiarise the reader with the system which differs significantly from European ones.

1.2.3. Original Contribution

This thesis is a starting point in examining Russia's criminal anti-cartel regime, and it provides both grounds for national and transnational scholarship and for further research. Before this thesis, Russia's anti-cartel criminal regime had not been examined coherently and consistently with the purposes of competition law; it was

merely described from the angle of national criminal law.³⁹ Therefore, the meaning of cartel deterrence, the role of leniency, threats of effects-based approach in Russian cartel enforcement are being discussed for the first time, and the research contributes significantly to scholarship in these areas of law.

a) Contributing to Russian antitrust study

Along with an examination of how conventional tools of criminalisation work in the context of Russia's enforcement system, the research directs attention to the importance of motivation and justification for the criminal regime and the influence of local legal culture and social norms on the enforceability of cartel criminalisation. Therefore, the thesis contributes to the national academic literature, as the study of theory and practice of Russian anti-cartel enforcement is at its very early days.

The analysis of the Russian cartel offence in the context of international efforts to fight cartels is particularly beneficial for enforcement agencies as Russian competition law was adopted under the influence of international financial institutions and relied on the competition law of the EU. For example, the study of the justification theories highlights the gaps in the theoretical justification⁴⁰ of anti-cartel criminal enforcement in Russia. Thus, examining theories that justify cartel criminalisation in other jurisdictions can assist the modification of justification of Russia's anti-cartel criminal regime.

b) Contributing to the transnational study of criminal anti-cartel enforcement

As the topic is a lively one for all jurisdictions which criminalised cartels, the findings can be of interest for jurisdictions considering criminalisation of cartels. The thesis demonstrates the importance of national social norms and compatibility of substantive competition law with principles of national criminal law. Also, the thesis is practically oriented, while the current literature lacks practical aspects of antitrust

³⁹ Elena A Kremyanskaya, 'Cartels in Russia: Fight Chronicles. Way to Success' (2011) 2 *New Journal of European Criminal Law* 426; Казбек Мухамедович Хутов, *Преступный монополизм: уголовно-политическое и криминологическое исследование* (Wolters Kluwer Russia 2007) (*Criminal monopolism: criminal-political and criminological research*).

⁴⁰ Хутов (n 39).

criminalisation.⁴¹ Finally, the bibliography of the criminal law of competition even in the USA and the European Union is assessed as a small one ‘compared to the amount of discussion given over to analyses of substantive conduct and broader policy’.⁴²

c) International impact of cartel enforcement in Russia

Gaps in national anti-cartel criminal regime may entail undesirable issues on the transnational level. The thesis provides the clear picture of criminal anti-cartel enforcement in Russia which is important for companies operating in Russia and implementing compliance programmes.

Then, multiple prosecutions of individuals in international cartel cases are envisaged to become more common as the number of countries providing for criminal penalties against individuals increases.⁴³ Thus, insights of this thesis are important for securing prosecution of cartelists and complying with the rule against double jeopardy.⁴⁴

Furthermore, as the most harmful of cartels will often be international in scope,⁴⁵ the scholarship on specifics of criminal anti-cartel regime in Russia is vital for competition authorities’ gathering evidence⁴⁶ and prosecuting overseas executives.⁴⁷ Since solutions on the prosecution of cartelists usually rely on mutual legal assistance treaties, unenforceable criminalisation could undermine the cooperation among the antitrust authorities located in different jurisdictions, because enforceable criminalisation is a necessary condition to execute the treaties.

⁴¹ Whelan, *The Criminalization of European Cartel Enforcement* (n 28) 6.

⁴² Furse, *The Criminal Law of Competition in the UK and in the US. Failure and Success* (n 27) 3.

⁴³ Michael O’Kane, , *International Cartels, Concurrent Criminal Prosecutions and Extraditions: Law, Practice and Policy in Caron BeatonWells & Ariel Ezrachi (eds) Criminalising Cartels: Critical Studies of an Interdisciplinary Regulatory Movement* (Hart Publishing Oxford 2011).

⁴⁴ *ne bis in idem* this effectively means that a person cannot be extradited for an offence if they have already been convicted or acquitted of the same offence or an offence substantially relating to the same facts – see for example ss 12, 80 Extradition Act 2003; Уголовно-Процессуальный Кодекс Российской Федерации (Code of Criminal Procedure of Russian Federation) 2001.

⁴⁵ Whelan, *The Criminalization of European Cartel Enforcement* (n 28) 283.

⁴⁶ O’Kane (n 43); *ibid*; J Joshua, ‘A Sherman Act Bridgehead in Europe, or a Ghost Ship in Mid—Atlantic? A Close Look at the United Kingdom Proposals to Criminalise Hardcode Cartel Conduct’ (2002) 23 *European Competition Law Review* 231, 240.

⁴⁷ Whelan, *The Criminalization of European Cartel Enforcement* (n 28) 284.

1.3. Existing literature

Two bodies of literature were considered for this thesis. First, although discussions of anti-cartel regime in Russia barely exist on the national level, with a very moderate number of empirical studies,⁴⁸ the author thoroughly studied findings of Russian researchers in the area of this thesis. Although the central discovery of this study is the deficiency of literature examining Russian competition law provisions on anti-cartel enforcement, this body of literature allows one to make some conclusions on how crucial tools of cartel criminalisation can be misinterpreted.⁴⁹

The most insightful studies of academics from jurisdictions that are more experienced in this policy area were employed for examining the essential aspects of the cartel criminal regime. Many of them compare cartel enforcement between jurisdictions, considering essential differences in culture. Others take cartels as a global problem requiring inter-jurisdictional cooperation and even some convergence in enforcement of anti-cartel laws. This section briefly reviews literature covering the main areas of cartel policy examined in the thesis. More detailed reviews are provided in relevant chapters where required. At a general level, the thesis was inspired by works of

⁴⁸ For example, Maria Ostrovnaya and Elena Podkolzina, 'Antitrust Enforcement In Public Procurement: The Case Of Russia' (2015) 11 *Journal of Competition Law & Economics* 331.

⁴⁹ IA Klepitskij, 'Dangerous Reforms: Punishments For Cartels And Leniency Programmes' (2018) 4 *Zakon* 92.

Christopher Harding and Julian Joshua,⁵⁰ Angus MacCulloch,⁵¹ Andreas Stephan,⁵² Bruce Wardhaugh,⁵³ Peter Whelan,⁵⁴ Wouter P.J. Wils.⁵⁵

Motivation for criminalisation

There is a long-standing debate among academics from the EU and other jurisdictions regarding objectives of cartel criminalisation and the preconditions necessary for its success. Unfortunately, the issue of competition law objectives in general and criminal cartel regime in particular has dropped out of the sight of scholars and lawmakers of the former USSR.⁵⁶

Deterrence arguments relying on the assumption that wrongdoers make rational choices about whether to engage in wrongdoing, weighing up the benefits of doing so and risks of imprisonment are the key justification for cartel criminalisation.⁵⁷ These theoretical provisions face reasonable criticism at least because rationalisation of cartellists' behaviour is questionable.⁵⁸ According to Stucke, 'it makes little sense to

⁵⁰ Harding and Joshua (n 11).

⁵¹ Angus MacCulloch, 'The Cartel Offence: Defining an Appropriate "Moral Space"' (2012) 8 *European Competition Journal* 73; BJ Rodger and Angus MacCulloch, *Competition Law and Policy in the EC and UK* (4th edn, Routledge-Cavendish 2009).

⁵² A Stephan and A Nikpay, 'Leniency Decision-Making from a Corporate Perspective: Complex Realities', *Caron Beaton-Wells, Christopher Tran (eds.) Anti-Cartel Enforcement in a Contemporary Age* (2015); Morten Hviid and Andreas Stephan, 'Cover Pricing and the Overreach of "Object" Liability Under Article 101 TFEU (' (2015) 38 *World Competition: Law and Economics Review* 507; Stephan, 'An Empirical Evaluation of the Normative Justifications for Cartel Criminalisation' (n 18); Stephan, 'Four Key Challenges to the Successful Criminalization of Cartel Laws' (n 26).

⁵³ Wardhaugh, *Cartels, Markets and Crime: Normative Justification Criminalisation Economic Collusion* (n 17).

⁵⁴ Peter Whelan, 'Cartel Criminalization and the Challenge of "Moral Wrongfulness"' (2013) 33 *Oxford Journal of Legal Studies* 535; Whelan, *The Criminalization of European Cartel Enforcement* (n 28).

⁵⁵ WPJ Wils (n 21).

⁵⁶ [Oxana Migitko, Rules for Business – 2013: Lessons from Lawsuits \(Alpina 2013\); Paul L Joskow and others, 'Competition Policy in Russia during and after Privatization' \(1994\) 1994 Brookings Papers on Economic Activity, Microeconomics 301 <<https://www.brookings.edu/bpea-articles/competition-policy-in-russia-during-and-after-privatization/>> accessed 30 July 2018.](#)

⁵⁷ Wouter Wils, 'Is Criminalization of EU Competition Law the Answer?' (2005) 28 *World Competition* 117.

⁵⁸ Stephan and Nikpay (n 52).

assume that executives behave as rational profit maximizers who readily respond to incremental changes in criminal penalties'.⁵⁹

Whelan⁶⁰ identifies the flaws of deterrence theories such as the issues of accurate quantifying of sanctions to secure deterrence and to avoid disproportionate outcomes. In addition, the process of deciding to form a cartel is more complicated than is generally assumed in deterrence theory, and thus the deterrent effect of imprisonment may be overestimated.⁶¹

Conduct lacking any bottom-up moral outrage cannot be treated as a crime.⁶² Jones and Williams argue that the prevention of harm as a sole justification of a cartel offence brings a risk of creating a morally-neutral criminal offence. To address these weaknesses of the deterrence theory, a number of scholars focus on the moral wrongfulness of cartels to find normative justifications for cartel criminalisation. Wardhaugh⁶³ argues that criminalisation can be justified as cartels affect the market as a valuable institution in a liberal society.⁶⁴ Whelan finds that cartel conduct in its virtue is close to theft and deception and thus can be criminalised.⁶⁵ However, the normative justification of cartel criminalisation is also far from being flawless: the empirical tests of consumers' understanding of the benefits of competition and harmfulness of cartels are in their very early days,⁶⁶ and the sufficiency of the moral opprobrium of cartel

⁵⁹ Maurice E Stucke, 'Am I a Price Fixer? A Behavioural Economics Analysis of Cartels', *Caron BeatonWells & Ariel Ezrachi (eds) Criminalising Cartels: Critical Studies of an Interdisciplinary Regulatory Movement* (Oxford, Hart Publishing 2011).

⁶⁰ Whelan, *The Criminalization of European Cartel Enforcement* (n 28).

⁶¹ Caron Beaton-Wells and Christine Parker, 'Justifying Criminal Sanctions for Cartel Conduct: A Hard Case | Journal of Antitrust Enforcement | Oxford Academic' (2013) 1 J Antitrust Enforcement 198.

⁶² A Jones and R Williams, 'The UK Response to the Global Effort against Cartels: Is Criminalization Really the Solution?' (2014) 2 Journal of Antitrust Enforcement 100, 102.

⁶³ Wardhaugh, *Cartels, Markets and Crime: Normative Justification Criminalisation Economic Collusion* (n 17).

⁶⁴ Russia's cartel offence introduced into 'soviet' society where market economy was perceived as a source of turmoil rather than a value to some extent confirm this rationale.

⁶⁵ Whelan, *The Criminalization of European Cartel Enforcement* (n 28).

⁶⁶ Stephan, 'An Empirical Evaluation of the Normative Justifications for Cartel Criminalisation' (n 18).

conduct remains questionable for criminalisation and therefore can lead to over-criminalisation.

Conditions for effective criminalisation

Wils⁶⁷ lists five conditions for criminal antitrust enforcement to be effective in practice: a dedicated investigator and prosecutor; adequate powers of investigation; the willingness of the judiciary to convict; political and public support; and financial sanctions for corporations. Stephan supplements the conditions with three issues which can undermine the effectiveness of the criminal cartel regime. These are issues of corruption and organised crime, sympathetic or tolerant social norms and collectivist business cultures with the strong personal relationship.⁶⁸ Socio-legal scholarship and political study provide some insights into culture, social norms and attitude towards law and institutions in Russia when cartels were criminalised.⁶⁹

Cartel prohibition

Although the design of cartel policy is still in debate, the rule against price fixing is the least controversial prohibition in competition law throughout the world.⁷⁰ Hardcore cartels are viewed as restrictions of competition by the object and therefore are not subject to an effects-based analysis.⁷¹ The U.K., Irish, Australian and US offences ban the conduct with no regard to its results, which is referred to as the ‘per se illegality’.⁷²

⁶⁷ Wils, ‘Is Criminalization of EU Competition Law the Answer?’ (n 57).

⁶⁸ Andreas Stephan, ‘Beyond the Cartel Law Handbook: How Corruption, Social Norms and Collectivist Business Cultures Can Undermine Conventional Enforcement Tools’ [2008] SSRN Electronic Journal <<http://www.ssrn.com/abstract=1277205>> accessed 11 June 2018.

⁶⁹ Alena V Ledeneva and Marina Kurkchyan (eds), *Economic Crime in Russia* (Kluwer Law International 2000).

⁷⁰ Kaplow (n 9).

⁷¹ Peter Whelan, ‘Criminal Sanctions - An Overview of EU and National Case Law’ 41902 e-Competitions <http://www.academia.edu/1943458/Criminal_Sanctions_-_An_Overview_of_EU_and_National_Case_Law> accessed 30 July 2018.

⁷² R Williams, ‘Cartels in the Criminal Law Landscape’, *Caron BeatonWells & Ariel Ezrachi (eds) Criminalising Cartels: Critical Studies of an Interdisciplinary Regulatory Movement* (Oxford, Hart, 2011).

Administrative Fines for Horizontal agreements

Empirical studies find that the median overcharges of cartels are between 18.2% and 23%.⁷³ Considering that the rate of detection is estimated in the range from 10% to 20%, Wils argues that the minimum level of fines generally required to deter cartels of comparable profitability and ease of concealment, would be in the order of 150 % of the annual turnover of the products concerned by the violation. This level of fines would contradict the principle of proportionality.⁷⁴ Craycraft, Craycraft and Gallo estimated that 58 % of firms would become bankrupt because of the imposition of an optimal fine.⁷⁵ However, bankruptcy discounts reduce the cost of collusion, widen the shortfall in deterrence and worsen the EC enforcement problem.⁷⁶

Cartel offence (imprisonment of individuals)

There are a number of theoretical papers both supporting the cartel criminalisation and opposing it. DOJ officials⁷⁷ and academics⁷⁸ support the imprisonment of individuals as an important tool of deterrence. Spagnolo believes that corporate fines should be employed first as the potential costs of imprisonment are too high.⁷⁹

⁷³ OECD, 'Hard Core Cartels – Harm and Effective Sanctions, Policy Brief' (OECD 2002) <<http://www.oecd.org/competition/cartels/21552797.pdf>>; Connor and Lande, 'Cartel Overcharges and Optimal Cartel Fines' (n 3); Connor, 'Price-Fixing Overcharges' (n 3); Florian Smuda (n 3); Bolotova (n 3); Y Bolotova, JM Connor and D.J. Miller (n 3); Boyer and Kotchoni (n 3).

⁷⁴ Wouter PJ Wils, *The Optimal Enforcement of EC Antitrust Law, Essays in Law & Economics* (Kluwer Law International 2002) 188–237.

⁷⁵ Catherine Craycraft, Joseph L Craycraft and Joseph C Gallo, 'Antitrust Sanctions and a Firm's Ability to Pay' (1997) 12 *Review of Industrial Organization* 171, 171.

⁷⁶ Andreas Stephan, 'The Bankruptcy Wildcard in Cartel Cases' (Social Science Research Network 2006) SSRN Scholarly Paper ID 912169 <<https://papers.ssrn.com/abstract=912169>> accessed 30 July 2018.

⁷⁷ Scott D Hammond, 'When Calculating The Costs And Benefits Of Applying For Corporate Amnesty, How Do You Put A Price Tag On An Individual's Freedom?' (25 June 2015) <<https://www.justice.gov/atr/speech/when-calculating-costs-and-benefits-applying-corporate-amnesty-how-do-you-put-price-tag>> accessed 30 July 2018.

⁷⁸ Donald I Baker, 'Punishment for Cartel Participants in the US: A Special Model?', *Caron BeatonWells & Ariel Ezrachi (eds) Criminalising Cartels: Critical Studies of an Interdisciplinary Regulatory Movement* (Oxford, Hart Publishing 2011) 25; William E Kovacic, 'Criminal Enforcement Norms in Competition Policy: Insights from US Experience', *Caron BeatonWells & Ariel Ezrachi (eds) Criminalising Cartels: Critical Studies of an Interdisciplinary Regulatory Movement* (Hart Publishing Oxford 2011) 45.

⁷⁹ G Spagnolo, 'Criminalization of Cartels and Their Internal Organization', *Cseres, Schinkel and Vogelaar (eds), Criminalization of Competition Law Enforcement: Economic and Legal Implications for the EU Member States* (Edward Elgar London 2006).

An interesting discussion regarding the design of the cartel offence was observed among British⁸⁰ and Australian⁸¹ academics when a dishonesty test had been introduced. There is also a revealing body of literature on how bid-rigging is different from other forms of cartel offences⁸² including the development of the Irish criminal offence⁸³ and Canadian experience.⁸⁴ This body of literature is of particular importance for answering the research question of Chapter 5 regarding specifics of Russia's bid-rigging criminalisation.

Leniency

Some authors believe that it is hard to assess empirically whether the increase in fines and convictions after the introduction of a leniency programme is unequivocally due to its effectiveness in deterring cartels ex-ante.⁸⁵ Even though this increase in convictions may reflect the growing number of cartels, academic literature generally advocates the use of leniency programmes.

⁸⁰ Andreas Stephan, 'Why Morality Should Be Excluded from the Cartel Criminalisation Debate' (2012) 3 *New Journal of European Criminal Law* 126; Whelan, 'Cartel Criminalization and the Challenge of "Moral Wrongfulness"' (n 54).

⁸¹ Caron Beaton-Wells and Brent Fisse, 'Criminalising Serious Cartel Conduct: Issues of Law and Policy' (2008) 36 *Austral Bus L Rev* 166.

⁸² Florian Wagner-von Papp, 'What If All Bid-Riggers Went To Prison and Nobody Noticed? Criminal Antitrust Law Enforcement in Germany', *Caron BeatonWells & Ariel Ezrachi (eds) Criminalising Cartels: Critical Studies of an Interdisciplinary Regulatory Movement* (Oxford, Hart Publishing 2011); G Richard Strafer, 'Operation Roadrunner: The Misapplication of Federal Criminal Sanctions to Bid-Rigging in the Highway Construction Industry, 11 *Am. J. Crim L.* 1 (1983)', (1983) 11 *Am. J. Crim L* 1; SE. Weishaar, *Cartels, Competition and Public Procurement* (Edward Elgar Publishing 2013).

⁸³ Massey Patrick and John D Cooke, 'Competition Offences in Ireland: The Regime and Its Results', *Caron BeatonWells & Ariel Ezrachi (eds) Criminalising Cartels: Critical Studies of an Interdisciplinary Regulatory Movement* (Oxford, Hart 2011).

⁸⁴ John M Connor, 'Canada's International Cartel Enforcement: Keeping Score' (Social Science Research Network 2016) SSRN Scholarly Paper ID 2869430 <<https://papers.ssrn.com/abstract=2869430>> accessed 30 July 2018.

⁸⁵ Joseph E Harrington and Myong-Hun Chang, 'When Can We Expect a Corporate Leniency Program to Result in Fewer Cartels? *Journal of Law and Economics*, Forthcoming' 37; G Spagnolo, 'Leniency and Whistleblowers in Antitrust', *Paolo Buccirossi (ed) Handbook Of Antitrust Economics* (MIT Press 2008) 264; Catarina Marvão and Giancarlo Spagnolo, 'Pros and Cons of Leniency, Damages and Screens' (2015) 1 *CLPD* 47, 57–59.

Papers by Spagnolo⁸⁶ and Motta and Polo⁸⁷ highlight the necessity of leniency for cartel policy. The findings of Hammond⁸⁸ provide the cornerstone of an effective leniency notice and ideas for policy reforms. Analysis of the design and operation of the European Leniency notice is particularly relevant for this thesis. Stephan's analysis of the failures of the EU leniency programmes⁸⁹ provides a lot of insights into the shortcomings of Russia's corporate leniency. Yusupova argues that the corporate leniency programme in Russia has made the enforcement of market participants' behaviour less effective and 'accordingly reduces cartel discoveries'.⁹⁰ Klepitskij criticises the ethics of criminal leniency in Russia and questions its ability to achieve declared goals.⁹¹

Ali Nikpay and Andreas Stephan test the theoretical underpinnings of corporate leniency programmes and find that the majority of cartel cases uncovered by leniency in the European Union ceased to operate before they were reported; they warn not to over-rely on leniency as an investigative tool.⁹² Spagnolo and Luz take the next step in developing leniency and prove that there is an urge to create a 'one-stop point' enabling firms and individuals to report cartels and corruption crimes simultaneously receiving immunity for all of them at once if they are entitled to it.⁹³

⁸⁶ Giancarlo Spagnolo, 'Divide et Impera: Optimal Leniency Programmes' (2004) <<https://econpapers.repec.org/paper/cprceprdp/4840.htm>> accessed 8 June 2018; Reinaldo Luz and Giancarlo Spagnolo, 'Leniency, Collusion, Corruption, and Whistleblowing' (Social Science Research Network 2016) SSRN Scholarly Paper ID 2773671 <<https://papers.ssrn.com/abstract=2773671>> accessed 7 June 2018; M Bigoni and others, 'Trust, Leniency, and Deterrence' (2015) 31 *Journal of Law, Economics, and Organization* 663.

⁸⁷ Massimo Motta and Michele Polo, 'Leniency Programs and Cartel Prosecution' (2003) 21 *International Journal of Industrial Organization* 347.

⁸⁸ Scott D Hammond, 'Cornerstones Of An Effective Leniency Program' (25 June 2015) <<https://www.justice.gov/atr/speech/cornerstones-effective-leniency-program>> accessed 30 July 2018.

⁸⁹ Andreas Stephan, 'An Empirical Assessment of the European Leniency Notice' (2009) 5 *Journal of Competition Law & Economics* 537.

⁹⁰ Gyuzel Yusupova, 'Leniency Program and Cartel Deterrence in Russia: Effects Assessment' [2013] *SSRN Electronic Journal* <<http://www.ssrn.com/abstract=2348596>> accessed 30 July 2018.

⁹¹ Klepitskij (n 49).

⁹² Stephan and Nikpay (n 52).

⁹³ Luz and Spagnolo (n 86).

1.4. Methodology

It was not an easy task to choose research methods for this thesis, as this area of Russian competition law is a relatively recent development, and not much has ever been written about cartel criminalisation in Russia. In addition to the scope of cartel offence, there are recurrent themes throughout the thesis, such as influence of social norms and sufficiency of institutions' power to enforce the anti-cartel criminal norms. Also, my purpose was not only the analysis of primary sources but also a complex assessment of the effectiveness of enforcing cartel provisions in this jurisdiction. For the chosen methodology, I have considered a number of factors regarding the law in books as well as law in action.

First, cartel enforcement regimes in Russia were mostly inspired by cartel legislation of the European Union. Second, the first cartel offence was introduced in the course of transition from state economy to market economy. These reforms affected public attitudes towards institutions. As social norms are crucial for the success of criminalisation, the sources of social and political studies are to be considered. Finally, where there is not enough academic literature on the subject, case studies can be the focus of investigation and representatives of enforcement bodies can help to identify the flaws of the enforcement. As a result of these considerations, I rely upon the doctrinal methodology to provide a reader with a bigger picture of anti-cartel enforcement in Russia and to pursue the research question at the heart of this thesis in the most important directions.

The theoretical literature of academics from other jurisdictions is important for our understanding of the purpose, incentives and limits of anti-cartel criminal enforcement. This research method is also crucial for predicting a firm's behaviour in response to a given enforcement tool and environment.

The court decisions are used throughout this thesis to facilitate assessing the effectiveness of the regime in the past and provide a means for measuring the effects of policy change over time. The use of hypothetical case illustrates the atypical elements of Russia's anti-cartel regime without taking the more in-depth study of extensive areas of Russian law.

This thesis makes a particularly original contribution, in the form of interviews with officials of Russian competition authorities. In this research, an interview has been used for three reasons. First, insights into the process of the cartel offence enforcement were imminent for assessing the regime, and interviews are a useful method to get to know the story behind the published information. Second, detailed information was required to understand how the enforcers cope with gaps in statutes, particularly, how the competition authorities and the police interact as communications between them are not regulated by legislation. The interviews were used ‘to investigate the complexities of policy and politics’⁹⁴ and to examine those realities of enforcement that are not yet regulated by relevant legislation or detailed in the literature. This methodology is recommended for research that traces the recent history or development of a phenomenon and programmes that engage with intentional human behaviour due to its specific advantages.

Finally, understanding the level of enforcement was crucial for pursuing the research question. The Federal Antimonopoly Service of the Russian Federation (“The Central Apparat”) has been the only agency that possessed and analysed the data for the whole jurisdiction: no open database for the criminal cases against cartel members has been available. Thus, I could not reach either judges or practising lawyers involved in the particular cases to ask them how the system works. Therefore, using these interviews helps to corroborate what has been established from other sources, find out what a group of people think and reconstruct an event or set of events.⁹⁵

To organise the interview, I emailed the Federal Antimonopoly Service of the Russian Federation (“The Central Apparat”) about the research, its purpose and funding and asked whether it was possible for them to answer some open questions regarding the enforcement of anti-cartel criminal laws. Having received a positive response and consent, I obtained the approval from the University’s General Research Ethics Committee in March 2015. After that, I attended meetings organised by the Federal Antimonopoly Service of the Russian Federation in Moscow where I interviewed the

⁹⁴ Glenn Beamer, ‘Elite Interviews and State Politics Research’ (2002) 2 *State Politics & Policy Quarterly* 86.

⁹⁵ Oisín Tansey, ‘Process Tracing and Elite Interviewing: A Case for Non-Probability Sampling’ (2007) 40 *PS: Political Science & Politics* 765.

Deputy Director of the Cartel Department of FAS Konstantin Aleshin. The meeting started from open questions about the assessment of the current criminal anti-cartel regime and then developed into broader conversations on the topic. This high-level interview allowed me to obtain accounts from those directly involved in the cartel investigations; to gather information about the underlying context of cartel enforcement in Russia; the interview compensates the lack and limitations of secondary sources about Russia's criminalisation

Synthesis of rules, principles, interpretive guidelines and values from various jurisdictions is essential because the whole anti-cartel regime mirrors the earlier reforms in other countries. For example, the cartel prohibition looks like a simplified translation of Article 101(1) of TFEU, as well as the administrative leniency programme. Also, the US antitrust watchdog, the Department of Justice (DOJ), enjoyed exceptional success in uncovering and prosecuting cartels. Thus, there will be some references, where required, to cartel criminal regimes of the European Union, Germany, the UK and the US, as they seem to be some of the pivotal trendsetters in the area of cartel policies, and this comparison identifies ways in which Russia's policy can be improved. In addition, the most severe cartel infringements may transcend legal jurisdictions. Therefore, similar principles can be considered for forming anti-cartel policies.

In addition, I employ some interdisciplinary approaches, mainly, from socio-legal studies and political studies. I used academic literature from these areas of scholarship because any study of how cartel enforcement can be made more effective requires a keen understanding of political realities and social norms. Fortunately, there is a wealth of literature on the reforms in the 1990s, changes in the society, attitude towards laws and markets, institutional issues and other factors significant for successful cartel criminalisation, although this literature is not specifically about competition law.

1.5. Thesis synopsis

Although all chapters are linked together by the overarching question of what are specifics of Russian anti-cartel regime weakening criminal enforcement, they are

written so that they can be read individually. Chapter 2 was presented at the 10th Competition Law and Economic European Network (CLEEN) Workshop, May 2016 and as a poster ‘Defining Russia’s cartel offence’ at Annual International Graduate Legal Research Conference, King’s College, London, April 2016. Findings on the deficiencies of Russian leniency programme from this chapter were presented at the annual conference ‘Antimonopoly Regulation in Russia,’ Moscow, October 2017 and are being considered for reforms of leniency policy by the Cartel Department of the Federal Antimonopoly Service of the Russian Federation. An earlier version of Chapter 4 was presented at CCP PhD Workshop 2016, UEA, June 2016. Some of its findings in Russian were published in the article ‘Cartels in Russia: Effect or Per se’ in Herald of the Economic Justice in the Russian Federation, No 2 (2017). The paper which formed the basis of Chapter 5 was published as an article - ‘An Examination of Criminalization of Russia’s Anti-Bid Rigging Policy’ in Russian Law Journal (RLJ), No 3(4) (2015). Chapter 6 was completed in July 2018, although its policy recommendations were disseminated to the Cartel Department of Russia’s competition authorities during informal consultations.

Chapter 2

Introduction of Russia’s cartel offence

This chapter reveals how drastically different Russia’s cartel offence is compared to conventional designs of cartel offences in leading jurisdictions and thus frames the basis for this research. The most atypical characteristic of this offence is its pronounced effects-based nature. A cartel’s gain or amount of inflicted losses are the compulsory elements for opening a criminal case. This condition sets an unrealistically high bar for national prosecution and may affect international anti-cartel enforcement in cases where a cartel has been formed by individuals from different States.

In order to facilitate understanding the specifics of the Russian cartel offence for the reader, without going too deep into Russian criminal law, this chapter applies Russia’s criminal anti-cartel offence to the widely known Marine Hose cartel case, to underline the fundamental distinctions of the criminal cartel regime. The case has been chosen because this horizontal agreement has been treated as an offence in multiple

jurisdictions and involved the most serious forms of cartel practices. It is, therefore, a useful benchmark for analysing criminal anti-cartel regimes.

The main finding of the chapter is that prosecution of the cartel offence is very unlikely under the current regime in Russia. Thus, even if a company in Russia is penalised for a cartel, it is highly improbable that an individual would be prosecuted in a case like Marine Hose. First, proving a certain amount of gain/damage is very challenging for many forms of cartel agreements. Then, the fashion in which the limitation period for the cartel offence is designed may prohibit incarceration. Finally, the criminal leniency programme does not work. Therefore, the probability of detection of the prohibited agreement and successful prosecution of its members is very low.

To demonstrate that these issues are rather country-specific than specific to civil law jurisdictions, the chapter also briefly refers to France's and Germany's experience. These countries have been chosen out of civil law countries because both of them enforce cartel offences consistently despite differences in their design. Both France's cartel offence and Russia's offence cover all sorts of hard-core cartel arrangements. Although only bid-rigging constitutes the offence in Germany, Germany's regime, like the Russian cartel regime, includes both administrative and criminal sanctions for individuals. However, it manages to keep individual sanctions punitive which is consistent with purposes of the offence.

Chapter 3

The Motivation behind the Introduction of Criminal Sanctions for Anti-Competitive Conduct in Russia

This chapter examines how the history and reasons to criminalise a cartel offence in Russia determined anti-cartel criminal regime for a long time. This chapter is essential for understanding the background of anti-cartel regimes in Russia, as it provides insights into the legislator's intentions, which are crucial for interpreting laws in Russia's legal system. Meanwhile, the limited number of papers available that have attempted to examine some aspects of cartel criminalisation in Russia⁹⁶ have not

⁹⁶ АЮ Кинев, 'Административно-правовая защита конкуренции: проблемы и пути совершенствования' (2014) <https://msal.ru/common/upload/avtoreferat-A.U._Kinev.pdf> accessed

answered this question yet. Thus, this analysis is crucial for identifying factors causing unenforceability of anti-cartel criminal laws.

The chapter finds that a criminal offence was borrowed from Western jurisdictions without thoughtful adjustments and at a time it was premature, given that Russia's economy was in transition cartels had not become a real threat for economy yet, and consumers did not appreciate benefits of a competitive economy because markets were still largely under state control. At this stage of the development of competition law, criminalisation was inappropriate.⁹⁷ Also, the chapter shows that forced cartel criminalisation is unlikely to educate consumers and enforcers, and in this meaning, findings can be of interest for researchers from jurisdictions considering cartel criminalisation for states with economies in transition.

In this chapter, the author demonstrates how Russia's motivation to criminalise cartels differs from more conventional reasons and preconditions for criminalisation, particularly from market conditions and social norms usually accompanying this process. This chapter provides some background for understanding Russia's very unusual effects-based interpretations of the cartel prohibition in chapter 4.

This chapter proves that broad criminalisation of anticompetitive behaviour in Russia weakens anti-cartel criminal regimes, blurring the perception of cartel harmfulness and creating considerable uncertainty of its enforcement.

Chapter 4

Effects-based Approach and the Enforcement Problem in Russia's Anti-cartel Regime

This chapter focuses on an unusual characteristic of Russia's administrative anti-cartel regime. Hard-core cartel conduct is generally treated as *per se* illegal in competition

11 June 2018 (Administrative Regime for Protection of Competition: Problems and Ways of Improvement); Хутов (n 38).

⁹⁷ John Fingleton, Marie-Barbe Girard and Simon Williams, 'The Fight Against Cartels: Is A Mixed Approach To Enforcement The Answer? - Chapter 2', Barry E. Hawk (ed.) *International Antitrust Law & Policy: Fordham Competition Law 2006* (Juris Publishing 2007) <<http://www.jurispub.com/The-Fight-Against-Cartels-Is-A-Mixed-Approach-To-Enforcement-The-Answer-Chapter-2-Internation.html>> accessed 11 June 2018.

enforcement regimes around the world. However, Russia's prohibition of hard-core cartel conduct can be interpreted either as *per se* or effects-based, and there is no clear criterion to choose between them. The chapter frames suggested reforms which will be discussed in chapter 6. It argues that along with inadequate levels of fines, the cartel prohibition is inconsistent and secures neither cartel deterrence nor effective punishment of its participants.

In this chapter, the author introduces Russia's cartel prohibition and administrative sanctions, including the methodology for calculating corporate fines to demonstrate the lack of incentive to deter cartels and to punish infringers in Russian anti-cartel enforcement. Then, illustrative cases are used to demonstrate the inconsistency of the enforcement and ambiguity of interpretation of the cartel offence. An analysis of case law reveals that there is no criterion to choose between *per se* approach and effects-based approach for courts and there is no complete test of effects to prove cartels.

In the US, hard-core cartels are subject to a *per se* prohibition, to avoid the necessity for an incredibly complicated and prolonged economic investigation. Similarly, the EU competition law bans this type of agreements in Article 101(1) TFEU automatically, i.e. by their object and there is no need to define a relevant market and the actual impact on competition. Although all infringements of Article 101(1) can in principle be saved by efficiency arguments under Article 101(3), application of these exemptions is extremely unlikely in the case of hard-core horizontal arrangements.⁹⁸

Russia's anti-cartel regime distinguishes an administrative wrongdoing from a criminal cartel offence, but the cases are dealt with as administrative (civil) matters in the first instance, and the outcome of the administrative case usually determines whether the criminal investigation will be ever open. The cartel prohibition in Russian anti-cartel enforcement is very unusual. On the one hand, competition authorities interpret it as a *per se* prohibition and need to prove only the fact of achieving an agreement among competitors. While, on the other hand, courts take two opposing approaches: in some cases, they rule that the agreement is prohibited *per se*, while in others they establish that competition authorities have to prove some aspects of the

⁹⁸ Commission Notice Guidelines on the application of Article [101(3)] of the Treaty 2004 para 46.

effect of the agreement. The market analysis required in Russia for all horizontal agreements except bid-rigging makes inquiry very complicated and often leads either to unreasonably excessive enforcement or the reversal of decisions imposing fines. All these features creates uncertainty and inconsistency in Russia's anti-cartel enforcement regime.

Finally, Chapter 4 identifies a marked gap in deterrence in Russia's administrative regime, concludes that there is an enforcement problem of the administrative anti-cartel regime and outlines its possible reasons. Russia's enforcement problem, resulting from both ambiguity of the interpretation of the cartel offence and methodology of imposing fines, has not yet been studied. Russia's cartel offence has been adopted under the significant influence of the EU anti-cartel administrative regime which articulates deterrence and punishment of infringers as its primary aims. The theory of optimal cartel deterrence assumes that cartel deterrence could be achieved if the anti-cartel fine includes the cartel profits and a mark-up for the risk of detection. However, policymakers do not claim to impose fines that economists believe to be optimal, and the estimated average overcharges of cartels (around 25 %⁹⁹) may significantly exceed the maximum fine both in the EU (10 per cent) and Russia (4 per cent).

Chapter 5

Should Bid-Rigging be Treated Differently?

In Russia, the importance of sufficient anti-bid-rigging enforcement is more notable since cartels detected on tenders constitute over 80 % of all detected cartel agreements. In addition, in Russia, auctions are mainly used in the public sector; therefore, bid-rigging may have a more significant impact as it negatively affects both state funds and a significant number of consumers. Indeed, the administrative regime distinguishes bid-rigging from other forms of cartels, and a Bill introducing a new reading of Article 178 of the Criminal Code that will single out bid-rigging from other forms of cartels was being discussed by the legislature at the time of writing this thesis.

⁹⁹ John M Connor and Robert H Lande, 'The Size of Cartel Overcharges: Implications for U.S. and EC Fining Policies' 41.

The chapter answers the question whether bid-rigging in Russia should be treated differently from other forms of price-fixing.

To answer this question, the chapter examines specifics of Russia's anti bid-rigging policy and finds that collusive agreements in Russian public procurement differ from other horizontal cartel agreements. For example, the normative justification works better for the bid-rigging offence and attracts fewer objections typical for criminalising economic crimes. Thus, the public and enforcing agencies may view bid-rigging as a more immoral offence than other cartels. Also, the author looks into the issues of moral content of white-collar crimes, particularly, into characteristics of bid-rigging that distinguish collusion on auctions from other types of hard-core cartels and examine relationship of bid-rigging with theft and fraud. The chapter examines the only successful conviction under Article 178 of the Criminal Code of the Russian Federation which happened to be a bid-rigging case linked with corruption crimes. It then deepens the analysis by comparing these findings with Germany's experience of prosecuting bid-rigging. The chapter argues that despite the similarities between bid-rigging and more traditional crimes like theft and fraud, these traditional offences cannot do their job for anti-bid-rigging enforcement in Russia.

Also, the chapter finds that the vast majority of the detected and punished agreements on tenders are not bid-rigging, as they represent the 'imitation of competition' rather than restriction of competition. This unusual concept distinguishes these practices from bid-rigging in Russia's law. There is no competition in the case of the so-called 'imitation of competition,' as the only bidder places bids on behalf of the affiliated legal entities pretending to be competitors. This is different from bid-rigging because there is, in reality, never more than one bidder. However, the motivation of this strategy is not clear. There is an assumption that 'imitation of competition' is a way to avoid the long and complicated procedure of gaining approvals for the purchase from a single supplier. The firms do not need each other to guarantee a price for future tenders and do not pursue the common objective of bid-riggers to sell the product for the highest possible prices. This is a new form of the infringement of competition laws distinguished from bid-rigging and cover-pricing.

The chapter concludes that bid-rigging should not be a stand-alone offence, distinct from other cartel practices. The introduction of a stand-alone bid-rigging offence is not well justified for Russia's regime. However, the clearer case for treating bid-rigging as a crime makes it a useful focus for the enforcement of the cartel offence – especially where the authority wishes enforcement to perform an educative function.

Chapter 6

Conclusions. Reflections. Dimensions of policy reforms

The final chapter of this thesis provides a summary of findings and how policy recommendations should be prioritised. It also highlights lessons to be learned from Russia's experience of cartel criminalisation, outlines the avenues for future research and summarises the contribution this thesis makes to the understanding of cartel enforcement in Russia.

The purpose of this chapter is to outline the blueprint for reforming criminal cartel enforcement in Russia to make anti-cartel regimes effective and coherent with the purposes of competition law. Chapters 2-5 identified the central issues of Russia's criminal cartel regime precluding from consistent enforcement of criminal laws in the fight against cartels.

As cartel criminalisation at the very beginning appeared as an unjustified measure, coordination between the criminal and administrative regimes had not been considered. This lack of coordination between regimes is aggravated by very unclear criteria to distinguish between the administrative wrongdoing and the criminal offence and by the existence of two independent programmes of granting immunity. Courts did not manage to balance all these inconsistencies between statutes; instead, they worsened administrative enforcement of anti-cartel laws by unsystematic application of *per se* provisions to the arrangements. These deficiencies set out the main dimensions for reforms of the offence.

With limitations for an increase of administrative fines, four priorities are determined and examined in this chapter. First of all, deterrence as a primary purpose of anti-cartel enforcement should be considered over traditions of splitting the procedures into criminal and administrative branches to achieve maximum certainty in the application

of laws. This priority means not only more collaboration between enforcing agencies is required but also significant re-design of leniency programmes. In this chapter the author also outlines how to reform Russia's cartel prohibition to prevent its misinterpretation and to strengthen the *per se* principle consistently with both principles of competition law and Russian laws. The suggested reform includes a new reading of undertaking and a new threshold between the administrative wrongdoing and the criminal offence.

Thus, the reform should focus on increasing certainty of the enforcement process and involve a re-wording of the offence and the cartel prohibition, to make it more understandable for enforcers and businesses, by reinforcing the *per se* prohibition. The next priority is a single leniency programme embracing both immunities and regulating the relationship between exemptions for corporations and individuals in one statute. This programme should remove all unreasonable conditions such as compensation for harm and focus on the quality of evidence as a criterion for immunity.

Chapter 2. Introduction of Russia's Cartel Offence

This chapter introduces Russia's cartel offence and identifies its unusual design. Unlike offences in other jurisdictions, cartels in Russia constitute a crime only if the cartel results in a certain amount of gain obtained by cartelists, or damages inflicted on other businesses or consumers. This effects-based element complicates criminal cartel enforcement in a number of ways. First, it sets a very high bar for the enforcing agencies and thus makes the enforcement of the offence extremely difficult – especially where the conduct is clearly hard-core, but either failed to affect prices or was never implemented. Second, this design creates a threat for international anti-cartel enforcement if the cartel is formed by companies from various jurisdictions. For example, the effects-based element may cause a problem for the extradition of individuals involved in a cartel arrangement if a severe breach of cartel laws is not seen as a criminal offence in one of the jurisdictions.

The understanding of what conduct is banned by means of criminal law is crucial for the whole thesis, as a framework for the rest of the research. However, the author came across the lack of literature on the Russian cartel offence in terms familiar to researchers dealing with cartel criminalisation; there are very few papers and comments analysing the Russian cartel offence within the scope of the national criminal law. This limited analysis left many questions typically raised towards the issues of cartel criminalisation. Seeking how to introduce the cartel offence into a global context, this chapter goes beyond the scope of the national criminal law. To highlight the specifics of the offence and to provide the reader with an understanding of the Russian cartel offence without digging too deep into the specifics of Russia's criminal law, this chapter applies Russia's cartel offence to the Marine Hose cartel case.

The Marine Hoses cartel is employed in this chapter as a means for comparison, because it was a very serious violation embracing nearly all possible types of hard-core cartel activity. This case is used as a benchmark for criminal anti-cartel regimes, and even in Germany, where cartels are partially criminalised, the case constituted grounds for extradition. Employment of a hypothetical case allows one to look into

criminal competition law of the leading jurisdictions such as the US and the UK and discovers that the arrangements constituting an offence in these jurisdictions would not constitute an offence in Russia. The chapter refers to the relevant experience of France and Germany to demonstrate that the detected specifics is not the result of belonging of the jurisdiction to civil law legal family and makes it clear that Russia's case is a unique country-specific issue.

Germany's regime is of particular interest for examination of Russia's regime. Cartel enforcement in Germany includes both administrative and criminal sanctions for individuals like the Russian cartel regime but keeps individual sanctions punitive and thus consistent with the purposes of the offence. However, the German cartel offence is limited to bid-rigging only. The thesis draws attention to France's cartel offence although France was not involved in Marine Hose's cartel case to support the statement that the distinctiveness of the Russian offence does not stem from the civil law family.

The main finding of the chapter is that the Russian offence is drastically different from the offences of the chosen jurisdictions and designed in a way that makes successful prosecution harder than in those jurisdictions. The most distinctive characteristic of Russia's criminal cartel regime is its reliance on the effect of the cartel agreement as a compulsory element. Thus, even if a company in Russia is penalised for a cartel, an individual is highly unlikely to be prosecuted in a case like Marine Hose as it would be tough for the prosecution to prove the effect of the cartel because of lack of expertise and evidence availability in Russia. Indeed, proving the effect in cartel cases would be difficult for most jurisdictions, and there is very limited cartel enforcement globally that employs an effects cartel prohibition. Also, due to the underestimation of cartel harm, and thus the severity of the cartel offence, the fashion in which its limitation period is designed is inconsistent with the nature of cartels. Finally, leniency policy cannot be used for detection and investigation of the offence because it is uncertain, conditional, and contains unrealistic requirements, so it is not attractive for individuals and has never been used.

The chapter is structured into four sections. Section 1 briefly introduces the cartel offences in the US, the UK, Germany, France and Russia to facilitate case analysis.

Section 2 shows how and why tools of criminal anti-cartel enforcement were applied in the Marine Hoses case in the foreign jurisdictions. Section 3 applies Russia's offence to the same case and explains that prosecuting the cartel members is unlikely in this case in Russia due to the effects-based elements and the inconsistent limitation period. The last section examines the criminal leniency policy, its correlation with corporate leniency and investigates why criminal leniency has never been granted.

2.1. Outline of the offences in the US, UK, Germany, France and Russia

In the US a cartel offence is introduced in Section 1 of the Sherman Act establishing that '[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.' The substantive test for the US cartel offence is passed with the establishment of a horizontal agreement under Section 1 of the Sherman Antitrust Act (15 USC. § 1). The prosecutor needs only prove the existence of an agreement and that the defendant knowingly entered into the alleged agreement or conspiracy.¹⁰⁰

The *per se* rule in the US considers any restraint is raising the price, reducing output, diminishing quality, limiting choice, or creating, maintaining, enhancing or preserving market power unreasonable;¹⁰¹ thus the rule of reason is inapplicable in cartel cases. Practically, in the US there is no need to analyse the effects of the agreement in a particular case and any mitigating factors cannot justify the time and expense necessary to identify them.¹⁰² For hard-core cartels, the prosecution has to show only that the defendant entered knowingly into an agreement with one or more competitors in a market in order to establish that the offence has been committed; it is 'sufficient to establish that the purpose was to restrain trade'.¹⁰³

¹⁰⁰ ME Stucke, 'Morality and Antitrust' [2006] Columbia Business Law Review 443, 492–493; Sheryl A Brown and Christopher Kim, 'Antitrust Violations' (2006) 43 American Criminal Law Review 217, 227; *United States v United States Gypsum Co*, 438 US 422 (1978) (US) 444–446.

¹⁰¹ Furse, *The Criminal Law of Competition in the UK and in the US. Failure and Success* (n 27) 63.

¹⁰² *Continental TV, Inc v GTE Sylvania, Inc* (1977) 433 36 (US) 50.

¹⁰³ Furse, *The Criminal Law of Competition in the UK and in the US. Failure and Success* (n 27) 63.

For example, the price-fixing arrangement is *per se* illegal irrespective of the level of the fixed price as involving the power to control the market:

[a]greements which create such potential power may well be held to be in themselves unreasonable or unlawful restraints, without the necessity of minute inquiry whether a particular price is reasonable or unreasonable as fixed and without placing on the government in enforcing the Sherman Law the burden of ascertaining from day to day whether it has become unreasonable through the mere variation of economic conditions.¹⁰⁴

In *Standard Oil Co* the Court confirmed that there was no ground to apply the rule of reason in price-fixing arrangements.¹⁰⁵ Also, these agreements can never be assessed as pro-competitive.¹⁰⁶ Likewise, the customer-allocation agreement is *per se* illegal.¹⁰⁷

Under the UK law, Chapter I of the Competition Act 1998 modifies the Article 101(1) TFEU formulation to trade within the UK (rather than trade between member states).¹⁰⁸ The agreement does not have to be made formally or in writing, and no express sanction or enforcement measures need to be involved.¹⁰⁹ The non-exhaustive list of illustrative practices¹¹⁰ prohibits hard-core cartel agreements¹¹¹ ‘by object’¹¹² The cartel offence is set out in Pt 6 of the Enterprise Act 2002.

¹⁰⁴ *United States v Trenton Potteries Co* (1927) 273 392 (US) 397–398.

¹⁰⁵ *Standard Oil Co v United States* (1911) 221 1 (US); *Chicago Board of Trade v United States* (1918) 246 231 (US).

¹⁰⁶ *Chicago Board of Trade v United States* (n 105).

¹⁰⁷ *Addyston Pipe & Steel Co v United States* (1899) 175 211 (US); *United States v Sealy, Inc* (1967) 388 350 (US); *United States v Topco Associates* (1967) 405 596 (US).

¹⁰⁸ Competition Act 1998 s (a) Section 2(1).

¹⁰⁹ *Arriva plc and FirstGroup: market-sharing agreement for bus routes* [2002] OFT CA98/9/2002, 2002 UKCLR 322 [29].

¹¹⁰ Competition Act (n 108) ss (a) Section 2(2)

¹¹¹ Competition Act (n 108) s (b) (a) Section 2(1)

¹¹² Guidance on restrictions of competition ‘by object’ for the purpose of defining which agreements may benefit from the De Minimis Notice 2014 s 2; *Bookmakers’ Afternoon Greyhound Services Ltd & Ors v Amalgamated Racing Ltd & Ors* [2008] EWHC 1978 (Chancery Division) 198.

Initially, s.188 established that an individual was guilty of an offence if he dishonestly agrees with one or more other persons to make, to implement or cause to be implemented arrangements amounting to price fixing, output restriction, market or customer allocation and bid-rigging, relating to at least two undertakings. Dishonesty was incorporated as an element of the *mens rea* in the offence ‘to signal the seriousness of cartel practices and increase the likelihood of custodial sentences under the offence.’¹¹³ However, later dishonesty has been rejected for making the offence unenforceable.

Dishonesty did not work as it was expected because public attitude towards cartels in the UK ‘was not in step with cartel criminalisation.’¹¹⁴ Then, taking a weak discouragement of cartels, there was a real doubt as to whether a jury would be satisfied that an anticompetitive agreement was objectively dishonest¹¹⁵ considering a complex test for dishonesty which has been set in *Ghosh*.¹¹⁶ Finally, the finding in *Norris* that secret price fixing cannot in itself be dishonest¹¹⁷ demonstrated the flaws of dishonesty standards for enforcement of the offence, and in 2013 dishonesty was removed from the offence¹¹⁸ following by the criticism above. The same Act introduced a number of defences in the new sections 188A and 188B which are not relevant for this analysis as they did not exist at the time of *Marine Hoses* case.

In Germany the offence is limited to anticompetitive agreements in tendering procedures’ (bid-rigging) pursuant to Sec. 298(1) of the German Criminal Code (StGB): ‘[w]hoever, upon a call to tender goods or commercial services, enters a bid based on an illegal agreement which aims at inducing the organiser to accept a

¹¹³ Scott D Hammond and Penrose R, ‘The Proposed Criminalisation of Cartels in the UK. A Report Prepared for the Office of Fair Trading’ (2002) U.K.C.L.R. 97; M Furse and C Nash, *The Cartel Offence* (Hart Publishing 2004).

¹¹⁴ Andreas Stephan, ‘How Dishonesty Killed the Cartel Offence’ (2011) 6 *Criminal Law Review* 446, 447.

¹¹⁵ Harding and Joshua (n 11) 51.

¹¹⁶ *R v Ghosh* - 1982 [1982] EWCA Crim 2. 2, [1982] 3 WLR 110

¹¹⁷ *Norris v United States of America and Others* (2008) 2 (UKHL)..

¹¹⁸ The Enterprise and Regulatory Reform Act 2013.

particular bid, shall be sentenced to imprisonment of up to five years or a fine.¹¹⁹ The principal distinction of Germany's cartel offence from fraud under Sec. 263, which can be applied to bid-rigging too if the economic loss to the victim could be established,¹²⁰ is that Sec 298 takes a *per se* approach so that there is no need to prove an 'economic loss' for prosecution under the bid-rigging offence. If an economic loss can be established, there will be 'concurrent liability under both sections.' In practice cartel, agreements on tenders may be considered as aggravating factors for fraud.¹²¹

In France, Article L420-1¹²² prohibits cartel agreements. Although the wording of this article is inclusive, and there is no an exhaustive list of prohibited practices such as price-fixing or bid-rigging, it mirrors, to a significant extent, the cartel prohibition under Article 101 TFEU. Following EU law, French competition authorities consider cartels as a breach of law 'by object' and do not seek for evidence of the effect of the agreement on competition.¹²³ Also, there is no need to establish the intent of the parties to restrict the competition. However, the burden of proof for France's cartel offence is high. To date, convictions have been mostly limited to bid-rigging cases.¹²⁴

Article L420-6¹²⁵ establishes that any natural person who fraudulently takes a personal and decisive part in the cartel practices limiting access to the market or fixing prices shall be punished by a prison sentence of four years and a fine of 75,000 euros. Therefore, in addition to the existence of an anti-competitive agreement three cumulative elements for the involvement of the individual must be proven: (i) personal accomplishment of the competition infringement, as well as (ii) the involvement of an individual is decisive, i.e. the role an individual played when initiating or organising

¹¹⁹ Florian Wagner-von Papp, 'What If All Bid-Riggers Went to Prison and Nobody Noticed? Criminal Antitrust Law Enforcement in Germany' in Caron Beaton-Wells & Ariel Ezrachi (eds) *Criminalising Cartels: Critical Studies of an Interdisciplinary Regulatory Movement* (Oxford, Hart Publishing 2011) 165.

¹²⁰ *ibid.*

¹²¹ Florian Wagner-von Papp (n 82).

¹²² The French Commercial Code 2006.

¹²³ 'France Cartel Regulation – Getting The Deal Through – GTDT' (*Getting The Deal Through*) <<https://gettingthedealthrough.com/>> accessed 7 August 2018.

¹²⁴ David Viros, 'Individual Criminal Sanctions in France' (2016) 2 *Concurrences* 24.

¹²⁵ the FCC (n 122)

the infringement is crucial¹²⁶ and (iii) fraudulent intent. Therefore, being a legal representative or exerting control over the concerned activity is not sufficient for the conviction and a person must materially participate in the infringement. To illustrate Frances's approach, in the Marine Hose cartel case the prosecution would have to prove that individuals' involvement was decisive and that individuals acted in bad faith 'through deceptive means or attempts at concealment.'¹²⁷

Russia's cartel offence sets the highest bar for prosecution. The decision to open a criminal case relies on the sufficiency of evidence proving a certain amount of gain obtained by cartelists, or damages inflicted to other business or consumers, rather than on the seriousness of the wrongdoing. There are three types of cartel offences depending on the increasing severity of the crime. Basically, paragraph 1 of Article 178 of the Russian Criminal Code establishes sanctions¹²⁸ for the restriction of competition by entering into an agreement among competing economic entities prohibited by the antimonopoly legislation of the Russian Federation (cartel), if this act has caused large-scale loss for citizens, organizations or the state or resulted in gaining income on a large scale. Gain on a large scale means the amount of 50,000,000 Rubles¹²⁹ and more, and large-scale damage exceeds 10,000,000 Rubles.¹³⁰ Following the Russian criminal law tradition, paragraph 2 of Article 178 presents the cartel offence with aggravating circumstances, which is the use of the official position; destruction or damage to property, or the threat of destruction or damage in the absence of evidence of extortion; and especially large damage (exceeding 30,000,000 Rubles) or which results in gaining income on an especially large scale (over 250,000,000 Rubles). The third paragraph of Article 178 presents a cartel offence aggravated by the use of violence or threat of violence.

¹²⁶ For example, a violator plays an active role 'as regards the conception, the organisation and the implementation of the practice' - see David Viros, 'Individual Criminal Sanctions in France' (2016) 2 *Concurrences* 25.

¹²⁷ David Viros (n 124).

¹²⁸ The criminal sanctions are established as a fine from 300,000 to 500,000 Rubles; or the amount of salary or other income for a period from one to two years; or community service for up to three years with disqualification to hold certain positions or engage in certain activities for up to one year or without disqualification; or imprisonment for up to three years, with disqualification for up to one year, or without it.

¹²⁹ Approximately 500,000 GBP

¹³⁰ Approximately 100,000 GBP

2.2. *Marine Hose* case and its meaning for cartel criminalisation

2.2.1. Overview of the case.

The Marine Hose cartel case has been chosen as a model case for application of Russia's offence because it was a severe crime embracing many types of cartel conduct. Although this case was a regular exercise of the criminal anti-cartel enforcement in the US, it became a milestone event not only for the UK criminal regime but also for international cooperation.

The organisation of this cartel was in many ways a textbook example. The cartel agreement had been achieved on the market of a flexible rubber hose used to transfer oil between tankers and storage facilities. At least for twenty years, from since 1986,¹³¹ a number of companies from different states manufacturing marine hoses had been participating in allocating tenders, fixing prices, fixing quotas, fixing sales conditions, sharing the market geographically, and exchanging sensitive information on prices, sales volumes and procurement tenders.¹³² Cartel members regularly attended meetings and communicated by fax, e-mail and telephone. The scheme of sharing the tenders awarded by customers was managed by a cartel coordinator who gathered inquiries and allocated the bid to the member of the cartel who was supposed to win the tender. Other cartel members quoted the prices 'so that all their bids would be above the price quoted by the champion.'¹³³ The implementation of the cartel had been backed up by penalties.

These practices were prohibited by Article [101(1)] of the Treaty¹³⁴ as incompatible with the common market as their object was restriction of competition within the common market. The agreement existed as 'the parties adhere to a common plan which

¹³¹ Furse, *The Criminal Law of Competition in the UK and in the US. Failure and Success* (n 27) 203.

¹³² Case COMP/39406 – Marine Hoses, Commission Decision of January 28, 2009

¹³³ *Marine hoses* [2009] European Commission COMP/39406.

¹³⁴ Article 101 (1) Treaty on European Union and the Treaty on the Functioning of the European Union 2012 (TFEU).

limits their individual commercial conduct by determining the lines of their mutual action or abstention from action in the market.’¹³⁵ It is worth noticing that the Commission is not expected ‘to classify the infringement precisely, for each undertaking and for any given moment, as in any event both those forms of infringement are covered by Article [101] of the EC Treaty.’¹³⁶ Thus the facts mentioned in Section 4 of the Decision were sufficient to demonstrate that cartel members agreed to allocate tenders, fix prices, quotas, and sales conditions, and to share geographic markets.

The agreements and concerted practices were deemed to have the restriction of competition as their object because ‘the undertakings aimed at eliminating the risks involved in uncoordinated bidding for marine hoses tenders, notably the risk of not being awarded a tender due to high prices or less attractive sales conditions, as the cartel members were able to predict with a reasonable degree of certainty what the pricing policy pursued by their competitors during the tenders was going to be’¹³⁷ while prices are the primary remedy of competition.

Importantly, the Decision stated that there was ‘no need to consider the actual effects of an agreement when it has as its object the prevention, restriction or distortion of competition within the common market. Consequently, it is not necessary to show actual anti-competitive effects where the anti-competitive object of the conduct in question is proven.’¹³⁸ Moreover, the Commission underlined that anti-competitive effects of the cartel included allocated tenders, increased or maintained prices, the exchange of commercially sensitive information and monitoring of the implementation of those agreements.¹³⁹ The Commission thereby did not analyse whether market and its indicators changed due to the cartel operation. Marine Hose cartel had an appreciable effect on trade between the Member States because this product sector was characterised by a substantial volume of trade between the Member

¹³⁵ *Marine hoses* (n 133) para 251.

¹³⁶ *Commission v Anic Partecipazioni* [1999] the Court (Sixth Chamber) C-49/92 P, ECR I-4125 [132–133].

¹³⁷ *Marine hoses* (n 133) para 277.

¹³⁸ *ibid* 278.

¹³⁹ *ibid* 279.

States and other countries. Also, it was proved that tenders for marine hoses were subject to tender allocation within the cartel.¹⁴⁰

This cartel has been discovered due to the application of the leniency programme. Japanese company Yokohama applied for immunity to the European Commission¹⁴¹ on 22 December 2006. The Commission had opened an investigation and coordinated it with the US and UK authorities. In May 2007, the United States Department of Justice (DOJ) arrested eight foreign executives in Houston, Texas, in relation to alleged cartel conduct in the market for the supply of flexible marine hoses.¹⁴² On December 3, 2007, the DOJ filed a felony charge for a violation of section 1 of the Sherman Act of 1890 by participating in the conspiracy aimed at suppressing and eliminating competition by rigging bids, fixing prices and allocating market shares for sales of marine hoses¹⁴³ in the United States. At the same time, the Office of Fair Trading in the United Kingdom also conducted a criminal investigation regarding this cartel for the country's market. Parallel investigations and the defendants' cooperation with the authorities of the US and the UK resulted in the arrangement that became very important for the entire international criminal enforcement.¹⁴⁴

The UK executives, Bryan Allison, David Brammer, and Peter Whittle pleaded guilty and agreed to prison terms in the US under a plea bargain which is a form of a negotiated agreement between the competition authority and a company and/or directors on the reduced sanctions in exchange for pleading guilty, cooperating with

¹⁴⁰ *ibid* 314.

¹⁴¹ Commission Notice on Immunity from fines and reduction of fines in cartel cases 2006.

¹⁴² the US Department of Justice press releases '#08-663: Italian Marine Hose Manufacturer and Marine Hose Executives Agree to Plead Guilty to Participating in Worldwide Bid-Rigging Conspiracy (2008-07-28)' <<https://www.justice.gov/archive/opa/pr/2008/July/08-at-663.html>> accessed 3 August 2018.

¹⁴³ *United States v. Allison*, H 07-487 (S.D. Tex. July 3, 2008) in Michael O'Kane, 'Does Prison Work for Cartelists?— The View from behind Bars An Interview of Bryan Allison Michael O'Kane' (2011) 56 *The Antitrust Bulletin* 483, 483.

¹⁴⁴ U.S. Dep't of Justice, 'Press Release Three United Kingdom Nationals Plead Guilty to Participating in Bid-Rigging Conspiracy in the Marine Hose Industry' (12 December 2007) <http://www.justice.gov/atr/public/press_releases/2007/228561.htm> accessed 15 October 2017; U.K. Office of Fair Trading, 'Press Release Three Imprisoned in First OFT Criminal Prosecution for Bid Rigging' (11 June 2008) <<http://www.of.gov.uk/news-and-updates/press/2008/72-08>> accessed 15 October 2017.

an ongoing investigation and waiving rights of appeal.¹⁴⁵ The plea-bargaining system in the US secures procedural savings, savings in the cost of legal defence and reinforces the deterrent effect of anti-cartel sanctions by freeing up resources for timely punishment.¹⁴⁶ However, the effect of the plea-bargaining system for deterrence may be detrimental if fines are the only effective sanction or less information about the infringement is available to plaintiffs as a result of the settlement.¹⁴⁷ Also, shortened investigations and procedures may result in unjust outcomes if the information received from convicted parties is overrated.¹⁴⁸ Finally, in the Marine Hose case this settlement damaged the legitimacy of the UK cartel offence as ‘many felt the way in which a US plea bargain had been used to induce guilty pleas in an English court was objectionable.’¹⁴⁹

2.2.2. The meaning of *Marine Hose* cartel case for the UK cartel criminalisation

Eight employees of the companies involved in Marine Hose cartel were arrested; seven of them pleaded guilty and served prison terms. However, this case was broadly criticised by academics as it did not send to the public a message blaming cartels.

Under the deal in the Marine Hose case, the UK executives agreed to serve the term of imprisonment in the US between 20 and 30 months. However, they were allowed to return to the United Kingdom on the condition that they also plead guilty to the UK cartel offence and that they would have returned for serving imprisonment if their UK sentences were shorter than those agreed to under the plea agreement.¹⁵⁰ Upon the arrival in the United Kingdom, they were arrested, charged with the UK cartel offence,

¹⁴⁵ Over 90 per cent of corporate criminal antitrust cases result from a plea of guilty negotiated with Antitrust Division of the US Department of Justice: SD Hammond, ‘The US Model of Negotiated Plea Agreements: A Good Deal With Benefits For All’ (2006) <<https://www.justice.gov/atr/speech/us-model-negotiated-plea-agreements-good-deal-benefits-all>> accessed 18 October 2017.

¹⁴⁶ Andreas Stephan, ‘Enhancing Deterrence in European Cartel Enforcement’ (University of East Anglia, Norwich Law School 2008) 17.

¹⁴⁷ *ibid* 100.

¹⁴⁸ *ibid*.

¹⁴⁹ Stephan, ‘How Dishonesty Killed the Cartel Offence’ (n 114) 452.

¹⁵⁰ *Plea Agreement United States v Allison H 07-487* [2007] SD Tex 27, 28, 29 14.

sentenced and imprisoned. Their terms of imprisonment varied from thirty months to three years depending on their roles in the cartel. The US plea bargain influenced the sentences as defendants were not allowed to serve in a UK prison less time that was agreed in the US. This was the first criminal prosecution under the Enterprise Act 2002 in the United Kingdom.

Although the sentence has been reported as the first (and to date the only) successful conviction under S. 188 of Enterprise Act 2002, it did not become a success story of criminal anti-cartel enforcement. First of all, the dissemination of information about the convictions and the offence was very limited due to the obscure nature of the market.¹⁵¹ Then, the issue of dishonesty had not been considered. Furse notices that ‘the Court was clearly not persuaded that participation in the Marine Hose cartel by the appellants merited a penalty towards the upper end of the available spectrum.’¹⁵² The judgement marked the good character of participants although they ‘clearly understood the illegal nature of their activity and took efforts to avoid detection’¹⁵³ and as Judge Rivlin QC’s noticed their agreement most harmfully restricted competition:

[F]our main aggravating features of this case. First, this was a very carefully planned and executed criminal fraud. Second, this crime was carried on by all of you for a prolonged period [...] Third, the sums of money involved in this case were substantial [...] Fourth, the great mischief of the offence is not just the amount of money involved, but the damaging effect that it is bound to have upon the confidence with which the business community is entitled to have in the whole process of contract bidding.¹⁵⁴

In addition to the expressed doubts in the legitimacy of the prohibition of the cartel by the object, the plea bargain agreement in Marine Hose ‘may have eroded credibility and served to instil fear in the business community as to the unpredictable way in

¹⁵¹ Stephan, ‘How Dishonesty Killed the Cartel Offence’ (n 114) 453.

¹⁵² M Furse, ‘The Cartel Offence: “Great for a Headline but Not Much Else”?’ (2011) 32 European Competition Law Review 223, 226.

¹⁵³ *ibid.*

¹⁵⁴ *R v Whittle, Brammar & Allison (Marine Hose)* [2008] EWCA Crim 2560 28 [439] (Rivlin QC).

which the offence might be applied in the future'.¹⁵⁵ The Court of Appeal expressed its concern to the propriety of the plea bargaining arrangements¹⁵⁶ when defendants appealed for a reduction in sentence, but not below those agreed in the plea bargain:

It follows that this court has not had the benefit of the kind of argument from counsel to which it is accustomed; we emphasise this is through no fault of theirs. They were acting upon their instructions, and their instructions were imposed upon them by the terms of the plea agreements. We have our doubts as to the propriety of a US prosecutor seeking to inhibit the way in which counsel represent their clients in a UK court, but having heard no argument on the subject we shall express no concluded view.¹⁵⁷

Therefore, while the case was handed to the OFT on a plate,¹⁵⁸ and the case was unique,¹⁵⁹ the UK's anti-cartel criminal enforcement had not been eased by this sentence, and *Marine Hose Cartel* case did little for convincing the community of the need to attach criminal liability to hardcore cartel conduct'.¹⁶⁰

2.2.3. The Meaning of *Marine Hose* for global anti-cartel enforcement

Despite the criticism above, this case set trends for international dimensions of cartel criminalisation. Before moving on to scrutinising the *Marine Hose* case under Russia's cartel law, I should note that the *Marine Hose* case explicitly shows how crucial leniency programmes are for effective prosecution. Extensive evidence including documents and witness testimony has been gained from the immunity applicant. The infringements of the competition law were so severe that they would also have been

¹⁵⁵ Stephan, 'Four Key Challenges to the Successful Criminalization of Cartel Laws' (n 26).

¹⁵⁶ Furse, 'The Cartel Offence' (n 152) 226.

¹⁵⁷ *R v Whittle, Brammar & Allison (Marine Hose)* (n 154).

¹⁵⁸ The nature of this arrangement was criticised by the Court of Appeal in *ibid.*

¹⁵⁹ Gregory C. Shaffer, Nathaniel H. Nesbitt and Spencer Weber Waller, 'Criminalizing Cartels: A Global Trend?' in Arlen Duke, John Duns and Brendan Sweeney (eds) *Research Handbook on Comparative Competition Law* (Edgar Elgar, 2015) 17;

¹⁶⁰ Stephan, 'Four Key Challenges to the Successful Criminalization of Cartel Laws' (n 26).

caught by anti-cartel laws and treated as a crime in some other countries including France.¹⁶¹

The case also caused the first successfully litigated extradition of an individual on the antitrust charge:¹⁶² in 2014 an Italian national was extradited from Germany to the US to serve his imprisonment sentence for participating in a worldwide bid-rigging conspiracy.¹⁶³ The extradition renders it insufficient to merely avoid travel to the US to avoid imprisonment there and thus becomes an essential tool for criminal anti-cartel enforcement considering a growing number of countries criminalising cartel conduct.

It is worth noting that in some cases a basis for cooperation among different jurisdictions is to be clarified because competition law does not provide a mechanism for prioritising competing interests of various states in prosecuting the same case ‘where the alleged conduct or effect has occurred in more than one jurisdiction, and there may be competing interests as to where any trial should be conducted.’¹⁶⁴ For example, the issue of extradition of foreign executives emerges for the US authorities in the cases where individuals hold meetings in other jurisdictions unlike those involved in *Marine Hoses*,¹⁶⁵ or where a cartel affects more than one jurisdiction and other States compete to be the most appropriate forum¹⁶⁶. In any event, establishing dual criminality, i.e. identity of the offences in the requesting jurisdiction and extraditing jurisdiction, is of particular importance. Thus, the alleged act should constitute a crime in both jurisdictions in order to successfully extradite someone on antitrust charges.¹⁶⁷

¹⁶¹ Article L420-6 the FCC (n 122)

¹⁶² Department of Justice, ‘Press-Release First Ever Extradition on Antitrust Charge’ (4 April 2014) <<https://www.justice.gov/opa/pr/first-ever-extradition-antitrust-charge>> accessed 4 August 2018.

¹⁶³ Gregory C. Shaffer, Nathaniel H. Nesbitt and Spencer Weber Waller (n 159) 25.

¹⁶⁴ Michael O’Kane, *The Law Of Criminal Cartels: Practice and Procedure* (Oxford University Press 2009) at 7.113.

¹⁶⁵ Stephan, ‘Four Key Challenges to the Successful Criminalization of Cartel Laws’ (n 26).

¹⁶⁶ Although in theory extradition can lead to more active enforcement of the criminal anti-cartel laws as it helps to keep their own houses in order, the risk of extradition of business people may have not only positive outcomes for criminal regimes. The main trade-off of extradition for anti-cartel enforcement is that a jurisdiction may refrain from criminalising anti-cartel laws to protect domestic executives from extradition – *ibid*.

¹⁶⁷ Stephan, ‘Four Key Challenges to the Successful Criminalization of Cartel Laws’ (n 26).

The issue of possible extradition opens a discussion whether the cartel offence from different jurisdictions matches. For example, the outcome of the request for extradition is not clear if a cartel offence is criminalised on a principally different basis as it has been done in Russia.

2. 3. Marine Hose Cartel would not constitute an offence in Russia

In this Section, Russia's offence is applied to Marine Hose case to show that conduct that clearly falls within the offences of other jurisdictions would unlikely to be considered as the offence. It is also shown that Russian criminal leniency programme would have been ineffective, too.

2.3.1. The concept drawing the line between criminal and administrative responsibility of individuals in Russia does not fit to the specific of the cartel offence

A Jones and R Williams remind that differentiation of a criminal offence from a civil one is essential for criminal enforcement as '[i]n the absence of a coherent justification for this difference in treatment, the 'non-felonious villainy' problem arises as the criminal law is allowed to signal moral opprobrium in a random and inconsistent fashion: the signal about the moral culpability of perpetrators becomes confused.'¹⁶⁸ However, the criterion for this separation has to be chosen carefully. Whelan relying on the retribution theory argues that the morally wrongful nature of cartels is to be considered as a justification of the cartel criminalisation.¹⁶⁹ Harding adds that criminal law should provide sufficient condemnation not only from normative perspective but also considering the actual damage done by cartels.¹⁷⁰ However, the criminality of hard-core cartels remains debatable, and some jurisdictions, including the UK, have

¹⁶⁸ Jones and Williams (n 62).

¹⁶⁹ Whelan, 'Cartel Criminalization and the Challenge of "Moral Wrongfulness"' (n 54).

¹⁷⁰ Christopher Harding, 'Hard Core Cartel Conduct as Crime: The Justification for Criminalisation in the European Context' (2012) 3 *New Journal of European Criminal Law* 139.

not yet drawn the line between cartel conduct which is subject to criminal enforcement and conduct which is not.¹⁷¹

In Russia, an individual bear either criminal or administrative responsibility for cartels. The differentiation between the criminal cartel offence and the administrative wrongdoing is made based on the general criterion of social danger which does not consider the virtue of the cartel. The concept of social danger¹⁷² is the fundamental characteristic of a crime in Russian law, but there is no exhaustive legal definition for this term. In theory, the social danger of an act ‘is defined in criminal law and depends on the elements of a crime established by the court; courts should focus on the direction of an act on values protected by the criminal law and harm caused to them.’¹⁷³ Practically, a social (or public) danger means that the act is harmful to society. There is still a high degree of discretion in assessing social danger: ‘it is defined in criminal law and depends on the elements of a crime established by the court; courts should focus on the direction of an act on values protected by the criminal law and harm caused to them’.¹⁷⁴ Table 1 briefly summarises the provisions for administrative and criminal regimes for individuals.

¹⁷¹ Jones and Williams (n 62).

¹⁷² Article 14 Уголовный кодекс Российской Федерации (Criminal Code of Russian Federation).

¹⁷³ Para 1 subpara 3 *Постановление О практике назначения судами Российской Федерации уголовного наказания* [2015] Пленум Верховного Суда Российской Федерации 58 (*On the judicial practice of imposing criminal sanctions*).

¹⁷⁴ *ibid.*

Table 1**Administrative and criminal enforcement for individuals**

	The administrative offence, Article 14.32 of the Code of Administrative Offences	The criminal offence, Article 178 of the Criminal Code
Corporate or Individual sanctions	Corporate and Individual	Individual
Threshold	Any horizontal agreement is a wrongdoing per se	Gain exceeds 50,000,000 RUB or damage exceeds 10,000,000 RUB
Standards of proof	The fact of the agreement and a market share of every violator	Restriction of competition, amount of damage or illegal income, aggravating factors
Leniency	Full exemption for the first participant and discounts for the next two participants	Exemption for the first participant
Investigating agency	FAS (Federal Antimonopoly Service)	Police (regional divisions of the Ministry of Internal Affairs)
Agency imposing sanctions	FAS (Federal Antimonopoly Service)	Regional courts
The procedural role of competition authorities	Investigator and the body imposing sanctions	No procedural role

At the same time, none of the approaches existing in Russian criminal law helps to explain a criminal virtue of cartels and to distinguish it from an administrative

wrongdoing. Some academics argue that a socially dangerous act is one that causes or threatens to cause a defined social danger by setting various manifestations of an act such as damage,¹⁷⁵ an action,¹⁷⁶ characteristics of an individual committing a crime,¹⁷⁷ consequences of certain harm to social relationships,¹⁷⁸ or violate their order, or entail negative changes in social reality.¹⁷⁹ While cartel harm to market and society is indisputable, the transition point at which an administrative wrongdoing turns into a crime is not clear. Other researchers believe that the social danger covers consequences and circumstances of the offence, form of the intent, motivation, degree of remorse and recidivism.¹⁸⁰

Reliance on the results and intent is also unsuitable for a cartel offence because there is always ‘scope for a “Robin Hood defence”,¹⁸¹ i.e. defendants tend to explain their agreements by socially acceptable motives, such as avoiding bankruptcy, saving a job or providing some certainty to consumers. Their opponents insist that social dangers exist objectively in society regardless of its origin or recognition by the law.¹⁸² However, price-fixing agreements have been tolerated in many countries criminalising

¹⁷⁵ С В Землюков, ‘Преступный вред. Теория. Законодательство. Практика’ (Thesis, МГУ 1993) 33–34 (Criminal harm. Theory. Legislation. Practice).

¹⁷⁶ В В Мальцев, ‘Проблема отражения и оценки общественно опасного поведения в уголовном праве’ (Thesis, Академия Министерства внутренних дел РФ 1993) 9 (The problem of evaluation of socially dangerous behaviour in criminal law).

¹⁷⁷ АА Герцензон and others, *История советского уголовного права* (Юрид изд-во Мин юст СССР, 1948) (*Russian Criminal Law History*) in СА Бочкарев ‘О Природе Общественной Опасности Преступления’ [2009] Бизнес в законе. Экономико-юридический журнал 155, 155 (About the Nature of Public Danger of Crime).

¹⁷⁸ Н Ф Кузнецова, *Преступление и преступность* (Изд-во Моск ун-та 1969) 60 (*Crime and Criminality*).

¹⁷⁹ А И Игнатов and Ю А Красиков (eds), *Уголовное Право России: Учебник Для Вузов. Общая Часть* (Издательская группа НОРМА—ИНФРА 2000) 71 (*Criminal Law of Russia*); Г Новоселов, ‘Без Преступных Последствий Нет Преступления.’ (2001) 3 Российская юстиция 56.

¹⁸⁰ В М Лебедев, *Научно-Практическое Пособие По Применению УК РФ* (Норма 2005) (*Academic and Practical Manual On the Application of the Criminal Code of the Russian Federation*).

¹⁸¹ Stephan, ‘How Dishonesty Killed the Cartel Offence’ (n 114); Angus D MacCulloch, ‘Honesty, Morality and the Cartel Offence.’ (2007) 28 *European Competition Law Review* 355; Furse and Nash (n 113); Brent Fisse, ‘The Cartel Offence: Dishonesty?’ (2007) 35 *A.B.L.R.* 235, 262.

¹⁸² Г Кадников (ed), *Уголовное Право. Общая и Особенная Части*. (Городец 2006) (*The Criminal Law*); А В Макаров, ‘Проблемы Определения Объекта Общественно-Опасного Деяния’ (2005) *Российский Судья* 10’ (2005) 10 *Российский судья* 20 (*Issues of the Defining of the Public Dangerous Act*).

the offence nowadays¹⁸³ while in Russia competitive pricing had been prohibited for decades¹⁸⁴ and thus price-fixing had not been considered as a danger. The only common view¹⁸⁵ is that social danger is an essential characteristic of the offence that may encompass elements to be proved, related to exemptions from criminal liability,¹⁸⁶ the circumstances precluding criminality of an act¹⁸⁷ and mitigating or aggravating circumstances,¹⁸⁸ and therefore has no predetermined characteristics.¹⁸⁹

The degree of the social danger is a general criterion for choosing between cartel as a crime and cartel as other violations. However, in reality, enforcers often struggle with applying this vague criterion to distinguishing crime from wrongdoing. The courts notice that the degree of the social danger should be established by the court depending on the specific circumstances of the offence - on the nature and scale of the consequences, the method of committing the crime; the role of the defendant in the crime committed in complicity and the type of intent (direct or indirect) or negligence in particular. Circumstances mitigating or aggravating punishment (Articles 61 and 63 of the Russian Criminal Code), relating to the crime (for example, the commission of a crime due to difficult life circumstances or on the motive of compassion, a particularly active role in the commission of a crime), are also to be taken into account in determining the degree of social danger.¹⁹⁰ These recommendations are also of little help for such a complex economic crime as a cartel and attract the same objections regarding the irrelevance of the motives of individuals charged with cartel for indictment.

¹⁸³ Stephan, 'How Dishonesty Killed the Cartel Offence' (n 114).

¹⁸⁴ Chapter 2

¹⁸⁵ СА Бочкарев (n 177).

¹⁸⁶ Article 73 Criminal Code (n 172)

¹⁸⁷ Chapter 8 *ibid* 8.

¹⁸⁸ Chapter 10 *ibid* 10.

¹⁸⁹ Л М Прокументов, 'Общественная Опасность Как Основание Криминализации (Декриминализации) Деяния' (2009) 4 Вестник Воронежского института МВД России 18 (Public Danger As the Basis for Criminalising and Decriminalising Acts).

¹⁹⁰ Para 1 subpara 4 *Plenum resolution* 58 (n 173).

To sum up, differentiation of the criminal offence from the administrative wrongdoing is problematic. Along with cartels, there are about one hundred¹⁹¹ criminal offences which are ‘adjacent’ to administrative wrongdoings and the point at which they become a criminal offence is still very debatable.¹⁹² To facilitate the process of deciding between crime and ordinary wrongdoing for investigating bodies, in some cases including the offence under Article 178 of the Criminal Code the material threshold is expressed in the particular amount of gain or damage. Thus, the cartel offence became effects-based ones.

2.3.2. An error of employing loss and gain for the cartel offence in parallel to theft and fraud

Article 178 of the Criminal Code establishing a cartel offence is called ‘Restriction of competition.’¹⁹³ Loss and gain in a certain amount as a trigger for criminal sanctions resemble the reading of theft¹⁹⁴ and fraud¹⁹⁵ which also can be the subject of criminal or administrative sanctions depending on the value of the stolen item.¹⁹⁶ Loss or gain was supposed to underline the social danger of criminal cartels, to express the harmfulness of cartels for legally protected social relations (values) and draw the borderline for distinguishing a crime from an administrative wrongdoing.¹⁹⁷ Apparently, parallels of the cartel offence with theft (stealing) and fraud (cheating) could balance the issues of the vague nature of the social danger as a criterion for choosing administrative or criminal tools, and compensate for the lack of negative

¹⁹¹ ПЮ Константинов, АК Соловьева and АП Стуканов, ‘Взаимосвязь административных правонарушений и преступлений.’ (2005) 3 Правоведение 58 (Interrelation of Administrative Wrongdoings and Crimes).

¹⁹² Анна Сергеевна Шавырина, ‘Вопросы Соотношения Преступлений и Смежных Административных Правонарушений’ (2010) 1 Пробелы В Российском Законодательстве. Юридический Журнал 1 (Issues of the Relationship between Crimes and Related Administrative Offences).

¹⁹³ The title of Article 14.32 of the Code of Administrative Offences is ‘Conclusion of the agreement restricting the competition, tacit collusion and coordination of economic activities’

¹⁹⁴ Art 158 Criminal Code (n 172); Art. 7.27 Кодекс Российской Федерации об административных правонарушениях 2001 (furthermore The Code of Administrative offences).

¹⁹⁵ Art 159 Criminal Code (n 172); The Code of Administrative offences (n 194) .

¹⁹⁶ Art 7.27 The Code of Administrative offences (n 194) .

¹⁹⁷ Л М Прокументов (n 189).

attitude towards unfair competition. However, there are a number of theoretical and very practical objections for such a simple analogy.

Considering that cartel members intentionally seek to take the money away from the those who purchase through a cartel overcharge,¹⁹⁸ the cartel offence may resemble stealing: ‘what is stolen is the amount that is paid constituting the margin between the competitive price (that is, the price that would have prevailed absent the cartel) and the cartel price.’¹⁹⁹ However, first of all, measuring this margin is highly problematic.²⁰⁰ Then, consumers do not appreciate cartel damage immediately as in the case of other thefts, especially in the case of bid-rigging.²⁰¹ Finally, employing the concept of stealing for the cartel offence distracts from the issues of cartel impact on total welfare and does not cover agreements that have not been implemented.²⁰²

Equating the cartel offence to fraud or cheating raises the question as to who is a victim of the offence, even if a model of cheating as obtaining an unfair advantage resembles advantages of the hard-core cartel.²⁰³ Although awareness of the violator of the victims’ identity is not a mandatory element of *mens rea*, in our case this question has a very practical implementation for calculating the damage done by the cartel. There is no consensus regarding this question. On the one hand, as the cheating supposes an intentional violation of the rule for taking advantage over those who obey the rules and expect reciprocal benefits,²⁰⁴ the competitors of the violator, their customers and suppliers²⁰⁵ could be victims of the cartel as a fraud. However, the final consumers

¹⁹⁸ A few more types of cartel harm are examined in Chapters 5 and 6.

¹⁹⁹ Caron Beaton-Wells, ‘Capturing the Criminality of Hard-Core Cartels: The Australian Proposal’ (2007) 31 Melbourne University Law Review <<https://papers.ssrn.com/abstract=1099175>> accessed 4 August 2018.

²⁰⁰ John M Connor and Robert H Lande, ‘How High Do Cartels Raise Prices? Implications for Optimal Cartel Fines’ (2005) 80 Tulane Law Review 513.

²⁰¹ Christopher Harding, ‘A Pathology of Business Cartels: Original Sin or the Child of Regulation?’ (2010) 1 New Journal of European Criminal Law 51.

²⁰² Whelan, ‘Cartel Criminalization and the Challenge of “Moral Wrongfulness”’ (n 54) 13.

²⁰³ Beaton-Wells, ‘Capturing the Criminality of Hard-Core Cartels’ (n 199); Whelan, ‘Cartel Criminalization and the Challenge of “Moral Wrongfulness”’ (n 54) 21–22.

²⁰⁴ Stuart P. Green, *Lying, Cheating, and Stealing: A Moral Theory of White-Collar Crime* (Oxford University Press 2007) 65–66.

²⁰⁵ Beaton-Wells, ‘Capturing the Criminality of Hard-Core Cartels’ (n 199).

also suffer from cartel conduct although they do not have to participate in any interplay with a violator.²⁰⁶ Therefore, as the circle of victims cannot be defined, any methodology of calculating losses would be unreliable for the prosecution.

2.3.3. The inner inconsistency of the *corpus delicti* of Russia's cartel offence

Whelan claims that the content and the scope of criminal competition law should be 'reasonably understood by potential cartelists, judges, jurors, and the public at large.'²⁰⁷ A clearly defined cartel offence pursues deterrence of undesirable conduct, results in lower social costs of prosecution, communicates the wrongfulness of cartels for the achievement of retribution and 'helps to ensure the workability of a criminal immunity policy.'²⁰⁸

The apparent simplicity of adopting the effects-elements by analogy with theft and fraud caused self-contradiction of the cartel offence and a high number of inconsistencies in its *corpus delicti*. First, Russia's concept of *corpus delicti* is different from the common law one. Article 8 of the Criminal Code states that criminal responsibility is applied to an act that contains all the elements of a crime under the Criminal Code. Article 73 of the Criminal-Procedural Code clarifies that prosecution in a criminal trial has to prove the event of the crime including the time, place, mode and the other circumstances of committing the crime; the persons being guilty of committing the crime, the form of his guilt and the motives; the circumstances, characterising the personality of the accused; the nature and the scale of harm caused by the crime; the circumstances, excluding the criminality and the punishability of the action; the circumstances, mitigating and aggravating the punishment; the circumstances which may entail relief from criminal liability and from the punishment.²⁰⁹ All together, they constitute *corpus delicti* and are grouped into four

²⁰⁶ Whelan, 'Cartel Criminalization and the Challenge of "Moral Wrongfulness"' (n 54) 23.

²⁰⁷ Whelan, *The Criminalization of European Cartel Enforcement* (n 28) 175.

²⁰⁸ *ibid.*

²⁰⁹ Уголовно-Процессуальный Кодекс Российской Федерации (Code of Criminal Procedure of Russian Federation) (n 44).

elements: a subject, a subjective side of a crime, an object and an objective side of a crime.

To begin with, it is not clear who is a subject of the cartel offence under Article 178 of the Criminal Code. A straight interpretation of paragraph 2 of Article 178, introducing an official position of a subject as an aggravating factor and more severe sanctions, means that Paragraph 1 relates to a general subject (offender) who should be just a sane individual who has attained the age of 16. Thus, para 1 may introduce a very hypothetical cartel agreement which involves individuals without managerial power. The court interpretations of a ‘use of the official position’ provide the variety of its meanings and thus do not simplify the task of determining an individual for Article 178. For example, the resolution of the Plenum of the Supreme Court of the Russian Federation²¹⁰ indicates that according to Para 2 Art. 210 of the Criminal Code, the use of official position shall be applied to officials, civil servants and employees of local governments and those who permanently, temporarily or by special authority perform organizational or administrative functions in a commercial organization, regardless of ownership or a non-profit organisation. As this interpretation separates organisational and administrative functions from regular responsibilities of employees, the offence under paragraph 1 of Article 178 may be committed by an ordinary member of a sales team, for example.

The resolution of the Plenum of the Supreme Court ‘On judicial practice in cases of fraud and embezzlement,’²¹¹ which may be more relevant considering that the cartel offence contains effects-based elements, adds that for para. 3 of Art. 159 (fraud) and para 3 of Art. 160 of the Criminal Code (embezzlement) the use of official position includes the officials of the Russian Federation Armed Forces,²¹² state or municipal employees and other individuals acting as the sole executive body, the member of Board of Directors or any other member of the collegial executive body or

²¹⁰ *Постановление О судебной практике рассмотрения уголовных дел об организации преступного сообщества (преступной организации) или участии в нем (ней)* [2010] Пленум Верховного Суда 12 (‘*On judicial practice in criminal cases on the organisation of a criminal community (criminal organisation) or participation in it*’).

²¹¹ *Постановление О судебной практике по делам о мошенничестве, присвоении и растрате* [2007] Пленум Верховного Суда 51.

²¹² Footnote 1 to Art 285 Criminal Code (n 172) .

permanently, temporarily or on special authority exercising organizational and administrative or administrative functions in these organizations.²¹³ This interpretation means that not only directors but also employees of all levels are subject to sanctions of paragraph 2 of Article 178 of the Criminal Code if they are involved in a cartel arrangement. This view is reinforced by the resolution of the Plenum of the Supreme Court ‘On judicial practice in cases of illegal business and the legalization (laundering) of money or other property acquired by criminal means’²¹⁴ establishing that individuals are supposed to use an official position if they are official of the state bodies, employees or managers in commercial and other organizations. Thus, it is still an open question who is the subject for paragraph 1 of Article 178 of the Criminal Code.

For the cases like the Marine Hose cartel, this uncertainty means that acts of individuals may constitute an offence of low gravity or medium gravity depending on their role in the company and the choice of interpretations for the use of official power. The gravity of a crime determines not only the length of the prison sentence but also the limitation period, i.e. the imposition of sanctions and thus their deterrent effect.²¹⁵

The so-called subjective side of Article 178 admits both the direct intent and indirect intent to achieve an agreement, which means that the individual may not necessarily envisage all the consequences including restriction of competition and amount of damage to individuals or organisations. In general, this reading of the intent for the cartel offence seems reasonable as little empirical evidence is available to judge individuals arranging a cartel. They may be driven not only by increased profitability, but also by ‘social and emotional (not just financial) rewards, and indirect (rather than direct) financial rewards, such as promotions and bonuses.’²¹⁶

²¹³ Footnote 1 to Art. 201 *ibid*.

²¹⁴ *Постановление О судебной практике по делам о незаконном предпринимательстве и легализации (отмывании) денежных средств или иного имущества, приобретенных преступным путем* [2004] Пленум Верховного Суда 23.

²¹⁵ See Section 4 of this Chapter

²¹⁶ Christine Parker, ‘Criminal Cartel Sanctions and Compliance: The Gap between Rhetoric and Reality’, *Caron BeatonWells & Ariel Ezrachi (eds) Criminalising Cartels: Critical Studies of an Interdisciplinary Regulatory Movement* (Oxford, Hart Publishing 2011).

Traditionally, the object and objective side of an act express the social danger of a crime and thus they are the main criteria to separate cartel as a wrongdoing from cartel as a crime. However, they are barely perceptible for an enforcing body.

In Russian criminal law doctrine, the object of a crime and the significance of the public relations suffering from an offence are used as a decisive factor for distinguishing one crime from the other. The generic object for Article 178 is the same as for the section 'Economic crimes' embracing three chapters and three corresponding types of objects: 'Crimes against property', 'Crimes in the field of economic activity' and 'Crimes against interests of service in commercial and other organisations'. It is defined as the normal functioning of the economy. The cartel offence is classified as a crime in the field of economic activity, and its immediate object is the normal operation of competition on the market. In the context of Article 178, the object of the offence means 'public relations' securing free market and fair competition protected by criminal law.

The objective side, covering an act prohibited by criminal law, its socially dangerous consequences and the causal link between them, is the most ambiguous element of the cartel offence. Article 178 of the Criminal Code prohibits 'the restriction of competition by entering into a cartel' in the offence, and therefore the negative effect is to be proved.²¹⁷ As not only agreements amongst competitors but also a restriction of competition and an amount of damage are to be proved for prosecuting the case, the question raised is what agency, when and how is to decide on opening the case?

There is no legal requirement that the FAS decision establishing the existence of a cartel agreement is necessary for opening a criminal investigation.²¹⁸ Furthermore, there is no formal status of competition authorities in criminal proceedings rather than that of any other applicant, so the police are authorised to open a criminal case under Article 178 of the Criminal Code at their discretion. If there is no proven damage or

²¹⁷ Александр Валерьевич Егорушкин, *Антимонопольное законодательство: очередной этап реформы* (Wolters Kluwer Russia 2010) 131 (Antimonopoly legislation: the next stage of the reform).

²¹⁸ Art 140 Уголовно-Процессуальный Кодекс Российской Федерации (Code of Criminal Procedure of Russian Federation) (n 44)

gain above the threshold, a cartel agreement is an administrative case to be investigated by FAS or its regional offices. If a certain amount of gain (damage) can be proved, a criminal case is to be open and investigated by police.

Employment of an amount of damage or gain to demonstrate the seriousness of the cartel conduct attracts common criticism if it applies to a cartel operating in one country and makes enforcement of the offence impossible for international cartels like Marine Hose. The apparent simplicity of using the money term threshold by analogy with theft and fraud caused a significant number of inconsistencies in its *corpus delicti*. The chance to prove damages is so unrealistic that in many cases competition authorities opt for imposing fines on individuals within the simple administrative procedure instead of taking the risk of opening a criminal investigation and receive a rejection after the limitation period is expired.²¹⁹

From the very beginning, the outcome of the petition to open a criminal investigation under Article 178 of the Criminal Code is highly uncertain. First of all, the prosecution in cartel cases is wholly detached from the investigation of competition authorities and their decisions about cartels. This approach to distribution of power in criminal investigation of cartels in Russia differs from other jurisdictions criminalising cartels whereby a decision of competition authorities is a mandatory element of a criminal case against the cartel, ‘e.g., investigate up to the point of the indictment, ask questions and make statements in court.’²²⁰ Until the end of 2014, the idea of introducing a decision of competition authorities as a mandatory element of a criminal case against cartel had been moderately discussed²²¹ followed by the similar model used for investigation of tax crimes whereby decisions of tax authorities were the only ground for opening criminal cases against tax violations.²²² However, this order of opening the criminal investigation for tax crimes has been abolished.

²¹⁹ Interview with Aleshin (n 34).

²²⁰ Florian Wagner-von Papp (n 82).

²²¹ СВ Максимов, ‘Уголовная Ответственность За Нарушения Антимонопольного Законодательства в России’ (2014) 1 Российское конкурентное право и экономика 7, 13 (Criminal Responsibility for Violations of Antimonopoly Legislation in Russia).

²²² Federal Law 308-FZ О внесении изменений в Уголовно-процессуальный кодекс Российской Федерации 2014.

The full discretion of the police to open or not to open a criminal case raises a number of questions regarding the elements of the offence requiring specialised expertise. For example, while just the fact of concluding an agreement disregarding damages or effect for competition is sufficient for administrative liability both for individuals and undertakings, the police must prove (or at least assume for deciding to open the case) a restriction of competition emerged as a result of the horizontal agreement and an amount of damages exceeding the threshold. This is unlikely to be a feasible task for a police investigator. In addition to theoretical consideration on the importance of *per se* prohibition of the cartel conduct,²²³ the assessment of losses or gain seems a very unpractical exercise taking into account that it is still unclear who exactly suffers from the cartel agreement, how losses are dispersed among thousands of final consumers and how all hazardous effects of cartels can be considered. Ultimately, this element decriminalises cartels that have not been implemented or have not resulted in losses yet and those cartel members that deceive others by cutting prices to attract more customers.²²⁴

In a case like Marine Hose cartel, a cartel member would likely go unpunished not just because the effect of the cartel had been spread across many states but also because none of the prosecuting agencies proved the effect of the cartel agreement. Therefore, even if Russia's authorities were handed the case on a plate, like the OFT, initiating the criminal case investigation would be very unlikely because the Russian police do not have expertise and resources to prove the elements of the objective side of the crime.

Also, extradition of individuals is doubtful because of effects-based elements in Russia's cartel offences. Extradition of the suspects is possible only where there is double criminality. Thus, the activity of which the suspect is accused should be a criminal offence in both the requesting and the extraditing jurisdictions. In Russia, only bid-rigging, out of all types of anti-competitive arrangements in Marine Hose, could be grounds for prosecution if a cartel had been detected and consequently deterred reasonably soon after the auction. The task of proving the restriction of

²²³ See more regarding *per se* prohibition of cartels in Chapter 4

²²⁴ Whelan, 'Cartel Criminalization and the Challenge of "Moral Wrongfulness"' (n 54) 15–16.

competition and gain seems more natural for violations on tenders because the tender price paid for purchase constitutes gain for seller for means of Article 178 of the Criminal Code or the difference between the price of the bid in the concluded agreement and the price offered by the bidder which was not involved in the cartel can be counted as damage.

However, other jurisdictions involved proved only the agreement amongst competitors, while in Russia the activity of which the suspect is accused may be either an administrative wrongdoing or a criminal offence. Although different requirements of proof applicable in the two countries do not defeat extradition,²²⁵ and it is enough if a cartel agreement is a criminal act in both jurisdictions, the classification of the agreement as a wrongdoing due to unproved gain or gain below threshold makes extradition inevitably impossible.

2.3.4. Cartels as crimes of low and medium gravity and issues with the limitation period

In a cartel that has lasted for many years, like Marine Hose, another issue preventing prosecution comes up. The limitation period set for the Russian cartel offence is very short and does not consider the nature of cartels.

There is no good faith information concerning why regular anticompetitive agreements²²⁶ were classified as crimes of small and medium gravity while, for example, corruption crimes, which often accompany bid-rigging, are classified as more dangerous crimes.²²⁷ One possible explanation could be the hasty and very formal criminalisation of anti-competition violations at the very beginning of the transition of the post-Soviet economy to a free market economy in the 1990s without proper examination of the issue. The threshold for this classification is a maximum length of imprisonment established in the particular article of the Criminal Code.

²²⁵ *Heilbronn v Kendall*, 775 F Supp 1020 (WD Mich).

²²⁶ Para 1 of Article 178 (n 172)

²²⁷ Arts 285, 290 *ibid*.

Criminal sanctions for cartels under Paragraph 1 of Article 178 are set up to three years, which corresponds to crimes of low gravity.

The aggravating circumstances transfer cartel agreements²²⁸ into the category of grave crimes because the maximum sanction increases to the deprivation of freedom for a term of up to six years. However, the applicability of these circumstances to the cartel offence is not clear. The uncertainty of the use of the official position has been discussed above.²²⁹ Considering the secret nature of the cartel, aggravating factors in the form of destruction or damage of another's property, a threat of its destruction or damage²³⁰ and cartel resulted from violence on or the threat of violence²³¹ are very unrealistic. Especially large losses or gain²³² as an aggravating factor bear the same risks as a regular cartel offence. Thus, it is still unclear what act falls under paragraph 2 of Article 178 as a grave crime with a maximum sanction of up to six years of imprisonment.

Often criminal investigation of the cartel offence of medium gravity cannot be commenced due to the expired limitation period. Usually, a cartel investigation starts from administrative procedure carried out by competition authorities. They open a case within three years of a violation having been committed or, in the case of an ongoing violation, after the date the violation was stopped or discovered.²³³ The competition authority shall initiate administrative proceedings and impose sanctions on violators within two months from the date of their decision establishing the fact of violation of the antimonopoly legislation.²³⁴

²²⁸ Paras 2, 3 Art 178 *ibid.*

²²⁹ S 2.3.3.

²³⁰ Para 2 of Article 178 Criminal Code (n 172)

²³¹ Para 3 of Article 178 *ibid.*

²³² Para 2 Article 178 *ibid.*

²³³ Art 41.1 О защите конкуренции No 135-ФЗ 2006 (On Protection of Competition).

²³⁴ Para 10.1 *Постановление О некоторых вопросах, возникающих в связи с применением арбитражными судами антимонопольного законодательства* [2008] Высший Арбитражный Суд Российской Федерации 30 (On some issues arising in connection with the application by the commercial courts of antimonopoly legislation).

A suspect shall be released from criminal liability on expiry of two years after committing a crime under paragraph 1 of Article 178 and six years for paragraphs 2 and 3²³⁵ as the limitation period shall be counted from the day of committing a crime to the time of the entry of a court's judgment into legal force. After a few months required for completing all proceedings in competition authorities, appealing the decision in some courts,²³⁶ the decision on establishing a cartel may come into force many years after the illegal agreement has been detected. Therefore, often a limitation period for a crime expires before the case can be transferred to the investigating agency.²³⁷

To sum up, the unusual characteristics of the offence make it barely enforceable even in such a textbook case as Marine Hose. The Russian cartel offence is designed as an effects-based offence, and the restriction of competition along with a certain amount of damage or gain are to be proved. It is also a stand-alone offence as it does not consider the decision of competition authorities on establishing cartels. Thus, complex expertise is required before opening a criminal case, which is not available to police. Underestimation of the gravity of the offence and inconsistency of the procedure with the realities of the administrative procedure resulted in short limitation period preventing the criminal enforcement of anti-cartel laws. The desperate attempts to impose administrative sanctions on individuals in order to demonstrate at least some outrage definitely cannot substitute the criminal penalty like in Germany where fines are significantly higher.²³⁸ In practice, Russia's fines can be easily compensated to individuals by companies.

The next section demonstrates that the criminal immunity, which was crucial for discovering, investigation and prosecution of individuals on Marine Hose cartel, cannot be granted for Russia's cartel cases and thus is of little help for investigators.

²³⁵ Criminal Code (n 172) .

²³⁶ The issues of the appeal procedure are discussed in Chapter 4.

²³⁷ Interview with Aleshin (n 34).

²³⁸ Florian Wagner-von Papp (n 82).

2.4. Leniency is not used as a tool for detection and investigation in Russia

This section examines Russia's criminal leniency programme and finds out that it does not fit for detection of cartels as it lacks certainty and coordination with the corporate application, contains unclear conditions coupled with broad discretion of investigating bodies and is thus unattractive for applicants.

2.4.1. Meaning of leniency for anti-cartel criminal regime

Leniency policies often accompany cartel criminalisation as the most critical tool for detecting cartels.²³⁹ Without leniency uncovering of cartels would be very difficult.²⁴⁰ Also, leniency policies mean the economy of resources²⁴¹ in the resource-intensive investigation. On a bigger scale, implementing a leniency policy can also benefit cartel deterrence, sanctioning and international cooperation in cartel investigations.²⁴² For example, Marine Hose cartel was detected due to the application of Yokohama for immunity under the Commission's 2006 Leniency Notice (2).

The programmes are granting immunity to cartel members for their co-operation draw upon the prisoner's dilemma. In other words, in anti-cartel enforcement, usually only the first applicant is exempted from liability or at least is rewarded a significant discount for fines. This provision undermines the trust between conspirators and sparks a 'race' to the competition authority.²⁴³ Facing this dilemma, a cartel member as a rational actor is believed to weigh repeatedly the profitability of staying in a cartel agreement with benefits of confession to the competition authority.²⁴⁴ In theory, the distrust between cartel members results in destabilising active cartels and deterring future infringements. Although the effect of leniency programs on cartels is less

²³⁹ Stephan and Nikpay (n 52).

²⁴⁰ 'Fighting Hard-Core Cartels: Harm, Effective Sanctions and Leniency Programmes' (OECD 2002).

²⁴¹ Para 2.2 ICN, 'Anti-Cartel Enforcement Manual'
<<http://www.internationalcompetitionnetwork.org/working-groups/current/cartel/manual.aspx>>
accessed 4 August 2018.

²⁴² *ibid.*

²⁴³ Stephan and Nikpay (n 52) 139.

²⁴⁴ *ibid.*

straightforward,²⁴⁵ many countries based on the given assumptions adopt programmes on granting exemptions to corporations from fines and individuals from criminal sanctions for cartels.²⁴⁶

To make a leniency policy effective, a number of prerequisites creating a prisoner's dilemma are to be secured. First, as inadequately soft sanctions reduce the benefits of leniency for a cartel participant,²⁴⁷ the policy should be based on a threat of severe sanctions²⁴⁸ so that the cost of getting caught would be higher than the value of the cartel for an applicant. Then, a real risk of detection and the certainty of the following sanctions encourages cartel participants to come forward before they are caught.²⁴⁹ Finally, credible level of enforcement securing the high risk of detection and its predictable effect for an applicant²⁵⁰ build the trust of leniency applicants and make the immunity programme attractive for those whistle-blowers.²⁵¹ Otherwise, lack of transparency and predictability destroys the necessary incentives for self-reporting and cooperation as it has been observed in the earliest immunity programmes in the United States, Canada, and the EU.²⁵²

A leniency programme must cover all sanctions, both administrative and criminal, in order to be effective and attract applications. Discretion should be eliminated from leniency, and standards for opening investigations, deciding whether to file criminal charges, sentencing and calculating fines should be transparent.²⁵³

²⁴⁵ Stephan and Nikpay (n 52).

²⁴⁶ ICN, 'Leniency Materials' <<http://www.internationalcompetitionnetwork.org/working-groups/current/cartel/awareness/leniency.aspx>> accessed 4 August 2018.

²⁴⁷ Para 2.3 ICN, 'Anti-Cartel Enforcement Manual' (n 241).

²⁴⁸ Hammond, 'Cornerstones Of An Effective Leniency Program' (n 88); ICN, 'Anti-Cartel Enforcement Manual' (n 241).

²⁴⁹ ICN, 'Anti-Cartel Enforcement Manual' (n 241).

²⁵⁰ Hammond, 'Cornerstones Of An Effective Leniency Program' (n 88); ICN, 'Anti-Cartel Enforcement Manual' (n 241).

²⁵¹ Para 2.3 ICN, 'Anti-Cartel Enforcement Manual' (n 241).

²⁵² Hammond, 'Cornerstones Of An Effective Leniency Program' (n 88).

²⁵³ *ibid.*

2.4.2. Leniency: the exemption from criminal liability in Russia is not guaranteed

Should a cartel member wish to obtain immunity in Russia in exchange for information about the cartel, they would face considerable uncertainty on where to apply for it, how to secure individuals if an application is made on behalf of the corporation and how to fulfil the requirements prescribing compensation of losses. Thus, the mere detection of the cartel due to a leniency programme is questionable in Russia.

2.4.2.1. Granting immunity in Russia

Although administrative and criminal anti-cartel regimes offer programmes of exemptions from liability and discounts for individuals and economic entities,²⁵⁴ individual criminal immunity is not guaranteed in Russia, and the outcome of an application is unpredictable for an applicant. Both programmes remain unpopular: no application for criminal immunity has been reported yet and less than 20 per cent of cartels²⁵⁵ were self-reported in an administrative inquiry.

Criminal and administrative leniency programmes are independently administered by different state bodies, and the leniency policies do not consider the issues of multiple parallel applications as, for example, the ECN Model Leniency programme²⁵⁶ does. In the absence of the regulation for parallel applications, an individual must apply to the various agencies of a different level for immunity. Also, both programmes contain subjective wording without guidance as to when their conditions are satisfied. Considering the lack of methodology to calculate damages or gain for defining threshold between an offence and an administrative wrongdoing, a potential applicant has to consider risks and perspectives of both leniency programmes.

2.4.2.2. Administrative leniency programme

Granting immunity is usually justified for discovering a cartel ‘where the competition agency is aware of the cartel, but the competition agency does not have sufficient

²⁵⁴ Appendix 1 Leniency conditions.

²⁵⁵ Interview with Aleshin (n 34).

²⁵⁶ ECN Model Leniency Programme Explanatory Notes 1996 para 7.

evidence to proceed to adjudicate or prosecute.’²⁵⁷ In this case, leniency remains ‘an efficient and effective means of detecting, investigating and prosecuting or adjudicating cartel conduct’²⁵⁸ if an exemption is granted in exchange for strong evidence, and the requirements for this evidence are certain. However, Russia’s administrative leniency programme lacks criteria of evidence sufficient to establish the fact of an administrative offence. As some companies obtained immunity from administrative sanctions in turn for pleading guilty without providing new evidence,²⁵⁹ there is no wonder that often the courts overturned the decisions of competition authorities based on leniency applications of cartel members.²⁶⁰

Russia’s administrative leniency programme²⁶¹ resembles the EU leniency notice 1996²⁶² and deserves the same criticism. Similar to this earliest EU leniency programme, the Note 1 to Article 14.32 of the Code of Administrative Offences provides the full exemption from administrative sanctions to the first applicant if by this moment the competition authority did not detect a cartel; an applicant terminated participation in the agreement and information is sufficient to establish the fact of an infringement. The second and the third applicant shall be granted a minimum fine (1 per cent) if they satisfy the same conditions and, also, are not instigators of the cartel. The immunity does not catch the employees if a company applies, and an exemption from administrative sanctions is granted to an applicant specifically while both a company and an individual are the subjects to administrative sanctions. The higher sanctions and other adverse consequences applied to non-co-operators and certainty

²⁵⁷ Appendix 1: Good practices relating to leniency programs ICN Anti-Cartel Enforcement Manual 2009.

²⁵⁸ *ibid* 3.12.

²⁵⁹ *Решение по делу № 1-00-110/00-22-16* [2017] ФАС 1-00-110/00-22-16; *Определение об отказе в возбуждении дела об административном правонарушении* [2017] Управление по борьбе с картелями Федеральной антимонопольной службы 22/77547/17.

²⁶⁰ For example, in Fish and Caustic Soda cartels ‘Картельный сговор оказался слишком сложно доказуем для ФАС’ (*ПРАВО.Ru*, 2 November 2016) <https://pravo.ru/court_report/view/126155/> accessed 9 August 2018 (The cartel is too difficult to prove for FAS); Анастасия Мануйлова, ‘Суд посчитал возможным, в нарушение требований Конституции, придать обратную силу закону’ (*ПРАВО.Ru*, 29 April 2014) <https://pravo.ru/court_report/view/104687/> accessed 9 August 2018 (The court ruled on retroactive effect to the law contradictory to the Constitution.).

²⁶¹ Note 1 Article 14.32 The Code of Administrative offences (n 194).

²⁶² Commission Notice on the non-imposition or reduction of fines in cartel cases 1996.

of conditions are the principal incentives to apply for leniency.²⁶³ Similar to the first European leniency programme,²⁶⁴ the Russian administrative leniency does not attract applicants.

As the threat of administrative fines is not severe enough, administrative leniency does little to enhance deterrence by uncovering active cartels. Also, the limitation of the sanctions to a minimum fine for the second and third applicants if they were not cartel organisers demotivates members of a cartel to race to competition authorities with a confession and to take ‘a competitive advantage in that the other firms must deal with significant fines.’²⁶⁵ Considering that the difference between the administrative immunity and the level of sanction otherwise faced is insignificant, there is no incentive to reveal an infringement.²⁶⁶

The condition of terminating participation in a cartel in Russia’s administrative programme may also work against collecting evidence.²⁶⁷ In addition to the lack of flexibility regarding termination of participation, the administrative programme does not provide guidance on the sufficiency of information. It does not specify the criteria of sufficiency and does not require cooperation; therefore, benefits of granting immunity for the anti-cartel enforcement are not clear considering that competition authorities do not gain strong evidence for an inquiry.

All evidence is to be assessed at the discretion of the enforcing agency. Similarly, to the earliest EU immunity programme, this approach ‘left room for interpretation and, therefore, uncertainty as to what decisive information was and what it meant to be an instigator.’²⁶⁸ Also, Article 14.32 does not specify when the required information is to

²⁶³ Chapter 2 ICN Anti-Cartel Enforcement Manual (n 257).

²⁶⁴ Stephan, ‘An Empirical Assessment of the European Leniency Notice’ (n 89).

²⁶⁵ Stephan and Nikpay (n 52).

²⁶⁶ Stephan, ‘An Empirical Assessment of the European Leniency Notice’ (n 89) n 89.

²⁶⁷ European Commission, ‘Press Release - Competition: Commission Adopts Revised Leniency Notice to Reward Companies That Report Cartels’ (Brussels, 7 December 2006) <http://europa.eu/rapid/press-release_IP-06-1705_en.htm?locale=en> accessed 8 June 2018.

²⁶⁸ European Commission, ‘Press Release - Commission Adopts New Leniency Policy for Companies Which Give Information on Cartels’ (Brussels, 13 February 2002) <http://europa.eu/rapid/press-release_IP-02-247_en.htm?locale=en> accessed 9 August 2018.

be provided. Therefore, an applicant has to provide it at the time of applying for immunity. In conjunction with the obligation to provide ‘sufficient information,’ this may stop applicants from spontaneous decisions to confess.

In practice, the lack of guidance on the quality and sufficiency of evidence gives violators one more opportunity to reduce fines. Russian competition authorities are supposed not to possess information about a cartel infringement, and a person or a company can apply for immunity until the moment when the decision of the competition authority establishing the fact of violating the law is announced.²⁶⁹ The High Commercial court reasoned that this is a separate stage of the process before initiating a procedure for imposing administrative fines.²⁷⁰ In fact, this is a quasi-judicial hearing at the very end of the investigation at which all obtained evidence is disclosed and examined, and cartel members can well predict an outcome of this hearing for them. No wonder, that in some cases cartel members agree on the order of applications and distribute fine reductions in the course of this hearing.²⁷¹ Thus, instead of accelerating tension amongst competitors the administrative leniency programme may provide them ideas on future cooperation. Under these circumstances even if a cartel member decides to confess, the information they provide can be limited to the facts that have already been established by competition authorities. Finally, an application for administrative leniency does not guarantee an individual immunity from criminal sanctions.

2.4.2.3. Criminal Immunity under Article 178 of the Criminal Code²⁷²

Criminal immunity is regulated separately from the administrative one; in such a parallel system, maximum certainty to potential leniency applicants is crucial.²⁷³ However, on closer examination, the conditions of criminal leniency programme are

²⁶⁹ *Постановление О некоторых вопросах, возникающих в связи с применением арбитражными судами антимонопольного законодательства* (n 234) s 10.3.

²⁷⁰ s 1.1 of Article 28.1 of The Code of Administrative offences (n 194)

²⁷¹ Interview with Aleshin (n 34).

²⁷² Appendix 1 Leniency conditions.

²⁷³ ICN Anti-Cartel Enforcement Manual (n 257)

not only uncertain, but also unrealistic,²⁷⁴ and an individual is very unlikely to be exempted from criminal sanctions.

While the regulation of administrative immunity deserves criticism for eliminating incentives to confess about cartel as soon as possible, the criminal leniency does not specify when an individual has to apply for immunity. Taking into account that contribution either to disclosure or to an investigation of a crime is sufficient to meet the first condition in that it may be assumed that an application for criminal immunity can be submitted until the verdict is announced. Then the question of which body is entitled to accept the application and to decide if all conditions are met raises. Competition authorities have no power in criminal procedure. Also, there are no special procedural rules for criminal anti-cartel enforcement, and it can be assumed that an application for criminal immunity shall be addressed to police (a body of inquiry, an investigator), a prosecutor or a judge²⁷⁵ even if an individual applied for administrative leniency to competition authorities but their inquiry established that cartel's gain or produced damage is above a threshold separating an administrative wrongdoing from a crime.

Authorising police and prosecution to decide on granting immunity for a first self-confessed cartel member means not only the highest uncertainty of the application outcome but also calls in question the value of the obtained evidence for cartel detection. First, any act of an investigator or a prosecutor within a criminal investigation can be appealed to the court. Therefore, the decision on granting immunity is neither absolute nor irrevocable. Second, the requirement that an applicant should not have committed any other crime for obtaining an exemption from criminal sanctions means that a court's verdict may be necessary for criminal leniency if any criminal investigation has been started because only courts can find a person guilty of committing a crime.²⁷⁶

²⁷⁴ Appendix 1 Leniency conditions.

²⁷⁵ Уголовно-Процессуальный Кодекс Российской Федерации (Code of Criminal Procedure of Russian Federation) (n 44) Chapter 3.

²⁷⁶ Article 49 Конституция Российской Федерации 1993 (Constitution of the Russian Federation); Уголовно-Процессуальный Кодекс Российской Федерации (Code of Criminal Procedure of the Russian Federation) (n 43).

The second condition of criminal immunity makes the outcome of an application even less certain. It requires an active contribution to disclosure and investigation but does not set criteria of sufficiency of an individual's efforts to contribute. The unlimited discretion of an unknown body to assess an individual's contribution makes criminal immunity unattractive for potential whistle-blowers.

Finally, the most controversial condition of criminal immunity is the obligation of an applicant to compensate the damage or otherwise redress the harm caused by a cartel. As this compensation is likely to be greater than the fine from which the applicants are protected, leniency is not attractive. Also, an individual cannot assess and compensate harm caused by the agreement of a number of corporations as the cartel harm may be caused to thousands of firms and individuals.

As there is no single case on compensating cartel harm in Russia to date,²⁷⁷ there is no data to estimate claiming compensation. Also, the method of paying harm to an indefinite number of individuals and companies remains unclear. The requirement of redressing the harm, probably aimed at expanding the opportunities for an applicant, makes the situation even more complicated because, on the one hand, there is no indication in law what else can be considered as sufficient substitution, and on the other hand, some types of cartel harm, like preventing innovation, can never be redressed by an individual.

The meaning of criminal leniency has been undermined by the recent amendments to the criminal Code expanding the immunity on all first-time offenders including cartel members. Now, leniency is not the only opportunity to escape imprisonment: a cartel member may choose not to report the crime at all and opt for exemption under Article 76.1 of the Criminal Code establishing that the only condition is a compensation of the damage and its doubled amount transferred to the federal budget.²⁷⁸ Article 76.1 opens a safe harbour for all cartel members caught for their first horizontal agreement.

²⁷⁷ Денис Гаврилов, 'Некоторые Вопросы Взыскания Убытков Вследствие Нарушения Антимонопольного Законодательства: Текущая Практика и Перспективы с Учетом Зарубежного Опыта' (2015) 3 Вестник Арбитражного Суда Московского округа <<https://zakon.ru/publication/igzakon/6310>> accessed 15 May 2017 (On Issues of liability Recovery in Antitrust Law: Current Practice and Prospective. Comparison with Other Jurisdictions).

²⁷⁸ Article 76.1 Criminal Code (n 172).

It provides immunity to any number of cartel members and thus eliminates the incentive to be the first person reporting about the cartel. The enforcement of this immunity is the subject of investigating bodies, and competition authorities are not involved in deciding on the sufficiency of compensation. Apparently, the amount to be paid for exemption seems significant. However, taking into account the lack of economic expertise in criminal investigating bodies and the lack of policy on calculating and compensating the damages, one can claim any compensation sufficient for this exemption.

To sum up, both the administrative and criminal immunity programmes fail to motivate corporations and individuals to be the first reporting about cartel because of small fines. Thus, Russia's criminal immunity is detached from anti-cartel enforcement undertaken by competition authorities. Police are not obliged to inform competition authorities about applications and decisions on granting immunity under the Note to Article 178 or Article 76.1 of the Russian Criminal Code.

2.4.2.4. Assessment of leniency perspective in Marine Hose case

The outcome of the parallel leniency programmes would be particularly interesting in the Marine Hose case. Given that the conditions for administrative and criminal immunity are different, the application on behalf of the corporation for administrative leniency would not be sufficient for criminal immunity of the applicant's managers. If Yokohama CEO applies for individual exemption from criminal sanctions to the regional police station in addition to the application to the competition authorities, that does not mean that the regional police are authorised to evaluate all circumstances and grant immunity.²⁷⁹ Considering that until losses or gain is proved the agreement unlikely to be regarded as an offence, application for criminal immunity may be unreasonable. In other cases, an individual would have to compensate losses caused by their action to an indefinite circle of partners and customers; this burden and uncertainty of other conditions may prevent individuals from whistleblowing.

²⁷⁹ There is no evidence of granting criminal immunity in Russia

A dilemma also arises regarding the correlation of administrative immunity programme with the criminal one. As there are no examples of imposing a fine on an individual if a company applied for leniency, then the choice of the CEO between applying on behalf of the company or in their capacity seems less dramatic for administrative immunity. However, there is no linkage between criminal and administrative enforcement. Thus, there are blind-spots both to the consequences of an individual's application for criminal immunity for company responsibility, and to the power of competition authorities to open the case against a company if an individual has been granted criminal immunity. While competition authorities can (but do not have to) accept evidence obtained in the criminal case,²⁸⁰ the police can open a case on its discretion, disregard immunity granted by competition authorities, and reject any materials from competition authorities. Also, nothing prevents competition authorities from imposing administrative fines on an individual if they apply for criminal immunity but the case has not been opened.

Thus, in the given case, the leniency application would unlikely result in opening a criminal investigation, and the application outcome remains very uncertain for applicants.

2.5. Concluding remarks

This chapter reveals how drastically different Russia's cartel offence is from cartel offences in leading jurisdictions and thus identifies the basis for the research in this thesis. The most atypical characteristic of this offence in Russia is its unusual effects-based nature. A cartel's gain or amount of inflicted losses of a certain amount are the required elements for opening a criminal case. This condition sets an unrealistically high bar for national prosecution and may affect international anti-cartel enforcement in cases where the cartel has been formed by individuals from different states.

²⁸⁰ *Обзор по Вопросам Судебной Практики, Возникающим при Рассмотрении Дел о защите Конкуренции и Дел об Административных Правонарушениях в Указанной Сфере* (Президиум Верховного Суда Российской Федерации) [9] (*Review on the Issues of Judicial Practice for the Protection of Competition and the Affairs of Administrative Misdeeds in This Area*); Уголовно-Процессуальный Кодекс Российской Федерации (Code of Criminal Procedure of Russian Federation) (n 44).

The meaning of the revealed specifics is especially noticeable if the offence is applied to the Marine Hose cartel case. This case is used as a benchmark because it was an international infringement that involved all the main practices associated with hard-core cartels. It was treated as a very serious infringement across a number of jurisdictions, attracting both very substantial fines and criminal prosecution and extradition. Despite these characteristics, it cannot be successfully prosecuted under Russia's current criminal cartel regime.

To some extent, these deviations stem from Russia's concept of *corpus delicti* which is different from the corresponding common law concept because criminalisation is based on the vague term of social danger of an act. As in many other offences such as fraud and theft, the value of the stolen assets was employed to draw a line between an administrative wrongdoing and a criminal offence, the same criterion was included in the cartel offence. Thus, the only effects-based criminal cartel offence in the world was created.

An amount of damage or gain chosen as a criterion to choose between the administrative and criminal regimes makes enforcement of the cartel offence very tough in three ways. First, it automatically puts all agreements that have not been implemented out of the criminal regime. Second, in the current design, the offence may practically be enforced only in a limited number of bid-rigging cases because there is no tool for calculating and assessing the damage done by other types of the cartel. Finally, the focus on the amount of damage or gain as a threshold between administrative fines and criminal sanctions causes the establishment of two parallel conditional leniency programmes. Thus, the criminal immunity cannot be granted until the damage is compensated. Considering that proving the restriction of competition and damage or gain is almost impossible, competition authorities often use administrative fines where prosecution is doubted. Thus, the deterrent power of the offence is very weak.

The Russian cartel offence also illustrates how dangerous underestimation of the cartel harm can be for criminal enforcement. Cartels are treated as offences of low gravity or medium gravity, and sanctions for cartels are softer than for theft or fraud. This

classification of the cartel offence results in an automatic exemption from criminal sanctions if cartels last longer than a concise limitation period which is exhausted by the moment when competition authorities establish a cartel. Also, the offence lacks the consistent justification of the criminalisation of cartel conduct as the most serious infringement of competition laws. For example, it contains some atypical elements, such as the use of official positions or violence as aggravating factors, which confuse investigating bodies and mix up the cartel offence with other crimes.

The whole picture of the criminal enforcement is very atypical: the offence is barely enforceable, the limitation period protects the majority of violators from incarceration, and leniency does not guarantee immunity from criminal sanctions and thus cannot be used as a tool to detect cartels. There are two leniency programmes, but they are unlikely to incentivise companies and individuals for whistleblowing or contribute to cartel detection. The criminal leniency is conditional and contains many uncertainties. Importantly, the criminal immunity has never been used while individuals, not entire corporations usually form cartels. The administrative programme is being used from time to time by cartel members, but as it is completely detached from criminal enforcement, there is no registered impact on detection of cartels, too.

Competition authorities realised these deficiencies of the criminal cartel offence and came up with a Bill to amend the offence and criminal leniency policy.²⁸¹ The Bill removes ‘restriction of competition’ from Article 178 of the Russian Criminal Code but keeps the monetary threshold for distinguishing the offence. It also clarifies that paragraph 2 of Article 178 applies to the offences committed by managing directors or members of the boards of directors and removes violence and threat of violence as aggravating factors. This suggestion means that paragraph 1 is to apply to the offences committed by employees of the cartel member. However, paragraph 3 of Article 178 introduces a new aggravating factor - ‘the commission of the offence by the organised group.’ This aggravating factor reinforces the question of what is prohibited by paragraph 1 of Article 178: considering that a cartel is formed by the group of

²⁸¹ ‘Нормативные Правовые Акты - Официальный Сайт Для Размещения Информации о Подготовке Нормативных Правовых Актов и Результатах Их Обсуждения’ <<http://regulation.gov.ru/projects#departments=41&search=%D0%9E>> accessed 9 August 2018 (The Official Website for Information on Bills and Their Public Discussion).

individuals joined together to commit this crime,²⁸² it is very likely that all initial cartel members will be liable under paragraph 3 of Article 178 establishing the most severe sanctions, and only those who joined an existing cartel are covered by para 1 of Article 178.

The Bill does not address the issues of the insufficient severity of the crime, Moreover, it reduces the terms of imprisonment, and the general cartel offence is supposed to be a crime of small to medium gravity. Then, for the cartels except for bid-rigging, which is separated in the new offence of the medium gravity or a severe crime under Article 178.1, the issue of the short limitation period remains. The limitation period for the general cartel offence is two years for crimes under paragraph 1 and six years for paragraphs 2 and 3 of Article 178. The Bill removes the exemption from criminal sanctions for the cartel offence under Article 76.1 competing with leniency and compensation of damage as a criterion for criminal leniency, but it does not clarify the order of applying for and deciding about immunity.

Therefore, there is still a call for reforms of the criminal anti-cartel regime. However, to make the reform consistent, some factors causing the unenforceability of the offence are to be analysed thoroughly. This analysis should start from a historical, political and social background of criminalisation, to determine the motivation of cartel criminalisation in Russia and assess its justification. Then, links between criminal and administrative regimes are to be investigated to establish how cartel law fits the objectives of cartel criminalisation. Finally, the virtue of bid-rigging is to be compared with other forms of cartels and other crimes to establish whether its separate treatment benefits anti-cartel enforcement and in what way. The following chapters answer these questions consequently to provide a solid back up for formulating the essence of the reforms in Chapter 6.

²⁸² Article 35 Criminal Code (n 172).

Chapter 3. The Motivation Behind the Introduction of Criminal Sanctions for Anti-Competitive Conduct in Russia

Chapter 2 demonstrated the principally different nature of Russia's cartel offence compared to other jurisdictions of civil and common law families. The offence includes the effects-based element which makes its enforcement exceptionally problematic, even in such cases as the Marine Hose cartel. Traditionally, the hard law from actual binding legal instruments has a stronger impact on Russia's competition policy than the actual needs of enforcement.²⁸³ Therefore, understanding the motivation to introduce the law and its history are essential for interpreting laws in Russia's legal system,²⁸⁴ and, consequently, for analysing the contemporary anti-cartel enforcement.

The question on the background of criminalisation cartels in Russia comprises several dimensions. First of all, the understanding of the landscape where the offence had been introduced is essential. In contrast to the jurisdictions discussed in the chapter above, the competition law and criminal sanctions for its violation were introduced in the course of transition from the state-controlled economy to the market economy, and this transition was accompanied by serious social turmoil. As cartels were criminalised at a time when there was neither free enterprise nor competitors or private consumers to be protected by criminal sanctions, the question of motivation behind cartel criminalisation in Russia arises.

Usually, economic offences are criminalised to decrease the harmfulness of undesirable activity to the socially acceptable level by incarceration of individuals responsible for violation of laws. Social costs of criminal sanctions exceed social

²⁸³ Земфира Мухарбиевна Казачкова, 'Государственное антимонопольное регулирование в России и США: сравнительное правовое исследование' (2002) <<http://www.dissercat.com/content/gosudarstvennoe-antimonopolnoe-regulirovanie-v-rossii-i-ssha-sravnitelnoe-pravovoe-issledova#ixzz3kJE3a9MX>> accessed 11 June 2018 (State Antimonopoly Regulation in Russia and the United States: a Comparative Legal Study).

²⁸⁴ АФ Черданцев, *Толкование Права и Договора* (2003) 185–216 (Interpretation of Law and Contract); А В Смирнов and А Г Манукян, *Толкование норм права* (Prospect 2008) 65 – 71 (Interpretation of Law).

benefits of the crime,²⁸⁵ while personal opportunity costs of imprisonment are high for a violator which makes imprisonment a better remedy to deter a violation compared to monetary sanctions. Therefore, anti-cartel criminal enforcement usually aims at deterrence of an undesirable horizontal agreement by imprisonment of individuals. Nevertheless, motives of cartel criminalisation in Russia and its prerequisites have barely been examined in papers examining some aspects of cartel criminalisation in Russia.²⁸⁶ Some gaps in scholarship on criminal enforcement of the anti-cartel law can be explained by underdevelopment of some theories in Russian law (for example, the theory of punishment remains one of the most controversial areas in Russian criminal law²⁸⁷).

However, the justification of the cartel offence in Russia, or at least understanding of the legislator's intentions for adopting these laws, is essential since a rationale for cartel criminalisation is the central questions in the global discussion. This chapter shows the importance of justifying cartel criminalisation, pointing out the inconsistencies of Russia's decision to adopt a criminal cartel offence. Finally, the history of cartel criminalisation will inevitably reveal the roots of the errors preventing the enforcement of the offence, which is of importance for the purposes of this thesis and for formulating recommendations for reform.

The chapter further identifies historical, social and political factors that undermined criminal anti-cartel enforcement in Russia. The offence was adopted from Western anti-cartel laws at the moment when neither market economy, with its benefits for consumers, nor cartels had emerged yet, and these cartels had not created a significant threat to consumers' welfare. Therefore, two issues determined criminal anti-cartel enforcement. First, there was no explicit intention to deter cartels, as the cartel offence was introduced under the influence of international institutions and did not consider

²⁸⁵ Steven Shavell, 'The Optimal Structure of Law Enforcement' (1993) 36 *Journal of Law and Economics* 255.

²⁸⁶ АЮ Кинев, 'Административно-правовая защита конкуренции: проблемы и пути совершенствования' (МГЮА им ОЕ Кутафина 2014) (*Administrative Regime of Protection of Competition: Problems and Directions of Improvement*); Хутов (n 38).

²⁸⁷ НН Белокобыльский and others, *Уголовное право Российской Федерации. Общая часть: Учебник для вузов* (Статут 2012) ch 17 (*Criminal Law of the Russian Federation. General Provisions*).

the social context, or the state of the economy in the country. Second, the introduction of the offence was accompanied by reforms which were, economically, very painful for the population; consequently, the introduction of the offence had not been supported by any public outrage to cartels. Also, scholars and lawmakers of the former USSR ignored objectives of anti-cartel enforcement - hence there was little understanding of the importance of competition. In addition to the inopportune moment of adoption, anti-cartel tools were borrowed without considering universal principles and methodologies that should underpin criminal anti-cartel enforcement. For example, the offence criminalised an overly expansive range of anti-competitive conduct and did not correlate with criminalisation in jurisdictions taken as a model. These errors resulted in the creation of a morally neutral offence which was often misinterpreted and misused. The Russian anti-cartel regime was not particularly successful in fighting cartels, as a result.

The chapter is structured as follows. Section 1 reminds us why cartels should be criminalised. Section 2 investigates the motivation for introducing the first anti-competitive offence in Russia, drawing upon the social and political context of the reforms. Section 3 demonstrates how the revealed factors prevented enforcement of the cartel offence in Russia.

The chapter draws upon doctrinal analysis, analysis of secondary sources and socio-legal methods. Justification theories from other jurisdictions provide a frame for analysis. The chapter also considers such necessary preconditions of enforceable criminalisation as social norms,²⁸⁸ legal culture;²⁸⁹ the importance of timing of the introduction of the cartel offence²⁹⁰ and the role of enforcing institutions.²⁹¹ As the substantive competition law in Russia was adopted at the very end of the 20th century, the scope of the chapter is limited by examining the introduction of criminal norms

²⁸⁸ Stephan, 'Beyond the Cartel Law Handbook' (n 68).

²⁸⁹ David Nelken, 'Towards Sociology of Legal Adaptation', *David Nelken, Johannes Feest (ed) Adapting Legal Cultures* (Hart Publishing 2001); David Nelken and Johannes Feest, *Adapting Legal Cultures* (Hart Publishing 2001).

²⁹⁰ Fingleton, Girard and Williams (n 97).

²⁹¹ William E Kovacic, 'Criminal Enforcement Norms in Competition Policy: Insights from US Experience', in Beaton-Wells and Ezrachi (n 2) 45.

for anti-competitive violations in the 1990s although there is some evidence of prosecuting agreements among entrepreneurs aiming at increasing prices for goods in Russia in the 19th century.²⁹²

As the cartel offence is inefficient and misused, the chapter articulates a call for reforming the offence because an unenforceable law is worse than a mere absence of sanctions.²⁹³ The lessons from this chapter can be of interest for jurisdictions with economies in transition considering cartel criminalisation.

3.1. Justification for cartel criminalisation in Russia

As it is established in Chapter 2, Russia's cartel offence is shaped by national criminal law doctrine. However, to assess the criminal anti-cartel regime in Russia, some benchmarks need to be set out. For creating this framework, findings of academics from the US, Australia, the UK and other European jurisdictions were chosen as objectives of cartel criminalisation had not been investigated in Russian literature yet, and there is evidence that the impetus to introduce anti-cartel regime was given by recommendations of international experts.

Clearly, none of the working theories is flawless, and the very idea of criminalising horizontal agreements attracts well-justified criticism. However, understanding the three key points is essential for the assessment of the effectiveness of the offence: (a) why the specific behaviour is criminalised; (b) what makes cartels the only infringement of competition laws to be criminalised and (c) what are benefits of criminal sanctions for cartel enforcement. This section briefly uses some of the theories to the extent that is necessary to answer these questions and illustrate that Russia's cartel offence was not aimed at cartel deterrence or articulate what is wrong about cartel agreements to business. Thus, normative justification is not the focus of this chapter and will be referred to in Chapter 5.

²⁹² Кинев (n 283); СВ Максимов, 'Уголовная Ответственность За Нарушения Антимонопольного Законодательства в России' (2014) 1 Российское конкурентное право и экономика 7 (Criminal Responsibility for Violations of Antimonopoly Laws in Russia).

²⁹³ Baker (n 78) 34; Beaton-Wells and Ezrachi (n 31) 34.

3.1.1. Why is specific behaviour criminalised?

Although the theory of criminalisation is still very disputable, several general principles justifying criminalisation can be defined. First, the principle of individual autonomy are the central concept of the criminalisation: individual freedom may be infringed to protect the autonomy of other people. This principle also means that criminal sanctions can be Imposed only on those who are capable of choosing their acts and omissions.²⁹⁴ Then, criminalisation can be used only against the most severe attacks directed at the most important values.²⁹⁵ Naturally, the question of how to assess the seriousness of a new offence arises. However, not all reasons to protect certain interests can be explained,²⁹⁶ which sparks much debate around this principle.

This principle has a particular implication for Russian criminal law which follows the German legal doctrine. On the one hand, Russia's criminal law also pursues the goal of protection of certain legal values or interests.²⁹⁷ For example, objectives of Russian criminal law are defined as the protection of an individual's rights and freedoms, property, public order, the environment, the constitutional order, peace and security of humankind, and prevention of crimes.²⁹⁸ Encroaching on these values is considered to be the primary cause for criminalisation in Russia's criminal law.²⁹⁹ However, many of these values are also protected by administrative sanctions: at least one hundred of the crimes³⁰⁰ have their administrative counterparts wrongdoings, which differ depending on the degree of social danger of an act. When it comes to the law in action, sometimes courts discretionally assess the direction of an act on the protected values and harm caused to them³⁰¹ as there is no exhaustive legal definition for the social

²⁹⁴ Roger Bowles, Michael Faure and Nuno Garoupa, 'The Scope of Criminal Law and Criminal Sanctions: An Economic View and Policy Implications' (2008) 35 *Journal of Law and Society* 389, 393.

²⁹⁵ Andrew Ashworth, *Principles of Criminal Law* (4 edition, Oxford University Press 2003) 35.

²⁹⁶ *ibid* 41.

²⁹⁷ Bowles, Faure and Garoupa (n 294) 393.

²⁹⁸ Criminal Code (n 172)

²⁹⁹ НА Лопашенко, *Основы уголовно-правового воздействия* (СПб: Юридический центр-Пресс 2004) (Fundamentals of criminal law influence).

³⁰⁰ Константинов, Соловьева and Стуканов (n 191).

³⁰¹ *Постановление N 58* (n 171) [1].

danger of an act and clear criteria how to distinguish crimes from wrongdoing.³⁰² Nevertheless, the reassessment of the degree of social danger of the particular conduct is often the first step towards its criminalisation in Russia.³⁰³

The third argument for criminalising a particular conduct is the ability of criminal sanctions to prevent harm to citizens³⁰⁴ that other forms of social control may not be able to provide. Although this principle decreases the value of the immoral content of an offence, it justifies the criminalisation of formal offences, such as hard-core cartels,³⁰⁵ which are not necessarily considered immoral.³⁰⁶

3.1.2. Why are hard-core cartels the only violation of competition law to be criminalised?

There is a broad consensus on the harmfulness of cartel activity³⁰⁷ from the economic point of view.³⁰⁸ OECD found that consumers and wider economy suffer from increased prices while fewer goods are being sold at higher prices than it would be in competitive markets.³⁰⁹ As cartels usually form around essential goods for which there are few substitutes,³¹⁰ individual standards of living worsen.³¹¹ Sometimes this sort of

³⁰² Константинов, Соловьева and Стуканов (n 189); Шавырина (n 190).

³⁰³ АВ Наумов and ВН Кудрявцева, *Российское Уголовное Право. Общая Часть* (М: Спарк 2000) (Russian Criminal Law. General Provisions).

³⁰⁴ Joel Feinberg, *The Moral Limits of the Criminal Law Volume 1: Harm to Others* (Oxford University Press 1987)
<<http://www.oxfordscholarship.com/view/10.1093/0195046641.001.0001/acprof-9780195046649>> accessed 17 June 2018.

³⁰⁵ More about moral condemnation of cartels in Chapter 5

³⁰⁶ Bowles, Faure and Garoupa (n 294) 393.

³⁰⁷ P Whelan, 'Legal Certainty and Cartel Criminalisation within the EU Member States' (2013) 71.3 *Cambridge Law Journal* 677, 678.

³⁰⁸ More about cartel harm in Chapter 6

³⁰⁹ OECD, 'Recommendation of the OECD Council Concerning Effective Action against Hard Core Cartels' (n 1).

³¹⁰ Andreas Stephan, 'An Empirical Evaluation of the Normative Justifications for Cartel Criminalisation' (2017) 37 *Legal Studies* 621.

³¹¹ UNCTAD (n 6).

cartel harm is simplified to theft³¹² or ‘ripping-off consumers’³¹³ and can also be used to justify criminal enforcement against cartels.³¹⁴ Indeed, by raising price above the competitive level and reducing output, cartels force consumers to choose either not to pay the higher price for cartelised products that they desire, thus forgoing the product, or to pay the cartel price and thereby unknowingly transfer wealth to the cartel operators.³¹⁵ More broadly, horizontal agreements destroy the system of free enterprise and efficiency in a market economy³¹⁶ and lead to reductions in innovation and allocative inefficiency.³¹⁷ However, there is no evidence that any of these arguments had been considered for the introductions of Russia’s cartel offence.

One could argue that economic harm does not distinguish cartels from other conduct prohibited by competition laws.³¹⁸ For example, the largest fine (€1.06 billion) on a single undertaking³¹⁹ has been imposed by the Commission not for participating in a cartel, but for abuse of the dominant position.³²⁰ The first Russia’s offence used to be applied to all sorts of anti-competitive conduct including abuse of dominance. Such broad criminalisation opens a discussion on whether hard-core cartels are the only offence in competition law or other infringements of competition law should be criminalised, too.

The criminalisation of abuse of dominance is not unknown. For example, The Irish Competition Act 2002 sets out in sections 6 and 7 the criminal offences for abuse of

³¹² Stephan, ‘Four Key Challenges to the Successful Criminalization of Cartel Laws’ (n 26).

³¹³ Neelie Kroes, ‘European Commission - Press Release - European Commissioner for Competition Policy Tackling Cartels – a Never-Ending Task Anti-Cartel Enforcement: Criminal and Administrative Policy – Panel Session Brasilia’, (8 October 2009) <http://europa.eu/rapid/press-release_SPEECH-09-454_en.htm?locale=en> accessed 17 June 2018.

³¹⁴ See Chapter 5 for the examination of this similarity

³¹⁵ OECD, ‘Hard Core Cartels’ (n 3) 8.

³¹⁶ Wardhaugh, *Cartels, Markets and Crime: Normative Justification Criminalisation Economic Collusion* (n 17).

³¹⁷ Whelan, ‘Legal Certainty and Cartel Criminalisation within the EU Member States’ (n 307) 678.

³¹⁸ Jones and Williams (n 62).

³¹⁹ European Commission, ‘Press Release - Antitrust: Commission Publishes Decision Concerning Intel’s Abuse of Dominant Position’ (European Commission 2009) MEMO/09/400 <http://europa.eu/rapid/press-release_MEMO-09-400_en.htm?locale=en> accessed 19 August 2018.

³²⁰ Jones and Williams (n 62).

dominant position, at the same time making this offence less severe than horizontal agreements and providing some defences atypical for cartels.³²¹ The criminalisation of abuse of dominant position is criticised for a number of reasons. First, Massey and Cooke find this approach requires unachievably high standards of proof,³²² which would severely encumber the competition agency.³²³ Others remind us about the risks of overdeterrence of legitimate business practices and a waste of resources for insignificant infringements.³²⁴ There is also the issue of enforceability of overly extensive criminal sanctions³²⁵ because the distinctive stigma of a crime relies on the society's capacity to focus censure and blame, and this capacity is limited.³²⁶ Thus, as horizontal agreements are often secret, most jurisdictions condemn cartels more than a monopoly for their conspiracy element.

3.1.3. What are the benefits of criminal sanctions for cartel enforcement

Deterrent Effect of Incarceration

The ability of criminal sanctions to deter certain infringement remains one of the leading economic arguments why criminalisation can be justified only for hard-core cartels.³²⁷ For example, the need to make a stronger impact on individuals responsible for forming cartels than civil fines could make was the key argument for criminalising cartels in Ireland³²⁸ and Australia³²⁹ although some recent surveys of deterrence impact of criminal sanctions and the inherent criminality of cartel conduct can be found less straightforward.³³⁰

³²¹ P Whelan, 'Strengthening Competition Law Enforcement in Ireland: The Competition (Amendment) Act 2012' [2012] *Journal of European Competition Law & Practice* 176, 176.

³²² Patrick and Cooke (n 83); Beaton-Wells and Ezrachi (n 31) 105.

³²³ Kovacic (n 78) 50.

³²⁴ Florian Wagner-von Papp (n 82) n footnote 3.

³²⁵ Low QC and Halladay (n 30).

³²⁶ R Williams (n 72) 297.

³²⁷ Becker (n 20).

³²⁸ Patrick and Cooke (n 83).

³²⁹ Beaton-Wells and Fisse (n 81).

³³⁰ Beaton-Wells and Parker (n 61).

The core of deterrence is to prevent undesirable consequences of cartels for the society.³³¹ If businesses make rational choices whether to join cartels or to refrain from this illegal agreement weighing cartel profitability,³³² civil or administrative fines³³³ should be enormously high for securing optimal deterrence.³³⁴ In this case, criminal sanctions for anticompetitive agreements are more acceptable than high corporate fines³³⁵ for the economy and society because social costs of custodial sentences for an individual are lower than social costs of financial sanctions imposed on the company.

Also, corporate fines of any amount could never make an impact on the individuals.³³⁶ Civil fines for individuals cannot improve deterrence, too, as they ‘can be indemnified by the firm or taken into account when weighing up the potential benefits and costs of colluding’.³³⁷ Therefore, the threat of imprisonment is the only sensible remedy for a real deterrent effect.

The second key point of the deterrence theory is the deterrence of potential offenders due to fear of criminal sanctions and jail.³³⁸ It is believed that the criminal law gives a strong message to potential cartelists about the seriousness of a violation and severity of the sanction, and a responsible individual makes considered, rational and self-interested decisions to comply or not comply with it.³³⁹

Despite all these considerations, the deterrence theory does not answer the question whether cartels must be criminalised or not as well as how to define an ideal criminal

³³¹ Whelan, *The Criminalization of European Cartel Enforcement* (n 28) 29.

³³² Stephan, ‘An Empirical Evaluation of the Normative Justifications for Cartel Criminalisation’ (n 310).

³³³ Fines as anticartel sanctions are investigated in Chapter 4

³³⁴ Wils, ‘Is Criminalization of EU Competition Law the Answer?’ (n 57); Whelan, *The Criminalization of European Cartel Enforcement* (n 28) 78.

³³⁵ WPJ Wils (n 21) 181.

³³⁶ OECD, ‘Cartels: Sanctions against Individuals’ (2003) <http://www.oecd-ilibrary.org/governance/cartels-sanctions-against-individuals_clp-v9-art10-en> accessed 19 August 2018.

³³⁷ Stephan, ‘An Empirical Evaluation of the Normative Justifications for Cartel Criminalisation’ (n 310).

³³⁸ Beaton-Wells and Parker (n 61) 198.

³³⁹ WPJ Wils (n 21) 181.

sanction.³⁴⁰ For example, there are some reasonable doubts on rationalism determining cartellists' behaviour.³⁴¹ Then, the relation between the strictness of a penalty and its deterrent effect is unclear. Also, there is a risk of disproportional anti-cartel enforcement relying entirely on this theory if punishment is imposed for small violations to compensate the insufficient rate of detection.³⁴²

The ability of criminal sanctions to deter potentially harmful activity does not mean that harm is a reasonable ground for criminalisation of cartels,³⁴³ and often 'cartel laws make little or no attempt to quantify the harm caused,'³⁴⁴ which makes it problematic to create a proper criminal sanction. Also, deterrence theory omits 'the complex normative and social contexts in which cartel behaviour and enforcement occur.'³⁴⁵

Seeking to balance the shortcomings of deterrence theory, some proponents of cartel criminalisation point out to delinquency and inherent immorality of cartels as a sufficient ground for criminalisation.³⁴⁶ Wardhaugh considers cartel criminalisation legitimate from a normative perspective because cartels inflict harm on the market which is important social institution.³⁴⁷ However, Stephan reminds us that these assumptions validate cartel criminalisation only if 'members of society expect markets to be competitive and understand that cartel conduct is harmful'.³⁴⁸ This level of awareness of the benefits of the competitive markets is unlikely to be available for the countries criminalising cartels as a step towards liberal reforms as Russia did. In

³⁴⁰ Stephan, 'An Empirical Evaluation of the Normative Justifications for Cartel Criminalisation' (n 310).

³⁴¹ Stephan and Nikpay (n 52).

³⁴² Stephan, 'An Empirical Evaluation of the Normative Justifications for Cartel Criminalisation' (n 310).

³⁴³ See Chapter 5

³⁴⁴ Stephan, 'An Empirical Evaluation of the Normative Justifications for Cartel Criminalisation' (n 310).

³⁴⁵ Christine Parker (n 216).

³⁴⁶ See more about normative justification in Chapter 5

³⁴⁷ Bruce Wardhaugh, 'A Normative Approach to the Criminalisation of Cartel Activity' (2012) 32 *Legal Studies* 369.

³⁴⁸ Stephan, 'An Empirical Evaluation of the Normative Justifications for Cartel Criminalisation' (n 310).

this case, a cartel offence may not be perceived as an immoral act and does not face any public outrage.

Retribution Theory and a Signal to the Society

Some academics³⁴⁹ supplement the deterrence justification of criminalising cartel with the retribution theory employing a backwards-looking approach to the offence and developing a moral aspect in anticartel enforcement. The retribution theory justifies a criminal punishment by the responsibility of individuals for an act which is undesirable in the society:³⁵⁰ ‘human beings are responsible for their action and must thus receive what they deserve.’³⁵¹ Whelan develops the retribution theory conceptualising cartels as theft or deception.³⁵²

The retributions theory explains why criminalisation of an act is a better way to send out a signal to the business community on the inappropriateness of some types of conduct. As imprisonment is much more newsworthy than fines, it will thus get more publicity and be more noted than civil or administrative enforcement.³⁵³ For matching these expectations, a signal has to be strong and straightforward, i.e. a criminal law should clearly prohibit the undesirable conduct. If the design of a criminal offence does not comply with this principle, the offence should be decriminalised.³⁵⁴ The need for a bright, strong message corresponds with the issue of legitimacy of the anti-cartel offence, especially when a criminal anti-cartel regime is used to alter public opinion which is vital for Russia’s case.

However, the issue of moral reprehensibility of the cartel offence arises in connection with the retribution theory, too. The legitimacy of the cartel offence, which is essential

³⁴⁹ Whelan, *The Criminalization of European Cartel Enforcement* (n 28).

³⁵⁰ Herbert L Packer, *The Limits of the Criminal Sanction* / L. Packer (Oxford University Press 1968) 37.

³⁵¹ Whelan, *The Criminalization of European Cartel Enforcement* (n 28) 31.

³⁵² Whelan, *The Criminalization of European Cartel Enforcement* (n 28).

³⁵³ WPJ Wils (n 21) 185.

³⁵⁴ *ibid* 173.

for the success of cartel criminalisation,³⁵⁵ is shaped by social attitudes towards cartel activity.³⁵⁶ The criminal prohibition of undesirable conduct should correlate with this social perception of cartels and avoid over-criminalisation which can undermine the legitimacy.³⁵⁷

Objections to Cartel Criminalisation

Despite extensive support from academics and practitioners, cartel criminalisation is not indisputable. Some objections arise from moral ambiguity of cartel agreements and insufficiency of public outrage for a crime.³⁵⁸

Considering cartel harm deterrence seems a reasonable justification for anti-cartel enforcement in general. However, cartel deterrence does not necessarily mean that cartel members are to be treated as criminals. When it is not clear why a certain act is a crime, a risk that a cartel offence will be perceived as a ‘morally-neutral criminal offence’³⁵⁹ emerges. Jones and Williams also argue that a cartel offence lacks a certain ‘special’ element of a crime building moral stigma of a prohibited act.³⁶⁰ Williams also warns on the potential issues of criminalising cartel conduct noticing that the society’s ability to blame is limited, and criminal sanctions may not expose a stigmatising effect until cartel agreements are viewed as reprehensible practice.³⁶¹ Green points out that imposing criminal sanctions for the acts which are considered morally neutral is unjust, counterproductive, and weakens the impact of criminal sanctions.³⁶² The

³⁵⁵ Stephan, ‘Four Key Challenges to the Successful Criminalization of Cartel Laws’ (n 26).

³⁵⁶ Wardhaugh, *Cartels, Markets and Crime: Normative Justification Criminalisation Economic Collusion* (n 17) 312.

³⁵⁷ Douglas Husak, ‘The Criminal Law as Last Resort’ (2004) 24 *Oxford Journal of Legal Studies* 207.

³⁵⁸ Jones and Williams (n 62) 102.

³⁵⁹ Whelan, ‘Cartel Criminalization and the Challenge of “Moral Wrongfulness”’ (n 54) 541.

³⁶⁰ Jones and Williams (n 62) 102; A Ashworth, ‘Conceptions of Overcriminalization’ (2008) 5 *Ohio St J Crim L* 407, 407–409; Packer (n 350) 359; F Sayre, ‘Public Welfare Offences’ (1933) 33 *Colum L Rev* 55.

³⁶¹ R Williams (n 72).

³⁶² Stuart P Green, ‘Why It’s a Crime to Tear the Tag Off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses’ (1997) 46 *Emory Law Journal* 1533, 1536.

morally-neutral offence lacking legitimacy may lead to overcriminalisation;³⁶³ however, in Russia's context, it rather caused other undesirable consequence, namely 'a significant blurring of the line between civil and criminal law'³⁶⁴ and under enforcement³⁶⁵ for many years.

To sum up, the need to deter enormous cartel harm to the economy is most often viewed as an argument to introduce anti-cartel criminal regime. Many jurisdictions criminalising cartels were motivated by deterrence arguments and the prevention of economic harm.³⁶⁶ Although these reasons to criminalise anticompetitive conduct are still arguable, there is a consensus that only hard-core cartels agreements can be considered for criminalisation. Other anticompetitive offences should be exempted from criminal sanctions at least for the practical reasons which are the unachievable burden of proof and unsustainable use of the resource.

Anticartel criminal enforcement is expected to impose imprisonment rather than other types of criminal sanctions to secure deterrence and to articulate a strong message to the society on the inappropriateness of anticompetitive agreements. However, the harmfulness of cartels can justify anti-cartel regime only if the competitive market is perceived as an essential social institution. Otherwise, it is not clear why individuals, committing the morally neutral act, should be blamed and shamed by the society, criminal anti-cartel law loses its legitimacy and either leads to undesirable over-criminalisation or suffers from under-enforcement.

The provisions of this section are the starting point for understanding the roots of the peculiarities of the criminal anti-cartel enforcement in Russia. While motivation is essential for the design of anti-cartel criminal regime, Russia's offence was motivated by arguments that were principally different from the theories above. The next section

³⁶³ Stephan, 'An Empirical Evaluation of the Normative Justifications for Cartel Criminalisation' (n 18).

³⁶⁴ Jones and Williams (n 62) The UK response to the global.

³⁶⁵ *ibid* 108.

³⁶⁶ Stephan, 'How Dishonesty Killed the Cartel Offence' (n 114).

seeks what caused cartel criminalisation in Russia and looks into the social and political context in which Russia's cartel offence was introduced.

3.2. The economic and social context for adopting anti-cartel sanctions in Russia in the 1990s

This section looks into the economic, political and social context of adopting the first cartel offence in Russia. Considering that typically the criminal regimes aim to deter cartel harm resulted from cartel activity,³⁶⁷ this section highlights the distinctiveness of motivation behind the Russian cartel offence. The findings demonstrate that the first offence was introduced at the beginning of the 1990s without necessary considerations. Laws of the European Union were chosen to create the framework following recommendations of international organisations,³⁶⁸ particularly, The International Monetary Fund³⁶⁹ and The World Bank.³⁷⁰ The first cartel prohibition and the offence were incomprehensive and vague at the beginning and did not result in enforcement.

The first attempt to regulate competition in Russia is dated 1990³⁷¹ when Article 17 of the 1978 Constitution of RSFSR was amended by the provision which set that the state ensures the development of the market mechanism and prevents monopolies. Fairly soon after, the first attempt to criminalise anticompetitive conduct was undertaken. The cartel offence had been introduced at the time when the competition policy focused on dealing with abuses of dominance due to massive concentration instead of horizontal agreements. Also, at that time, social and non-social efficiencies were widely used as a valid reason for the distortion of competition, and the population

³⁶⁷ Stephan, 'Four Key Challenges to the Successful Criminalization of Cartel Laws' (n 26).

³⁶⁸ Leonid Fituni, 'Economic Crime in the Context of Transition to a Market Economy', *Alena V Ledeneva, Marina Kurkchian (eds) Economic crime in Russia* (Kluwer Law International 2000) 24; Ledeneva and Kurkchian (n 69).

³⁶⁹ 'Russia: Doing Business in Russia - Competition Policy and Growth' (*World Bank*) <<http://www.worldbank.org/en/news/feature/2010/11/26/competition-policy-growth>> accessed 18 June 2018.

³⁷⁰ John Odling-Smee, 'The IMF and Russia in the 1990s' (Social Science Research Network 2004) SSRN Scholarly Paper WP/04/155 <<https://papers.ssrn.com/abstract=878980>> accessed 18 June 2018.

³⁷¹ As Amended by Law of RSFSR 15.12.1990

highly tolerated the state economy. The free competitive market had not emerged, yet the principles of fair competition had been unknown, and the society had not enjoyed its benefits yet. The society was tolerant of heavy concentrations and vertical integrations remaining from the state economy. Under these circumstances, the offence was not viewed as a practical tool to fight cartels which were quite a vague hypothetical threat to the market.

3.2.1. The early 1990s: Russia's economy at the point of criminalisation

It is important to highlight that the collapse of the Soviet Union preceded the formation of the Russian state. There was neither a free market nor competition in the USSR. The State authorities not only set wages and prices, which is typical of many countries during periods of economic instability (for instance, the US National Industry Recovery Act 1933 effectively legalised cartels in the wake of the Great Depression)³⁷² but also prosecuted selling of goods at a price different from the centrally set one.

The Soviet State economy had some structural specifics which predetermined the development of the Russian markets for decades. The Soviet state economy was 'very politicised through the party control of' all aspects of economic life, from prices and wages to major investment decisions, to minute aspects of resource allocation.³⁷³ The state 'owned nearly all productive assets in the economy.'³⁷⁴ As there was no private property and everything was centrally planned, maximising of profits was of little importance for the state as an owner.³⁷⁵ Managers of state enterprises generally funded by the state had no or little incentive to reduce costs or to generate profits³⁷⁶

³⁷² Harding and Joshua (n 11) ss 1, 2; Harold L Cole and Lee E Ohanian, 'New Deal Policies and the Persistence of the Great Depression: A General Equilibrium Analysis' (2004) 112 *Journal of Political Economy* 779.

³⁷³ Andrei Shleifer, 'Government in Transition' (1997) 41 *European Economic Review* 385.

³⁷⁴ Elizabeth Brainerd, 'Winners and Losers in Russia's Economic Transition' (1998) 88 <<https://papers.ssrn.com/abstract=149989>> accessed 18 June 2018.

³⁷⁵ Michael McFaul, 'State Power, Institutional Change, and the Politics of Privatization in Russia' (1995) 47 *World Politics* 210.

³⁷⁶ Joskow and others (n 56); The World Bank Group., 'Russian Economic Reform : Crossing the Threshold of Structural Change' (The World Bank 1992) 11207 <<http://documents.worldbank.org/curated/en/674381468759009825/Russian-economic-reform-crossing-the-threshold-of-structural-change>> accessed 19 August 2018.

as neither budget constraints, nor consumers preferences had any effect on the production.³⁷⁷ By contrast, the system of administrative planning embraced more than forty ministries controlling meeting of the targets in the respective sectors of the economy, and directors bore responsibility for non-compliance with the plan.

To facilitate centralised planning and price establishment in the former USSR, concentration and high degrees of vertical integration were pursued. Typically, many gigantic enterprises were located in particular regions or even a single spot near the corresponding source of resources and operated as a single large integrated production complex. Although such a structural approach is not unknown, and both industrial giants and industrial towns could be found in other countries,³⁷⁸ the Soviet gigantism was highly imbalanced as there were no smaller producers.³⁷⁹ In the 1990^s Russia's production was concentrated in a relatively small (large by Western standards) number of enterprises: about 20% of industrial output was produced by enterprises with more than 10,000 employees and nearly 75% by enterprises with 1,000 or more workers.³⁸⁰ Although the state economy demonstrated growth and efficiency at some stages, it created significant economic inefficiencies,³⁸¹ and by the end of the 1980s consumers were faced with the intensified deficit in consumer goods. After the collapse of the Soviet Union, at the beginning of the 1990s, the Russian state 'continued on a downward spiral, bordering on collapse.'³⁸²

Therefore, heavy vertical integration, geographic segmentation, and concentration of buyers and sellers in selected markets resulted in the immunity of Russia's industry to

³⁷⁷ Brainerd (n 374).

³⁷⁸ Joskow and others (n 56).

³⁷⁹ Annette Brown, B Ickes and R Ryterman, 'The Myth of Monopoly: A New View of Industrial Structure in Russia' (Pennsylvania State - Department of Economics 1993) Working Paper <<https://www.ucis.pitt.edu/nceer/1993-806-21a-b-Brown.pdf>> accessed 19 August 2018.

³⁸⁰ Joskow and others (n 56) 312.

³⁸¹ Brainerd (n 374).

³⁸² McFaul (n 375).

robust competition.³⁸³ Enterprises did not experience the necessity for horizontal agreements aiming at softening competition.

3.2.2. Relevant political and economic reforms of the 1990s

In January 1992, Russia's first post-communist government launched an economic programme aimed at creating 'profit-seeking corporations, privately owned by outside shareholders and not dependent on government subsidies for their survival.'³⁸⁴ However, these reforms were not sufficient to create a free market.

Reforms and Shock Therapy

Russia started reforms transforming the Soviet state economic system into a market economy not long before the USSR collapse. When the sovereignty of Russia was proclaimed in 1990, Russian law became superior to the all-Union legislation, and the market transition was pushed forward. The Law on Competition,³⁸⁵ the Law on Enterprises and Entrepreneurship,³⁸⁶ and the Law on Property³⁸⁷ were adopted among the first sets of revolutionary laws. The package of measures to transform the Soviet state economic system into a market economy included liberalisation of prices and trade, the autonomy of enterprises as separate legal establishments,³⁸⁸ the introduction of bankruptcy and private property including ownership of productive assets without surrogates invented in the Soviet Union.

The most radical reforms commenced after the August Coup in 1991 were called 'shock therapy' and included the refusal of price controls, adoption of very soft rules of foreign and internal trade and mass privatisation. Those advocating 'shock therapy' methods believed that rapid liberalisation should have been done 'as quickly as

³⁸³ Harry G Broadman, 'Reducing Structural Dominance and Entry Barriers in Russian Industry' (Social Science Research Network 2000) SSRN Scholarly Paper ID 224261 <<https://papers.ssrn.com/abstract=224261>> accessed 18 June 2018.

³⁸⁴ *ibid.*

³⁸⁵ Закон РСФСР О конкуренции и ограничении монополистической деятельности 1991.

³⁸⁶ Закон РСФСР О предприятиях и предпринимательской деятельности 1990.

³⁸⁷ Закон РСФСР О собственности в РСФСР 1990.

³⁸⁸ Roy Medvedev, *Post-Soviet Russia: A Journey Through the Yeltsin Era* (George Shriver tr, Columbia University Press 2002).

possible to restart economic growth under normal market conditions'³⁸⁹ to revive the economy and address the consumer goods deficit that had ceased to be manageable. One of the ideologists of 'shock therapy,' Soviet economist Egor Gaidar had summarised the suggested plan as 'We must simply shut our eyes tightly and leap into the unknown.'³⁹⁰ Media reported about the rapid decline of living standards. Theodore P. Gerber and Michael Hout said that

there has been more shock than therapy in post-Soviet Russia. Although the private sector has grown, self-employment is still rare. Incomes are down, and unemployment is up. Some entrepreneurs and managers have achieved dramatic success, while most of their compatriots have steadily lost ground to hyperinflation. The upshot is a distended income distribution and unprecedented income inequality.³⁹¹

Liberalisation of Price Control, Hyperinflation and Poverty.

Price liberalisation and privatisation are the essential measures for understanding focuses of the newly introduced competition policy.

Although prices for public utilities and other basic necessities remained under the control of the specially established Committee for Prices, 90% of retail prices were freed overnight, and the prices for most goods explosively rocketed to an unprecedented level from 8-9 up to 100 times with average increase of 25 times³⁹² against expected raise up to 3-5 times. The loose monetary policy of the Central Bank worsened the shock of price liberalisation and led to hyperinflation of 1,100% in 1992.³⁹³ The 'arrears crisis' happened by the middle of 1992 when some enterprises found that they could not pass the rising costs within the production chain, pay for goods delivered to them and meet their payrolls. Many companies had no alternative

³⁸⁹ Shleifer (n 373).

³⁹⁰ Yegor Gaidar, *Russia: A Long View* (MIT Press 2012).

³⁹¹ Theodore P Gerber and Michael Hout, 'More Shock than Therapy: Market Transition, Employment, and Income in Russia, 1991–1995' (1998) 104 *American Journal of Sociology* 1.

³⁹² Joskow and others (n 56); Medvedev (n 388).

³⁹³ Gerber and Hout (n 391).

but to curtail output³⁹⁴ which led to a large-scale decline in production. The rapid decline in GDP until 1995³⁹⁵ and the contracted economy adversely affected the standard of living: the population rapidly impoverished although consumer markets quickly filled with goods.

Neither state enterprises nor new companies were able to provide themselves with necessary supplies in new conditions and immediately encountered with the problem of cash shortage and inability to pay wages.³⁹⁶ The state cut many social programmes to cover the budget deficit³⁹⁷ and did not provide support for the impoverished population. Thus, consumers did not see the benefits of the ongoing reforms as they found themselves in the epicentre of the social and economic catastrophe that caused many personal tragedies.

Privatisation

Even now privatisation is perceived as the most controversial part of reforms. The privatisation programme, based on the assumption that the new owners would know better than the Government what changes are needed³⁹⁸, had pursued restructuring the economy by creating privately owned profit-seeking corporations but fell short of expectations. The first phase of privatisation of state-owned small and medium enterprises in services, trade, industry and transportation began in April 1992, but large state corporations remained the main players in the market until 1993 when auctions of larger industries commenced.³⁹⁹

It turned out that the primary beneficiaries of the privatisation were the Soviet directors exploiting property rights already allocated among them according to nonmarket norms and principles during the Soviet era.⁴⁰⁰ As very few new owners were created,

³⁹⁴ *ibid.*

³⁹⁵ *ibid.*

³⁹⁶ Joskow and others (n 56); Medvedev (n 388).

³⁹⁷ Gaidar (n 390); Medvedev (n 388).

³⁹⁸ McFaul (n 375).

³⁹⁹ R Sean Randolph, 'Economic Reform and Private Sector Development in Russia and Mexico' (1994) 14 *Cato Journal* 109.

⁴⁰⁰ McFaul (n 375).

restructuring did not take place, and control over many enterprises did not change significantly, as in most cases, managers gained control over the enterprises they ran during the Soviet era.⁴⁰¹ Thus, privatisation formed a new class of ‘red directors’ originating from the Soviet nomenklatura and oligarchs owning ex-state property but did little to improve the welfare of other people. Neither price liberalisation nor privatisation facilitated the entry of new firms into the market. Entry barriers remained high because of a high level of concentration in product markets and the geographical distance from the developed western market economies.⁴⁰²

Focuses of Competition Policy

Demonopolisation became the priority of the competition policy in the Soviet Union in 1990 as the government passed the Resolution on Measures to Demonopolise the National Economy⁴⁰³ aimed at creating ‘regulated market economy.’ This regulation was a very controversial form of compromise between liberals and conservators. On the one hand, it called for creating free competition, but on the other hand, it provided the branch ministries with powers for planning and control over production in respective industries. Also, enterprises were supposed to be incorporated into industrial associations for centralised management. For the development of competition and dismantling of monopolists a new competition authority - the Antimonopoly Committee of the USSR – was established. Russia’s first competition policy followed by this regulation.⁴⁰⁴

Scepticism towards a market economy

The 1990s in Russia are remembered like dark times of chaos rather than a time of change. Impoverished and unemployed people felt frustrated as they received neither job training, nor unemployment compensation, and suffered from ineffective

⁴⁰¹ J Hass, *Rethinking the Post Soviet Experience: Markets, Moral Economies and Cultural Contradictions of Post Socialist Russia* (Springer 2011) 199.

⁴⁰² European Bank for Reconstruction and Development (ed), *Ten Years of Transition* (Europ Bank for Reconstruction and Development 1999) chs 4, 9.

⁴⁰³ Постановление О мерах по демонополизации народного хозяйства 1990.

⁴⁰⁴ Ирина Князева, ‘Историко-Экономический Экскурс: Генезис Монополизма и Конкуренции в Экономике России’ (2017) 10 Современная конкуренция 5 (Historical and Economic Excursus: The Genesis of Monopoly and Competition in the Economy of Russia).

retirement and welfare systems.⁴⁰⁵ Despite this drama of ‘shock therapy,’ the population could not see the benefits of the reforms and free markets. The economy remained politicised, and government retained substantial political control over economic life.⁴⁰⁶ The state was unable to sustain internal and external liberalisation⁴⁰⁷ and manage concerns about social costs of fully competitive markets.⁴⁰⁸ Complex bargains of privatised business with the state⁴⁰⁹ caused reluctance to eliminate soft supports and arbitrary impediments for enterprises, and these issues prevented the development of free markets.

The new private enterprises were, at best, unaccustomed to fair competition. Privatised companies inherited Soviet institutional arrangements as ‘well before the drafting of Russia's privatisation program, directors had effectively privatised many of the property rights of state enterprises.’⁴¹⁰ On the other hand, as the Programme was based on the ‘militant belief in the power of the invisible hand,’⁴¹¹ it did not consider any transformation of government institutions and creation of market-supporting institutions.

To summarise, by the moment when criminal regime for anticompetitive behaviour was introduced, people were suffering from 'shock therapy' methods, but the market economy and its benefits for consumers had not appeared yet.

3.2.3. Public attitude towards reforms and institutions

Due to these shortcomings, the reforms were accompanied by the crisis of trust and social security which caused deep scepticism toward the values of the new economy.

⁴⁰⁵ McFaul (n 375).

⁴⁰⁶ Shleifer (n 373).

⁴⁰⁷ Mark Dutz, Steven Fries and Maria Vagliasindi, ‘Promoting Competition and Entrepreneurship in Russia’ (2000) <<https://www.imf.org/external/pubs/ft/seminar/2000/invest/pdf/dutz.pdf>> accessed 15 June 2018.

⁴⁰⁸ McKinnsey Global Institute, ‘Unlocking Economic Growth in Russia’ (McKinnsey Global Institute 1999).

⁴⁰⁹ Dutz, Fries and Vagliasindi (n 407).

⁴¹⁰ McFaul (n 375).

⁴¹¹ *ibid.*

Social norms and business practices are the essential factors facilitating or undermining anticartel enforcement.⁴¹² Social norms can be defined as socially acceptable behaviour sanctioned at least by social ostracism and directed not only against defectors but also against anyone who refuses to punish them.⁴¹³ In the case of Russia's radical reforms, people's attitudes towards new institutions, regulations and the rule of law were of particular importance for assessment of anti-cartel laws as legal enforcement mechanism functioning hugely depends on a broad consensus about the normative legitimacy of the rules.⁴¹⁴

Consumers in the USSR state economy hardly obtained any power to influence the producers and ministries as the very system of administrative planning was unresponsive to signals from the bottom. Interestingly enough, there were no consumer protection remedies in the Soviet Union as continually growing shortages of products made them useless. Consumers having insufficient sources of supply were satisfied with any purchase, and either return or substitution of goods was unthinkable for people experiencing a persistent deficit of consumers goods. After many years of living in secure, hum-drum poverty,⁴¹⁵ people were hardly able to instigate competition.

The society and social norms inherited from the Soviet regime did not develop at the same rate as the reforms as Russia, and the organising principles of the Soviet regime dominated in Russia's civil society⁴¹⁶ many years after the collapse of the Soviet state. As a result, those who grew up under a command economy had the conflicting views of economic reforms:

⁴¹² Baker (n 78); Wils, 'Is Criminalization of EU Competition Law the Answer?' (n 57); Furse, *The Criminal Law of Competition in the UK and in the US. Failure and Success* (n 27); Stephan, 'Beyond the Cartel Law Handbook' (n 68).

⁴¹³ Federico Varese, 'Pervasive Corruption', *Alena V. Ledeneva, Marina Kurkchiyan (eds) Economic crime in Russia* (Kluwer Law International 2000) 109.

⁴¹⁴ Ernst Fehr and Urs Fischbacher, 'Social Norms and Human Cooperation' (2004) 8 *Trends in Cognitive Sciences* 185.

⁴¹⁵ Bruce L Ottley and Younghee Jin, 'Liability for Defective Products in the Soviet Union: Socialist Law Versus Soviet Reality' (1988) 8 *Northwestern Journal of International Law & Business* 27.

⁴¹⁶ McFaul (n 375).

Having just overturned the communist system, with its authoritarianism, centralisation, and inefficiencies, most people are hostile to the idea, at least, of socialism ... Once one gets away from the ideologically loaded terms of "socialism" and "market", however, this seeming consensus begins to disappear. When respondents were asked more specific questions, they tended to support important policies and values associated with the state socialist regimes they have left behind. This is perhaps most evident in widespread egalitarianism, support for a strong role for the government in the economy, and deep scepticism about a distributive system based more on merit than on need.⁴¹⁷

Notably, egalitarian notions on the immorality of high earnings were observed as one of the most significant obstacles on the way to a market economy.⁴¹⁸

Experiencing the adverse effect of 'shock therapy,' people associated the concepts of free market and private business with chaos and impoverishment; capitalism and market economy became distrusted as the very first experience of dealing with market principles was extremely painful for so many people. In addition to the peculiar social norms caused by seventy years of the state economy and 'shock therapy', the attitude to the rule of law and the relationship between business and enforcing agencies were opposed to the Western tradition of the rule of law.⁴¹⁹ These factors created essential difficulties particularly for enforcement of anti-cartel laws.

The Soviet legal system was determined by the arbitrariness of power and principally did not comply with 'the basic principle of the Western law-based society, universal equality before the law,'⁴²⁰ and a significant lack of legitimacy had been observed in

⁴¹⁷ David S Mason, 'Attitudes Towards the Market and the State in Post-Communist Europ' (1992); James L Gibson, 'Political and Economic Markets: Changes in the Connections Between Attitudes Toward Political Democracy and a Market Economy Within the Mass Culture of Russia and Ukraine' (1996) 58 *The Journal of Politics* 954.

⁴¹⁸ Otto Latsis, 'Obstacles in the Pursuit of Happiness' (1991) 11 *Cato Journal* 259, 267.

⁴¹⁹ Marina Kurkchian, 'The Transformation of the Second Economy into the Informal Economy', *Alena V Ledeneva, Marina Kurkchian (eds) Economic Crime in Russia* (Kluwer Law International 2000); Ledeneva and Kurkchian (n 69) 97.

⁴²⁰ Caroline Humphrey, 'Dirty Business, "Normal Life" and the Dream of Law', *Alena V Ledeneva, Marina Kurkchian (eds) Economic Crime in Russia* (Kluwer Law International 2000) 177.

state law by the time of the introduction of anti-cartel laws. Actual inequality before the law resulted in legal nihilism when people considered infringements of laws as just a normal practice, and society did not expect all laws to be enforced and crimes to be punished. Legal sociologists found that in the 1990s up to 21 per cent of entrepreneurs believed that the rule of law could be ignored if it was inconvenient and up to 77 per cent of them found that the risks of law violation were not high.⁴²¹ In respect of the competition laws, prohibitions were not taken as absolute and many violators were quite confident that they would have escaped punishment.

While in many jurisdictions courts are the key institution to promote criminal anti-cartel enforcement,⁴²² deep distrust between society and state institutions⁴²³ undermined law enforcement in Russia.⁴²⁴ State protection agencies were not committed to protecting business and competition; rather, they were coming to intertwine with criminal groupings which made informal links with state-run agencies more important⁴²⁵ and strengthened the role of ambivalent collectivist informal practices.⁴²⁶ The distinctively high levels of distrust to courts have been observed in Russia in the 1990s compared with international standards. When on average 80 % of the populations of Western European countries trust the police, and 66 % trust the courts,⁴²⁷ about two-thirds of the population in Russia did not trust the police at all, and barely one-quarter of the population had partial confidence in the police. Trust in the courts was only slightly higher: 35 % trust them to some degree, while 47 per cent did not trust them.⁴²⁸

⁴²¹ Vadim Radaev, ‘Corruption and Violence in Russian Business in Late 1990s’, *Alena V Ledeneva, Marina Kurkchiyan (eds) Economic Crime in Russia* (Kluwer Law International 2000) 75.

⁴²² DI Baker, ‘The Use of Criminal Law Remedies to Deter and Punish Cartels and Bid-Rigging’ (2001) 69 *The George Washington law review* 693, 694.

⁴²³ Kurkchiyan (n 419) 91.

⁴²⁴ Michal Gal, ‘The Ecology of Antitrust: Preconditions for Competition Law Enforcement in Developing Countries’ (Social Science Research Network 2005) SSRN Scholarly Paper ID 665181 <<https://papers.ssrn.com/abstract=665181>> accessed 18 June 2018.

⁴²⁵ Alena Ledeneva Introduction in Ledeneva and Kurkchiyan (n 69) 5.

⁴²⁶ *ibid* 7.

⁴²⁷ William Mishler and Richard Rose, ‘Trust, Distrust and Skepticism: Popular Evaluations of Civil and Political Institutions in Post-Communist Societies’ (1997) 59 *The Journal of Politics* 418.

⁴²⁸ Theodore P Gerber and Sarah E Mendelson, ‘Public Experiences of Police Violence and Corruption in Contemporary Russia: A Case of Predatory Policing?’ - Gerber - 2008 - *Law & Society Review* - Wiley Online Library’ (2008) 42 *Law & Society Review* 1, 25.

What Does This All Mean for Anti-Cartel Criminal Enforcement?

Summarising this part, it should be noted that by the time of introducing the cartel offence, concentration was remarkably high in the most sectors of the Russian economy without credible evidence of robust competition. While private property is a necessary foundation for real competitive markets and economically sensible prices,⁴²⁹ in Russia private property for productive assets began to form after the adoption of the first competition law and criminal sanctions for its violation.

There were no stakeholders for fighting anti-competitive agreements. The giant enterprises were not accustomed to acting under the new conditions, and the newly established small companies which could be interested in the fair competition had no significant impact on the Russian economy compared with other transition economies.⁴³⁰ Only by the end of the 1990s, the share of small enterprises in Russia accounted for 15 per cent of GDP and 10 per cent of total employment.⁴³¹ The poorly structured reforms provoked a very controversial public attitude towards market and market institutions. Also, the socialistic social norms did not support competition, and consumers could not instigate it because from bad shortage of production they were transferred into poverty by ‘shock therapy.’

Russia’s competition law was formed under the greatest influence of the competition laws of the European Union. However, institutional conditions in Russia were principally different from their European counterpart. Notably, negative views toward the legal institutions authorised to investigate anticompetitive crimes in Russia contrasted sharply with the situation in countries from which competition law had been borrowed. Distrust and corruption practices⁴³² prevented the Russian judiciary from adequate enforcement of the new laws.

⁴²⁹ Ludwig Von Mises, *Socialism: An Economic and Sociological Analysis* (1922); James A Dorn, ‘From Plan to Market: The Post-Soviet Challenge’ (1991) 11 *Cato Journal* 175.

⁴³⁰ Dutz, Fries and Vagliasindi (n 407).

⁴³¹ For example, in Hungary the share of employment in a new private sector was 47 percent of total employment, in Poland - 63 percent in Dutz, Fries and Vagliasindi (n 130).

⁴³² Frederique Dahan, ‘Money-Loudering Control and the Rule of Law in Russia’, *Alena V Ledeneva, Marina Kurkchian (eds) Economic Crime in Russia* (Kluwer Law International 2000); Johan Backman, ‘The Hyperbola of Russian Crime and the Police Culture’, *Alena V Ledeneva, Marina Kurkchian (eds) Economic Crime in Russia* (Kluwer Law International 2000); William Tupman, ‘The Development of Appropriate Response to Organized Crime in Post-Communist

Therefore, the motivation to criminalise cartels at the very beginning of the 1990s is unclear as the social norms did not express outrage towards an agreement between competitors. In these circumstances, it becomes obvious that cartels in Russia were criminalised prematurely: there was no competition on the market to protect it by criminal law; private business did not have a significant impact on the market or individual well-being; the benefits of the competitive markets had not appeared yet, and social norms did not condemn unfair competition. Thus, the cartel offence was morally neutral. The introduction of the cartel offence in Russia is a clear example of using criminalisation ‘as a ‘quick political fix’ where governments want to be seen to be taking an issue seriously’⁴³³ Criminalising cartels at an inopportune time and misuse of the offence predetermined the issues of Russia’s anti-cartel enforcement for decades.

3.3. The first cartel offence and factors that caused the failure of its enforcement

As it is established above, the first Russian anticompetitive offence did not originate from the need to fight cartels or any other clear motivation to criminalise conduct which had not been condemned in society yet. Even enforcement of a perfect offence would have failed under the given circumstances. However, the Russian case was aggravated with the criminalisation of an extremely vague spectrum of morally neutral behaviour. Owing to focuses of competition policy on demonopolisation and lack of strong moral backup for breaching of the rule of the game on markets, the first wording of the first offence was weak and uncertain. The enforcement of the offence encountered two opposite problems: on the one hand, the offence had been applied excessively to the conduct which had nothing to do with breaching competition law. On the other hand, for many decades the offence had been powerless against cartel agreements. The section introduces first Russia’s cartel offence and develops some new arguments against forcing countries to adopt cartel laws demonstrating how the premature cartel criminalisation in Russia became counter-productive.

Societies’, *Alena V Ledeneva, Marina Kurkchiyan (eds) Economic Crime in Russia* (Kluwer Law International 2000); Ledeneva and Kurkchiyan (n 69).

⁴³³ Robin White, “‘Civil Penalties’: Oxymoron, Chimera and Stealth Sanction’ [2010] *Law Quarterly Review* 593.

3.3.1. Introduction of the first offence

Law of The Russian Soviet Federative Socialist Republic No 948-1 Law 'On Competition And Restriction Of Monopoly Activity On Goods Markets'⁴³⁴ defined cartels⁴³⁵ as agreements (concerted actions) in any form between competing undertakings (including potentially competing undertakings), which collectively held dominant position if they resulted or might result in significant restriction of competition including agreement (concerted actions) aimed at fixing (maintaining) of prices (tariffs), discounts, mark-ups (extra charges), margins; increasing, decreasing or maintaining prices at auctions and bids; allocating markets by territory, volume of sales or purchases, assortment of goods, or by sellers or buyers (customers); restricting access to the market or eliminating from the market of other economic entities as sellers or buyers (customers) of certain goods or refusal to conclude contracts with certain sellers or buyers (customers).⁴³⁶ Therefore, agreements among non-dominant companies fell outside the prohibition.

Article 154.3 was incorporated in the Criminal Code of the Russian Soviet Federative Socialist Republic (RSFSR) of 1960 later and came into force in 1993.⁴³⁷ The new offence introduced sanctions for all sorts of monopolistic activity creating barriers to entry into the market for other economic entities or withdrawing goods from the market if such activity led to illegal increasing or maintaining of prices. Thus, criminalisation caught cartels among dominant companies, abuse of dominance and other anticompetitive violations if they caused the mentioned effects. As the offence embraced a very broad range of anticompetitive acts very few of which could be identified on the market, the interpretation of the offence created much uncertainty that allowed applying the criminal sanctions to a massive number of individuals.

⁴³⁴ Law on Competition and the Limitation of Monopolistic Activity in Markets (n 385).

⁴³⁵ See how the prohibition has been amended through the years in Table 2

⁴³⁶ Article 6 Law on Competition and the Limitation of Monopolistic Activity in Markets (n 386).

⁴³⁷ Закон РФ О внесении изменений и дополнений в законодательные акты Российской Федерации в связи с упорядочением ответственности за незаконную торговлю 1993 (The Law of the Russian Federation On Amendments to the Legislative Acts of the Russian Federation to Harmonise Terms of Responsibility for Illegal Trade).

This case is an illustration of how criminal enforcement failed if society's capacity to treat an offence seriously is exhausted.⁴³⁸ There was no test for determining dominance in the 1990s, and the threshold for dominance was established annually by competition authorities. In addition, markets were so highly concentrated that a group of 2-3 firms could cause a material limitation of competition, impede access to the market for other economic entities, or otherwise restrict their freedom of economic activity.⁴³⁹ With the given definition of dominance, almost any company could have been found guilty of encroaching upon the interests of its less successful competitors.

A defence for horizontal agreements among dominant firms⁴⁴⁰ instead of guiding the inapplicability of the prohibition brought uncertainty to defining legal and illegal conduct. The defence provided that a horizontal agreement could be deemed legal if its parties proved that the agreement contributed or would fill markets, improved quality of goods and increased their competitiveness, in particular on the foreign market. The theoretical justification of the defence is obscure; one could speculate that the need to fill markets with goods had driven this defence. However, filling the markets was not a difficult task for the dominant companies violating the prohibition.

The need to prove the effect in some way eliminated the risk of the excessive criminalisation; however, from the very beginning, the offence was effects-based as the prosecution had to prove that increasing or maintaining prices resulted from the violation.

Opting for the effects-based offence instead of a *per se*⁴⁴¹ one confirms the assumption of the previous chapter that cartels were not viewed as dangerous offences and that cartel deterrence had not been pursued by the legislator. Insufficiently severe criminal sanctions also indicated lack of the legislator's intention to deter cartels or to use the offence for retribution. The sanctions for the first 'regular' violation were limited by

⁴³⁸ R Williams (n 72) 296.

⁴³⁹ Para 8 Article 4 Law on Competition and the Limitation of Monopolistic Activity in Markets (n 385).

⁴⁴⁰ Para 4 Article 6 *ibid*.

⁴⁴¹ See more about the issues of the *per se* approach in Chapter 4

finer or disqualification for up to 5 years.⁴⁴² Imprisonment or fine with disqualification up to five years could have been imposed if there was conspiracy element⁴⁴³ either among violators or with the participation of state officials.⁴⁴⁴ The real threat of the imprisonment from three to seven years existed only for committing a crime by a specially organised group (an equivalent of ‘mafia’) and for recidivism. The complicity of officials or mafia is not very typical for this sort of economic crimes. Thus, the threat of imprisonment for cartel members was hardly realistic. Finally, the insufficient threat of incarceration along with vaguely formed prohibition also means that the first cartel offence failed to formulate and deliver a strong message to potential violators on the inappropriateness of horizontal agreements.

3.3.2. Cartel enforcement was not a priority

The first cartel offence became unenforceable for decades not only because of its inability to deter cartels or communicate their wrongfulness. It is widely accepted that determining principal objectives of competition policy is essential for effective functioning of competition laws.⁴⁴⁵ However, the issue of competition law objectives dropped out of the sight of reformers at the beginning of the 1990s.⁴⁴⁶

Anti-cartel enforcement was not identified as the objective of competition policy in the course of Russian reforms and, until the end of 2000, enforcement of anti-cartel laws was not a priority of the competition policy. Till then, cartelisation had not been considered as a serious threat, and competition authorities barely paid attention to horizontal agreements. For example, cartel cases did not exceed 1 % of all trials on competition law issues.⁴⁴⁷

⁴⁴² Para 1 Article 154.3 Уголовный кодекс РСФСР 1960.

⁴⁴³ The legislator did not specify this conspiracy as element of cartels agreements and applied it to any advanced preparation

⁴⁴⁴ Para 2 Article 154.3 Criminal Code of RSFSR (n 442).

⁴⁴⁵ Massimo Motta, *Competition Policy: Theory and Practice* (Cambridge University Press 2004) 17–30; Richard Whish and David Bailey, *Competition Law* (7th ed, Oxford University Press 2012) 19.

⁴⁴⁶ О.Мигитко, *Правила Для Бизнеса – 2013: Уроки Судебных Дел* (Альпина Паблишер 2013) (*Business Rules - 2013: Lessons from Trials*).

⁴⁴⁷ Joskow and others (n 56).

Like many other countries with the post-Soviet economy,⁴⁴⁸ Russia's competition policy in practice focused more on depoliticisation and demonopolisation to encourage reforms than on cartelisation and exclusionary practices.

Depoliticisation, which deemed necessary for privatisation support and promoting of market competition, failed quite soon as it accelerated influence of state bodies by giving control rights to local and regional governments.⁴⁴⁹ Even almost three decades after the beginning of the reforms, abundant governmental interference and the presence of a large number of companies owned, controlled, overseen or subsidised by the state on the market can be observed impairing the economic efficiency of the market system.⁴⁵⁰

Demonopolisation was reasonably justified by the peculiarities of the post-Soviet economy. The concentration of industrial activity in a small number of huge, vertically integrated organisations, domination of one or two suppliers in many industries and specific sales patterns where large enterprises were highly concentrated geographically and served only relatively small geographic areas made the creation of competitive markets extremely difficult. However, as the state often considered monopolistic structures as more manageable and suitable for resolving pressing social problems, the enforcement of competition laws in this area was very selective: no abuse of dominant position was properly punished; M&A transactions were approved so generously that they strengthened concentration on the markets. For example, the current level of concentration in Russia's various markets is assessed as very high, and the share of top-5 players in key industries may achieve 70% and more.⁴⁵¹ Also, monopoly and oligopoly problems are usually typical for developing markets rather

⁴⁴⁸ For example, Hungary, Poland, the Czech and Slovak Federated Republic in *ibid* 335.

⁴⁴⁹ *ibid* 302.

⁴⁵⁰ О.Мигитко (n 446).

⁴⁵¹ Алексей Кривошапко and Маттиас Вестман, 'Как Измерить Государство – 2' *Ведомости* (14 November 2017) <<https://www.vedomosti.ru/opinion/articles/2017/11/14/741701-skolko-gosudarstva>> accessed 20 August 2018 (How to Measure a State - 2); Екатерина Мереминская, 'Государство и госкомпании контролируют 70% российской экономики' *Ведомости* (29 September 2016) <<https://www.vedomosti.ru/economics/articles/2016/09/29/658959-goskompanii-kontroliruyut-ekonomiki>> accessed 20 August 2018 (The state and state companies control 70% of the Russian economy).

than for developed market economies.⁴⁵² However, the Russian way to deal with monopolies turned out to be very unusual.

In Russia's case, uniform or at least controlled prices for goods produced by monopolists were taken as a remedy to address monopolisation. Competition authorities were authorised to control and approve or disapprove monopolistic prices established by dominant companies. Competition authorities often treated prices that not match the expectations⁴⁵³ as abuse of dominance because the definition of a monopolistically high price was vague: it should be established 'for purposes of receiving super-profits and/or compensation of unjustified costs at the expense of the economic interests of other economic entities or citizens'⁴⁵⁴ where those interests had not been defined. Under these circumstances, 'naked' price fixing among competitors became a safe harbour.

Moreover, abuse of dominance was also seen as a crime, and mixing of the abuse of dominance with cartels in one article of the Criminal Code made the offence lacking the legitimacy and hardly enforceable against horizontal agreements. The definition of dominance and abuse of market power was overly broad, with no criterion for 'decisive influence on competition', restriction of 'access to the market' and other limitation of 'the freedom of their economic activities,' thus, almost any firm could be considered as a dominant one and subject to price control. Another issue extending the number of companies for control was the presumption of dominance for companies with market shares above a critical level which was set annually.⁴⁵⁵ As a result, considering the structure of Russia's economy at the beginning of the 1990s, the vast majority of state-owned (and later privatised) companies could have been considered as dominant ones. Control of the enormous number of enterprises deprived resources of competition authorities but made prosecution of the infringements unrealistic:

⁴⁵² Joskow and others (n 56) 352.

⁴⁵³ Временные методические рекомендации по выявлению монопольных цен 1994 paras 3, 4 (Temporary methodological recommendations for detecting monopoly prices).

⁴⁵⁴ *ibid* 2, 4.

⁴⁵⁵ Article 4 Law on Competition and the Limitation of Monopolistic Activity in Markets (n 386).

formally, any deviation in prices approved by competition authorities or delay in the application was supposed to be treated as a violation.

The amendments⁴⁵⁶ that came into force in 1997⁴⁵⁷ did not improve enforceability⁴⁵⁸ of the offence, and unjustified and unenforced criminalisation of dominance existed till March 2015, creating much confusion for enforcement of the offence against hard-core cartels. Although repeated abuse of dominance was singled out into a separate part of the article of the Criminal Code in 1997, and prohibited conduct was determined more clearly as ‘preventing, restricting or eliminating competition by establishing or maintaining monopolistically high or low prices, market sharing, limitation of access on the market, elimination of competitors from the market, establishing or maintaining uniform prices,’⁴⁵⁹ horizontal agreements were prohibited only for companies with a certain market share till 2006.⁴⁶⁰ This approach caused massive misinterpretations and misuses of the offence for many years, as investigators often requested competition authorities to prove both anticompetitive agreements and repeated abuse of a dominant position as necessary elements of one crime.⁴⁶¹ The absence of one of them was among the most common reasons to dismiss criminal cases.

There is evidence that, despite very early criminalisation, cartel enforcement had been out of focus until 2009, when competition in the informal sector had been recognised, and the private sector began to play an increasing role in some industries.⁴⁶² Leniency programme, being a necessary element of criminal anti-cartel enforcement to facilitate

⁴⁵⁶ See Table 2 for the summary of amendments

⁴⁵⁷ Criminal Code(n 172).

⁴⁵⁸ European Bank for Reconstruction and Development (n 402) iv.

⁴⁵⁹ Article 178 Criminal Code (n 172).

⁴⁶⁰ On Protection of Competition (n 233).

⁴⁶¹ Interview with Aleshin (n 34); Natalya Mosunova, ‘An Examination of Criminalization of Russia’s Anti-Bid Rigging Policy’ (2015) 3 Russian Law Journal 32.

⁴⁶² European Bank for Reconstruction and Development (n 402).

the detection of cartels,⁴⁶³ was introduced only in 2009,⁴⁶⁴ sixteen years after the cartel offence had been adopted.

Table 2

Timeline for the major amendments to the cartel offence

22.03.1991	Only agreements and concerted actions between dominant companies aimed at price-fixing, bid-rigging, market sharing, restricting access to the market and refusal to conclude contracts with certain sellers or buyers are prohibited. Defences: if undertakings prove that their agreements (concerted actions) have contributed or will contribute to the saturation of markets of goods, or to the improvement of consumer characteristics of goods and increase their competitiveness, especially in the foreign market.
25.05.1995	Dominance has been narrowed to holding a share of market exceeding 35 %, and defences for cartels have been eliminated.
09.10.2002	Agreements and concerted actions between any undertakings, not only dominant firms, are prohibited if they lead or can lead to price-fixing, bid-rigging, market sharing, restricting access to the market and refusal to conclude contracts with certain sellers or buyers (the aim of agreements has been replaced with their consequences (probable consequences)).
26.07.2006	The list of hard-core cartels has been expanded with some country-specific manifestations of horizontal agreements: the imposition of unfavourable conditions to the contract (e.g. unjustified requirements to transfers of financial assets); unjustified pricing; unjustified reduction or elimination of the output of goods; restriction of access to the market or leaving the market for other economic entities; preventing, restricting or eliminating competition by establishing conditions for membership in professional and other associations.
06.12.2011	Concerted actions have been excluded from the article and transferred to another article; exemptions for a group of undertakings and IP rights have been introduced. The list of prohibited horizontal agreements (hard-core cartels) has been narrowed to the agreements that lead or can lead to price-fixing, bid-rigging, market sharing, restricting of output and refusal to conclude contracts with certain sellers or buyers.
05.10.2015	Cartels among buyers have been prohibited explicitly, and an exemption on joint ventured agreements with prior consent of competition authorities has been introduced.

⁴⁶³ WPJ Wils (n 21) 183.

⁴⁶⁴ Федеральный закон О внесении изменений в Федеральный закон О защите конкуренции и отдельные законодательные акты Российской Федерации 2009 (Federal Law On Amending the Federal Law on Protection of Competition and Other Legislative Acts of the Russian Federation).

3.3.4. Lack of institutional and organisational preconditions

Importantly, the criminalisation of abuse of dominance could have been overcome by setting appropriate targets of criminal enforcement⁴⁶⁵ as it had been done in other jurisdictions which started from a broad anticompetitive offence and then narrowed it. However, the state anti-monopoly committee lacked the political power to change the policy.⁴⁶⁶ Although the regulator for competition policy was established in 1991, simultaneously with adopting of competition laws, little power was assigned to it. In the absence of clear objectives for the policy, there was also not much understanding of the principles and methodologies that should underpin cartel criminalisation.

During the first decade after adopting the competition laws, the State Committee for Antimonopoly Policy and its regional subdivisions had barely had any impact on privatisation cases. Control of dominance and price control were performed more enthusiastically. Competition authorities had limited investigative power: only the federal body of competition authorities was authorised to impose high penalties, which are the essential preconditions of anti-cartel enforcement.⁴⁶⁷ Regional offices imposed financial sanctions which were relatively insignificant for business due to inflation. Neither federal body nor regional offices had any procedural role in the criminal investigation of cartels.

Favouritism in privatization affected the competition authorities in some other ways. Managers and owners of privatised companies ‘used their influence to protect their enterprises [...] from competition’⁴⁶⁸ and competition authorities were reluctant to enforce the law even in clear cases of market abuse: more than 30% of the General Directors indicated that their companies colluded to fix prices and escaped sanctions.⁴⁶⁹ Excessive use of discretionary authority⁴⁷⁰ was reported as a major obstacle for competition law enforcement, and the problem of regulatory capture

⁴⁶⁵ Kovacic (n 78); Patrick and Cooke (n 83).

⁴⁶⁶ Randolph (n 399) 112.

⁴⁶⁷ Gal (n 424) 37.

⁴⁶⁸ European Bank for Reconstruction and Development (n 402) 4.

⁴⁶⁹ Broadman (n 383) 7.

⁴⁷⁰ *ibid.*

typical for developing countries arose. Thus, state institutions in the absence of constraints abused their decision-making power by singling out particular individuals or groups in return for political support.⁴⁷¹

On the other hand, lacking prioritisation, the regional committees were overwhelmed with routine work of different nature including price control, checks of the legality of actions of state bodies, control over natural monopolies in particular industries, monitoring of advertisement, regulation of the securities market and the protection of consumer rights. The excessive workload and underfunding caused insufficient resources to advocate competition and cartel harmfulness, and competition authorities became too weak for implementing a new regime.⁴⁷² It also should be noticed that remaining a very new organisation in comparison with the police, prosecution offices and other enforcing bodies, the state apparatus perceived competition authorities of all levels as aliens and did not adjust the system for enforcing competition laws. Thus, the Russian regulator turned out to be an incompetent institution in fear of both business people and other state bodies while skilfulness and well-deserved respect are undoubtedly the musts for the agency advocating imprisonment for economic crimes to equilibrate the deficiencies of the anti-cartel offence enforcement.

Notably, in addition to insufficient political weight of the competition authorities, there was no consensus among political forces regarding competition as a value to be protected while such a consensus usually benefits to success in the application of competition law⁴⁷³ and is of particular importance for an anti-cartel regime.⁴⁷⁴ However, the political environment was hostile to reforms, and that hostility has decreased neither in the Russian parliament generally opposed to reforms nor in the government where forces for and against reforms struggled for control.

⁴⁷¹ Louis Kaplow, 'Transition Policy: A Conceptual Framework' (2003) 13 *Journal of Contemporary Legal Issues* 161.

⁴⁷² European Bank for Reconstruction and Development (n 402) iv.

⁴⁷³ Bruce M Owen, 'Competition Policy in Latin America' [2003] *Stanford Law and Economics Olin Working Paper* <<https://papers.ssrn.com/abstract=456441>> accessed 20 August 2018.

⁴⁷⁴ Wils, 'Is Criminalization of EU Competition Law the Answer?' (n 57).

Courts, which mostly were successors of the Soviet courts, had a minimal impact on anti-cartel enforcement. In many other jurisdictions, criminal sanctions were introduced when the doctrine had been already developed by case law in private enforcement.⁴⁷⁵ Thus, courts often facilitate equilibration in competition law, i.e. the process by which ‘perceived imperfections in one aspect of a legal framework tend to be offset by adjustments in the application of other system elements’.⁴⁷⁶ In Russia private anti-cartel enforcement still does not exist, so it did not exist in the 1990s, and the Russian courts approached competition violation in an extremely formal manner. For example, the courts required competition authorities to provide a formal, written agreement among cartelists as the only reliable evidence of horizontal agreements,⁴⁷⁷ which made prosecution impossible.

As the offence had been adopted under the influence of foreign consultants, Russia’s academics did not contribute to the advocacy of competition law and anti-cartel sanctions being utterly ignorant about the issue. Also, after decades of the Soviet economy, many academics opposed criminal sanctions in competition law for a long period. There was no consensus among others on the essential elements of an anticompetitive offence, its objectives and values of competition.⁴⁷⁸ Some argued that unfair competition was not a criminal offence;⁴⁷⁹ or that criminal sanctions against

⁴⁷⁵ Kovacic (n 78); Patrick and Cooke (n 83); Low QC and Halladay (n 30).

⁴⁷⁶ Stephen Calkins, ‘Summary Judgment, Motions to Dismiss, and Other Examples of Equilibrating Tendencies in the Antitrust System’ (1986) 74 *Georgetown Law Journal* 1065.

⁴⁷⁷ Joskow and others (n 56) 337.

⁴⁷⁸ Хутов (n 39).

⁴⁷⁹ А Н Бойцов and К В Ображиев, *Уголовная ответственность за недопущение, ограничение или устранение конкуренции* (2006) (*Criminal liability for the prevention, restriction or elimination of competition*); А В Денисова, ‘Уголовно-Правовые Аспекты Борьбы с Монополизмом в Российской Федерации’ (2006) <<http://www.dissercat.com/content/ugolovno-pravovye-aspekty-borby-s-monopolizmom-v-rossiiskoi-federatsii>> accessed 20 August 2018 (Criminal Regime for Monopoly in the Russian Federation); Мария Вячеславовна Талан, ‘Преступления в сфере экономической деятельности :Вопросы теории, законодательного регулирования и судебной практики’ (2002) <<http://www.dissercat.com/content/prestupleniya-v-sfere-ekonomicheskoi-deyatelnosti-voprosy-teorii-zakonodatelnogo-regulirovan>> accessed 20 August 2018 (Economic crimes: Issues of theory, regulation and judicial practice).

fraud,⁴⁸⁰ illegal use of confidential information or trademarks are sufficient to protect competition.⁴⁸¹

In the absence of competition law schools and faculties till 2005,⁴⁸² anti-cartel criminal enforcement was the subject of criminal law researchers who neglected some critical features of competition law such as *per se* approach, the harmfulness of hard-core cartels, the need to deter cartels.⁴⁸³ Lack of expertise in competition law led to the adoption of the amount of damages or illegal income as an element a cartel offence in 2003,⁴⁸⁴ which predetermined enforcement problems for many years. Independent experts and public were out of the discussion of competition laws till 2011⁴⁸⁵ when the first platform for public discussions was introduced and became a part of the legislative process.

Thus, there was no pioneer to advocate new socio-legal ideology shaping relevant enforcement tools which is an integral part of cartel criminalisation.⁴⁸⁶ The lack of advocacy of the benefits of competition was a serious issue⁴⁸⁷ for resisting groups of the society as the adoption of competition policy involved a shocking change in the ‘rules of the game’ and transition of values which were not explained and promoted.

⁴⁸⁰ See analysis about using fraud for prosecution of the cartels in Chapter 5

⁴⁸¹ В Т Корниенко, ‘Уголовно-Правовая Охрана Добросовестной Конкуренции На Потребительском Рынке’ (2004) <<http://www.dissercat.com/content/ugolovno-pravovaya-okhrana-dobrosovestnoi-konkurentsii-na-potrebitelskom-rynke>> accessed 20 August 2018 Criminal Regime of Protection of Fair Competition in the Consumer Market).

⁴⁸² ‘Базовая кафедра Федеральной Антимонопольной Службы’ <<https://pravo.hse.ru/antimonopoly/>> accessed 20 August 2018 (School of the Federal Antimonopoly Service).

⁴⁸³ Хутов (п 39).

⁴⁸⁴ О внесении изменений и дополнений в Уголовный кодекс Российской Федерации 2003 (On Amendments of the Criminal Code).

⁴⁸⁵ Указ об общественном обсуждении проектов федеральных конституционных законов и федеральных законов 2011 (Decree on public discussion of federal constitutional laws and federal laws drafts 2011).

⁴⁸⁶ Gal (п 424) 24.

⁴⁸⁷ *ibid* 28.

3.3.5. New offence and conflicting social norms

Russia, like many other jurisdictions criminalising a cartel offence outside of North America,⁴⁸⁸ faced a great challenge of peculiarities of domestic social norms, to a great extent originating from the Soviet realities. Being unsupportive of the anti-cartel enforcement, social norms affected the criminalisation in a few dimensions and caused the failure of the anti-cartel offence to alter public opinion since the offence had not been perceived as immoral.⁴⁸⁹

The positive social norms could back up the normal functioning of a legal enforcement mechanism and to maintain a sufficient degree of immoral content in a criminal anti-cartel offence.⁴⁹⁰ For instance, Stephan points out that the power of social norms can strengthen a deterrent effect of the offence⁴⁹¹ as the negative perception of individuals' behaviour within social group stops the potential violators from collusive practices. Also, popular condemnation of price-fixing makes it easier to convince judges 'that the actions of those responsible should attract a criminal conviction that carries with it a possible custodial sentence'.⁴⁹²

However, as it was demonstrated above,⁴⁹³ social norms were non-receptive to the benefits of competitive markets in the 1990s. Some social norms conflicted with others: socio-economic changes required abandoning the old understanding of 'good' and 'evil'⁴⁹⁴ and to playing according to 'new legal rules which were often opposite to what they [people] had been taught throughout the better part of their lives.'⁴⁹⁵ This conflict negatively affected the 'domestication' of competition law which had been adopted under the influence of the western legislation.⁴⁹⁶

⁴⁸⁸ Stephan, 'Beyond the Cartel Law Handbook' (n 68) 10.

⁴⁸⁹ R Williams (n 72) Williams.

⁴⁹⁰ Peter Whelan, 'The Criminal Law of Competition in the UK and in the US: Failure and Success' (2013) 9 *European Competition Journal* 501.

⁴⁹¹ Stephan, 'Four Key Challenges to the Successful Criminalization of Cartel Laws' (n 26).

⁴⁹² *ibid* 340.

⁴⁹³ Ss 3.2.3

⁴⁹⁴ Fituni (n 368) 29.

⁴⁹⁵ *ibid*.

⁴⁹⁶ For example, following by recommendations of the Antitrust Division of the U.S. Department of Justice and the U.S. Federal Trade Commission: Joskow and others (n 56) 331.

Due to ‘shock therapy’ and its effects on living standards, the free market was viewed with great suspicion⁴⁹⁷ if not hostility. Although social hardship was presumed in this radical strategy as the inevitable period on the way to sustainable prosperity,⁴⁹⁸ the strategy provoked ‘a sense of insecurity’⁴⁹⁹ and stipulated the disintegration of the public moral structure by breaking down the inherited social consensus on meanings, shared beliefs and norms. The policy and sanctions for anticompetitive offences to some extent shared negative public perception of the whole set of reforms.

For example, new competition values confronted price control with which Russians were very comfortable for decades before the reforms. Its termination in 1991 was accepted with sharp criticism.⁵⁰⁰ Prices in Soviet Russia before 1992 were an element of political decisions regarding where production should be expanded⁵⁰¹ and set by application of accounting formulas⁵⁰² under control of the State Committee on Prices (Goskomtsen). After many years of interventions from government ‘through price controls, barriers against foreign competition and encouraging collusion through trade associations’⁵⁰³ the belief that the uniformity is an inherent characteristic of prices had been formed. Therefore, by the moment of the introducing the cartel offence people deeply trusted the benefits of uniform prices and distrusted the state policies.

The impact of social norms on anti-cartel enforcement had peculiar characteristics in Russia.

⁴⁹⁷ I De Leon, ‘A Market Process Analysis of Latin American Competition Policy’ (2000); William E. Kovacic, ‘Designing and Implementing Competition and Consumer Protection Reforms in Transitional Economies: Perspectives from Mongolia, Nepal, Ukraine, and Zimbabwe’ 44 DePaul Law Review 1197.

⁴⁹⁸ Marina Kurkchiyan, ‘Rule of Law in China: Chinese Law and Business Russia and China A Comparative Perspective On The Post-Communist Transition’ [2007] Working paper of the Foundation for Law, Justice and Society 9
<http://www.fljs.org/sites/www.fljs.org/files/publications/Kurkchiyan_Working_Paper.pdf> accessed 18 October 2015.

⁴⁹⁹ *ibid.*

⁵⁰⁰ Joskow and others (n 56) Joskow.

⁵⁰¹ *ibid* 338.

⁵⁰² *ibid* 355.

⁵⁰³ Stephan, ‘Beyond the Cartel Law Handbook’ (n 68) 12.

As the prices in the USSR were established by the state bodies and did not reflect the actual supply and demand, there were shortages of goods which were resolved by resort to the black market.⁵⁰⁴ The black market for goods was a natural part of daily life in the Soviet Union. Inaccessible goods were usually traded on black markets at prices much higher than those established by the state. Although the attitude to those selling on black markets softened by the time of the economic crisis and growing deficit in the 1980s, this trade was illegal and used to be punished severely in the early years. The particular offence ‘Speculation’ was introduced for trade on the black market in article 154 prohibiting ‘the purchase and resale of goods or other items for profit.’⁵⁰⁵ The speculation offence was one of the most controversial prohibitions in criminal legislation since 1917. Although at first glance it may resemble price gouging when prices for essential commodities increase following a disaster,⁵⁰⁶ the speculation offence covered all sorts of resale goods for prices higher than they were established by authorities.

Meanwhile, categorisation of crimes in the Russian criminal law tradition into a specific chapter or group of articles in the Criminal Code is very important since this classification predetermines numerous enforcement and procedural issues. In this context, it is noticeable (if not ironic) that the article 154.3 providing sanctions for anticompetitive conduct was incorporated in the group of crimes embraced by Article 154 of the Criminal Code sanctioning ‘resale of goods or other items for profit.’

Speculation as an offence with severe sanctions (up to seven years of imprisonment) was widely used to penalise any violation of price regulation and remained enforceable even at the beginning of the reforms, at the time of introducing competition policy. Moreover, on 28th of February 1991, just a few months before introducing competition policy, the legislator ratified the new Law of the USSR on October 31, 1990 ‘On

⁵⁰⁴ The World Bank, International Monetary Fund and Organisation for Economic Co-operation and Development, ‘A Study of the Soviet Economy’ (The World Bank 1991) 77773 vols 1–3 <<http://documents.worldbank.org/curated/en/308201468147582494/Volume-one>> accessed 20 August 2018.

⁵⁰⁵ Criminal Code of RSFSR (n 442).

⁵⁰⁶ Matt Zwolinski, ‘The Ethics of Price Gouging’ (2008) 18 *Business Ethics Quarterly* 347; Dwight R Lee, ‘Making the Case against “Price Gouging” Laws: A Challenge and an Opportunity’ 19 *Independent Review* 583; Jeremy Snyder, ‘What’s the Matter with Price Gouging?’ (2009) 19 *Business Ethics Quarterly* 275.

strengthening the responsibility for speculation, illegal trading activities and abuses of trade' which determined speculation as buying goods on which the state established retail prices from the trade organisations (enterprises) and reselling them for profit.⁵⁰⁷ In the same year (1991) there were 18,988 convictions for speculation.⁵⁰⁸ Therefore, technically, cartel offence was subordinated to the offence used to prohibit price competition for many years.

It is worth noticing that public perception of 'speculation' had always been ambiguous. On the one hand, in the Soviet Union speculation was one of the forms of organised crime, and sanctions for speculation were imposed on thousands of people every year. On the other hand, considering total deficit of consumer goods, speculation was often the only way to buy the necessary goods, and people accepted rules of this game: they knew about the prohibition, but it did not stop them from purchasing. Only in the middle of 1994 speculation was decriminalised,⁵⁰⁹ but until the middle of the 2000s the moral message of Article 154 'Speculation' had an impact of academic debates on anti-cartel criminal norms⁵¹⁰ and confused enforcement. For example, many criminal cases under the article 154.3 were initiated against farmers and traders on the local markets.⁵¹¹ Considering this mixed message on the nature of the cartel offence, there is no wonder that the cartel offence was not backed up by the supportive social norms.

Enforcement of the offence suffered not only from the lack of social outrage of price-fixing but also from distrust to state institutions and strong collectivist culture.

⁵⁰⁷ Закон СССР Об усилении ответственности за спекуляцию, незаконную торговую деятельность и за злоупотребления в торговле 1990 (The Law of the USSR On Strengthening Liability for Speculation, Illegal Trading and Trade Abuse).

⁵⁰⁸ Fituni (n 368) 27.

⁵⁰⁹ Закон РФ О внесении изменений и дополнений в законодательные акты Российской Федерации в связи с упорядочением ответственности за незаконную торговлю 1993 (n 438).

⁵¹⁰ В И Тюнин, *Уголовное Законодательство и Экономическая Деятельность (История и Современность)* (2000) 99 (Criminal Law and Economic Activity (History and Our Days)); Б В Волженкин, *Преступления в Сфере Экономической Деятельности (Экономические Преступления)* (2000) 50 (Crimes in Economic Activity (Economic Crimes); Хутов (n 38).

⁵¹¹ Maria Kunle 'FAS raises the threshold for criminal liability for price fixing' *Izvestia* (Moscow, 31.07.2013) <<http://izvestia.ru/news/554558#ixzz2rF6AakFq>> accessed 26.04.2015; Interview with Deputy Director of the Cartel Department of the Federal Antimonopoly Service of the Russian Federation Konstantin Aleshin (Moscow, Russia, 10 March 2015)

Unfulfilled expectations of a promised legality⁵¹² strengthened collectivists practices built upon personal relationships, reputation, and avoidance of confrontation.⁵¹³ Whistle-blowing, which is essential for detecting cartels, had not appeared as consumers were discouraged from reporting anti-competitive practices to the discredited state agencies. Business people also avoided relation with any official. Given a largely negative image of the state agencies,⁵¹⁴ they were coming to intertwine with criminal groupings, which made informal links with state-run agencies more important.⁵¹⁵ This symbiosis of collectivist culture with distrust to state institutions later became one of the factors annulling the effect of leniency programmes when cartelists use leniency programmes not against other cartel members to maximize their profit, but to decrease the sum of fines for each of them due to ‘fair’ allocation of the number of fines among all participants of the horizontal agreement.⁵¹⁶

Indifferent public attitude was reflected in the insufficient severity of sanctions for an anticompetitive offence.⁵¹⁷ The empirical research on the perception of the danger of economic crimes, including anticompetitive crimes, and necessity of severe sanctions demonstrated various groups – academics, business people, students and representatives of enforcing agencies – did not support imprisonment. The vast majority of representatives agreed that imprisonment was not justified for this group of crimes and alternative sanctions, such as increased fines, should be established.⁵¹⁸ Notably, none of 37 prominent Russian academics and experts in Criminal Law and Criminology participating in the survey considered imprisonment as a proper sanction.

Therefore, the anti-cartel offence was introduced into environment tolerant to price regulation. Ambiguous social norms eroded immorality of anti-cartel criminal regime further.

⁵¹² Marina Kurkchiyan (n 498).

⁵¹³ Stephan, ‘Beyond the Cartel Law Handbook’ (n 68).

⁵¹⁴ Radaev (n 421) 67.

⁵¹⁵ Ledeneva and Kurkchiyan (n 69) 5.

⁵¹⁶ Interview with Aleshin (n 34).

⁵¹⁷ Article 154.3 Criminal Code of RSFSR (n 442).

⁵¹⁸ Хутов (n 39) 60.

3.4. Concluding remarks

This chapter has sought to assess the motivation for introducing the cartel offence in Russia and the social and political context around it. Analysis of the motivation to criminalise cartels is the first step in determining why the offence is so different from offences in other jurisdictions. Russia's case was unique from the very beginning, because an offence requiring strong social support and clear moral outrage to succeed was introduced into a society where markets were still dominated by State monopolies. Moreover, private business was in its infancy, and the population swiftly plunged into poverty. The offence became unenforceable, as it was adapted in a way that did not parallel development in its original jurisdiction.⁵¹⁹ Thus, there was neither competition as a social institution nor its associated benefits for consumers yet. Under these circumstances, the cartel offence was perceived as a morally neutral act. Lack of legitimacy immediately led to misinterpretations and misuse of the offence. Next chapter examines the enforcement problem, which is the legacy of these issues.

Before moving to the contemporary anti-cartel enforcement, it is crucial to sum up the errors relating to the background of anti-cartel enforcement in Russia. This chapter has revealed that the forced and unjustified criminalisation of cartel laws becomes a serious obstacle for further development of anti-cartel laws and weakens the role of the criminal law for protecting one's interests. Also, there is anecdotal evidence that the neglecting of social norms undermines cartel criminalisation. For example, the anti-competitive offence had been incorporated into the group of rules against speculation. In the State economy, people had to rely on the 'black market' because many goods were unavailable, and speculation had a wide unspoken public support instead of moral outrage, so there was no strong moral message which might alter public opinion.⁵²⁰

There is much that can be learnt from Russia's experience of cartel criminalisation. The chapter contributes to the theoretical discussion on whether cartel should be criminalised by a few new arguments. First of all, even if the offence does not consider normative justification, it does not necessarily lead to over-criminalisation. However,

⁵¹⁹ Nelken (n 289) 39.

⁵²⁰ R Williams (n 72) 296.

gaps in normative justification may cause another undesirable consequence, namely ‘a significant blurring of the line between civil and criminal law’⁵²¹ and under enforcement for many years. This point addresses the argument on the danger of over-criminalisation as one of the most popular threats of opponents of cartel criminalisation and brings up a new factor: as we saw, a proper moment can be paramount for it as well as clear motivation and necessary resources.

Second, Russia’s experience illustrates the danger of extensive and rushed criminalisation: if the incentives to criminalise cartels come from outside, there is a risk of unenforceability of the offence for decades. The first decades of excessive Russia’s criminalisation support the assertion that ‘criminal antitrust enforcement, in its strongest form, relying on imprisonment, can only work or only makes sense if it is limited to hard-core cartels.’⁵²² Indeed, an extension of the offence also into the abuse of dominance and other anticompetitive conduct creates serious obstacles for anti-cartel criminal enforcement leading to confusion among investigators and the dismissal of criminal cases.

The next lesson is that simple borrowing of the offence from jurisdictions with the completely different stage of development⁵²³ does not make the domestic law more advanced without thoughtful justification and adjustment to the environment. This adoption was fruitless because of deep distrust between society and State institutions. Also, there were no institutional and organisational preconditions for enforcement of competition rules, and the judiciary system failed to adjust the legislation by forming society’s attitude and adequate enforcement due to corruption practices.

These lessons can be of particular interest for States with developing economies, considering criminalisation of their anti-trust laws. Briefly, the answer to the question whether cartels should be criminalised is ‘yes, they should’. However, a number of important principles must underpin this decision because the errors affect the enforcement for many years in many ways. First of all, cartel conduct becomes an

⁵²¹ Jones and Williams (n 62) 108.

⁵²² WPJ Wils (n 21) 221.

⁵²³ Nelken (n 289) 41.

offence only when customers get the taste of the benefits of competitive markets, and external influence on laws should be assessed critically with a thorough examination of existing social norms. The value of social norms should prevail over political reasoning because without moral outrage for cartels the offence may be misused. Then, overly expansive and unjustified criminalisation of anticompetitive conduct erodes outrage to cartel harmfulness and weakens the anti-cartel criminal regime. Therefore, only hard-core cartels can be criminalised. If legal traditions allow a broader anticompetitive offence, it should be narrowed by setting appropriate targets of criminal enforcement.

The findings of this chapter fill the gap in the literature on the origin of Russia's cartel enforcement and unfold a scene for the following chapters. The fact that the criminal offence had been abandoned for many years facilitates understanding of administrative regime and its underdeveloped relationship with the criminal regime in our days (Chapter 4). The findings also provide the ground for creating justification which fits the objectives of cartel criminalisation and specifics of national law (Chapter 5). These findings also frame the scope for the reforms and explain why the policy needs to be amended gradually, by tiny steps, bearing in mind that this offence has never had proper social support.

Chapter 4. The Enforcement Problem in Russia's Administrative Anti-Cartel Regime

In Chapter 3 we explored how the social and economic context affected cartel laws in Russia in an unusual way: the offence lacked legitimacy, was misused and misinterpreted. The criminalisation of cartels before establishing clear anti-cartel policy led to a problematic relationship between criminal and administrative regimes. In Russian anti-cartel enforcement, a criminal cartel offence is different from an administrative wrongdoing: different laws regulate them, and, respectively, different agencies enforce them. The relationship between these two systems is not clear as the statutes do not establish any coordination between them. However, an administrative cartel investigation usually serves as the starting point for a criminal investigation. In practice, administrative (civil) matters come in the first instance and thus the outcome of the administrative case determines the success of the following criminal investigation. This chapter investigates how Russia's administrative anti-cartel regime is unusual and how these specifics determine prosecution of cartel members.

Russia's hard-core cartel prohibition differs from the prohibition in most states where cartels are believed to be extremely harmful⁵²⁴ and therefore prohibited *per se* or by the object. In contrast to leading jurisdictions, in Russian enforcement practice, courts apply the cartel prohibition in two different ways without a clear criterion to choose between them: in some cases, they rule that cartels be prohibited *per se* while in others reverse the cases if the effects of cartel on the market are not proved, i.e. treat them as effects-based violation. This unusual characteristic of the Russian administrative enforcement has many implications for the practice of fighting cartels and theory of anti-cartel enforcement.

⁵²⁴ *Northern Pacific R Co v United States* [1958] Supreme Court of the United States 59, 356 US 1; *Competition Authority v Beef Industry Development Society Ltd* [2008] ECJ (3rd Chamber) C-209/07, I-8637 ECR [15, 16].

From a practical point of view, the prohibition of cartels *per se* or by object means procedural economy⁵²⁵ and restriction of the defences brought forward by defendants in cartel investigations.⁵²⁶ Competition law in many jurisdictions bans this type of agreement automatically, i.e. by their object⁵²⁷ so that courts disregard the actual impact on competition in a given case as they ‘need not define a relevant market or establish the parties’ market shares to find that restraint is unlawful.’⁵²⁸

In this context, the Russian administrative cartel prohibition is ambivalent, which causes a scarcity of resources for enforcement. Competition authorities interpret prohibition under Article 11 of the Federal Law on Protection of Competition,⁵²⁹ as a *per se* prohibition and prove only the fact of achieving an agreement among competitors. However, many cases collapse when courts require competition authorities to prove some aspects of the effect of the agreement. Thus, the meaning of cartels for the market is often misinterpreted. To address the issue of collapsed cases and to prevent waste of resources for investigating them, market analysis is required as part of investigations in Russia for all horizontal agreements, except for bid-rigging.⁵³⁰ However, the market analysis makes inquiries very complicated and often leads to the reversal of fine-imposing decisions made by competition authorities. Also, there is a lack of expertise to undertake the analysis properly.

The discretionary use of two different approaches to cartel prohibition sparks another argument in the discussion on the role of administrative sanctions for cartel deterrence. In the economic model of deterrence, cartel members are viewed as behaving like rational actors. The modern theory of cartel deterrence is based on the economic theory

⁵²⁵ Phillip E. Areeda and Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, vol XI § 1910 (2nd ed, Aspen Publishers, Wolters Kluwer Law and Business 2000); Ingeborg Simonsson, *Legitimacy in EU Cartel Control* (Hart Publishing 2010) 113.

⁵²⁶ Phillip E. Areeda and Herbert Hovenkamp (n 525).

⁵²⁷ Art 101(1) TFEU (n 134).

⁵²⁸ Ingeborg Simonsson (n 525).

⁵²⁹ On Protection of Competition (n 233).

⁵³⁰ Приказ Об утверждении Порядка проведения анализа состояния конкуренции на товарном рынке 2010 N 220 (Order on Approving the Procedure for the Analysis of the State of Competition on the Goods Market).

of optimal deterrence introduced by G. Becker.⁵³¹ This theory assumes that economic entities are rational actors who weigh up the expected illegal profits of the cartel against the size and likelihood of the expected penalty,⁵³² when deciding to commit this economic crime. Therefore, both sufficient size of the penalty and high probability of cartel detection and punishment should induce the potential cartel members to refrain from undesirable action.⁵³³

As courts often refuse to punish cartels if the material effect of the horizontal agreement is not proved, the probability of punishment of cartel members in Russia is low, even in cases where competition authorities prove the existence of a horizontal agreement. In these cases, a criminal investigation of the relevant matters cannot be opened because the courts rule that the cartel prohibition is not violated. Thus, cartel members feel safe to develop their arrangements.

The assessment of the ability of Russia's administrative regime to deter cartels adds to the criticism of the deterrent effect of financial sanctions against cartels. The issue of imposing fines below cartel profits and a mark-up for the risk of detection⁵³⁴ is quite common as there is no consensus on the correlation of the sanction with the expected benefit from the cartel or the net harm caused to others.⁵³⁵ Across the world, policy-makers justify cartel sanctions below the size that economists believe to be optimal⁵³⁶ by preventing risks of bankruptcy and protecting the interests of other stakeholders. For example, the average overcharges by cartels, which are thought to

⁵³¹ Becker (n 20).

⁵³² Stephan and Nikpay (n 52); Caron Beaton-Wells and Christopher Tran, *Anti-Cartel Enforcement in a Contemporary Age: Leniency Religion* (Bloomsbury Publishing PLC 2015) <<http://ebookcentral.proquest.com/lib/uea/detail.action?docID=2196933>> accessed 15 July 2016.

⁵³³ Wouter P J Wils, 'The Commission's New Method for Calculating Fines in Antitrust Cases' (1998) 23 *European Competition Law Review* 252.

⁵³⁴ William Landes, 'Optimal Sanctions for Antitrust Violations' (1983) 50 *University of Chicago Law Review* 652; A Mitchell Polinsky and Steven Shavell, 'The Fairness of Sanctions: Some Implications for Optimal Enforcement Policy' (2000) 2 *American Law and Economics Review* 223; Becker (n 20).

⁵³⁵ Richard A. Posner, *Antitrust Law* (2nd edn, University of Chicago Press 2001) 69–93.

⁵³⁶ Fernando Castillo de la Torre, 'The 2006 Guidelines on Fines: Reflections on the Commission's Practice' (2010) 33 *World Competition* 359, 361.

be between 18.2% and 23%,⁵³⁷ greatly exceed the maximum fines in the EU at 10%. However, the amount of fines for cartel agreements in Russia is much lower than even the criticised European levels. The administrative fines for corporations entering the cartel agreement are limited in Russia to 4% of Russian turnover.⁵³⁸ Therefore, according to Becker's theory, fines that are below cartel overcharge should be balanced by greater and more consistent detection, to secure cartel deterrence.⁵³⁹

Consequently, both the EU and Russia's anti-cartel regimes struggle to secure cartel deterrence. It is established that the EU civil anti-cartel regime suffers from the enforcement problem although 'the preventive effect of punishment of wide public'⁵⁴⁰ and punishment of infringers⁵⁴¹ are proclaimed as its main aim. This problem arises from limits of the resources for improving cartel detection and fines capped at 10%⁵⁴² and closely connected with the justification of cartel criminalisation: as deterrence remains the primary focus of competition authorities, it should be secured by other means. Russia's enforcement problem has not been studied yet, although Russia's cartel offence has been adopted under the significant influence of Article 101 of TFEU.⁵⁴³

⁵³⁷ Connor and Lande, 'Cartel Overcharges and Optimal Cartel Fines' (n 3); Connor, 'Price-Fixing Overcharges' (n 3); Florian Smuda (n 3); Bolotova (n 3); Y Bolotova, JM Connor and D.J. Miller (n 3); Boyer and Kotchoni (n 3); OECD, 'Hard Core Cartels' (n 3).

⁵³⁸ In practice, fines often do not achieve this threshold as courts reduce penalties to an insignificant amount. See ss 4.1.

⁵³⁹ Wouter PJ Wils, 'Optimal Antitrust Fines: Theory and Practice' (2006) 29 *World Competition* 183; Emmanuel Combe and Constance Monnier, 'Fines Against Hard Core Cartels in Europe: The Myth of Over Enforcement' [2009] *Cahiers de Recherche PRISM-Sorbonne Working Paper* <<https://papers.ssrn.com/abstract=1431644>> accessed 21 August 2018; Massimo Motta, 'On Cartel Deterrence and Fines in the European Union' (2008) 29 *European Competition Law Review* 209.

⁵⁴⁰ Johannes Andenaes, *Punishment and Deterrence* (University of Michigan Press 1974); Whelan, *The Criminalization of European Cartel Enforcement* (n 28).

⁵⁴¹ *Showa Denko v Commission* [2006] ECJ C-289/04P, I-5859 ECR 16.

⁵⁴² Stephan, 'The Bankruptcy Wildcard in Cartel Cases' (n 76).

⁵⁴³ Svetlana Avdasheva, 'Models of Monopoly in the Quarter-Century Development of Russian Competition Policy: Understanding Competition Analysis in the Abuse of Dominance Investigations', *Competition Law Enforcement in the BRICS and in Developing Countries. Legal And Economic Aspects* (Springer 2016); Frederic Jenny and Yannis Katsoulacos (eds), *Competition Law Enforcement in the BRICS and in Developing Countries. Legal And Economic Aspects* (Springer 2016) 240.

The chapter is structured as follows. The first section, introducing Russia's cartel prohibition and administrative sanctions, demonstrates that administrative enforcement is not sufficient for cartel deterrence or punishment of those who commit the offence. The second section analyses some illustrative cases to show how the prohibition can be misinterpreted and how the inconsistencies of the effects-based approach to cartels undermine cartel enforcement in Russia. It also draws attention to the ambiguity of interpretation of the cartel prohibition and reveals that there are no criteria in place which would enable courts to choose between the *per se* and the effects-based approaches. The third section concludes with a discussion about the enforcement problem of the administrative anti-cartel regime and its possible causes.

4.1. Outline of the administrative anti-cartel regime

The development of Russia's anti-cartel regime is unusual as the administrative regime was introduced some years after the criminal one. As introduction of the criminal sanctions is usually justified by the insufficient ability of fines to deter infringers, it is especially appealing to find what the administrative regime in Russia brought to anti-cartel enforcement.

At the beginning of the rapid transition from a state economy to a market economy,⁵⁴⁴ the competition policy randomly comprised elements suggested by consultants from various jurisdictions. At that time, in the 1990s, there was no powerful enforcing institution to form a consistent anti-cartel policy.⁵⁴⁵ The new-born competition authorities often viewed their power 'as mandates for personal enrichment rather than efficient regulation'.⁵⁴⁶ Laws were perceived as 'a mere instrument of autocratic control', and their coherent reform was taken as 'a nuisance and distraction'⁵⁴⁷ from creating a market economy.

⁵⁴⁴ Shleifer (n 373) 405.

⁵⁴⁵ *ibid.*

⁵⁴⁶ *ibid.*

⁵⁴⁷ McFaul (n 375) 227.

As a result of this inconsistency, the first sanctions for horizontal agreements, which had been prohibited since 1991⁵⁴⁸, were adopted only in 1995.⁵⁴⁹ It was liquidation of the companies involved in cartels. The liquidation of undertakings would have secured cartel deterrence as the violators were supposed to end their business entirely. However, similar to unrealistically high fines leading to the bankruptcy of cartel members, this sanctions deserves obvious criticism: this is a very complicated and long-lasting process affecting interests of many stakeholders including employees, shareholders, suppliers and purchasers and thus bearing excessive social costs. It is no wonder that liquidation of legal entities had never been enforced in cartel cases. Therefore, cartels remained unpunished until 2007 when the first fines for cartels were introduced.⁵⁵⁰

The current cartel prohibition has been borrowed partially from the prohibition of horizontal agreements by the object from Article 101 TFEU.⁵⁵¹ The prohibition does not provide any defense and covers agreements among competing economic entities which sell goods on the same market, or buy goods on the same market if such agreements lead or could lead to (1) fixing or maintaining prices (tariffs), discounts, markups (surcharges) and (or) additions to prices; (2) increasing, reducing or maintaining prices in the course of competitive bidding; (3) dividing the goods market according to a geographic principle, quantity of sales or purchases of the goods, the mix of goods or a composition of buyers or sellers (customers); (4) reducing or terminating the production of goods or (5) refusing to conclude contracts with particular sellers or buyers (customers).⁵⁵²

Article 2.9 of the Code of Administrative Offences exempts a wrongdoing of little significance from liability but does not provide criteria for what constitutes a wrong-

⁵⁴⁸ Law on Competition and the Limitation of Monopolistic Activity in Markets (n 386).

⁵⁴⁹ Федеральный закон О внесении изменений и дополнений в Закон РСФСР О конкуренции и ограничении монополистической деятельности на товарных рынках 1995 (The Federal Law On Amendments and Additions to the Law of the RSFSR On Competition and Restriction of Monopolistic Activity in Markets).

⁵⁵⁰ Art. 14.32 The Code of Administrative offences (n 194).

⁵⁵¹ И Ю Артемьев, С А Пузыревский and А Г Сушкевич (eds), *Конкурентное право России* (Изд дом Высшей школы экономики 2014) 175 (Competition Law of Russia).

⁵⁵² Art 11 On Protection of Competition (n 233).

doing of ‘little significance’. The Supreme Court vaguely explains that a wrongdoer may be exempted from administrative liability if an act can be qualified as a wrongdoing only formally but ‘the nature of the offence or the offender's role, the damages and the gravity of the consequences do not harm the protected social relationships’.⁵⁵³ Although this exemption resembles the appreciable restriction of competition in the EC competition law,⁵⁵⁴ there is no consensus on whether the hard-core cartels in Russia are covered by this rule. The FAS insists that Article 2.9 of the Code of Administrative Offences cannot be applied to hard-core cartels⁵⁵⁵ which are prohibited regardless their effect ‘as a significant threat to the society’⁵⁵⁶ and for this very reason Courts have applied this provision in a few cases against self-employed and tiny companies and annulled the decisions of the competition authorities⁵⁵⁷ as there is no exemption in the application of Article 2.9 for hard-core cartels.⁵⁵⁸

The methodology of calculating corporate fines for cartels in Russia also resembles the method set by the European Commission.⁵⁵⁹ However, there are some specific limitations⁵⁶⁰ making the amount of the imposed fines insignificant for retribution or

⁵⁵³ *Постановление О некоторых вопросах, возникающих у судов при применении Кодекса Российской Федерации об административных правонарушениях* [2005] Пленум Верховного Суда РФ 5 [21] (On some issues of applying the Code of the Russian Federation on Administrative Offenses).

⁵⁵⁴ Commission Notice Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty 2004.

⁵⁵⁵ Методические рекомендации по применению антимонопольными органами статьи 2.9 КОАП (в части прекращения дел об административных правонарушениях, связанных с нарушением антимонопольного законодательства, по малозначительности) 2012; ФАС России, ‘О Практике Применения Статьи 2.9 КОАП’ (21 March 2012) <<http://docs.cntd.ru/document/499035875>> (Methodological recommendations on the application of Article 2.9 of the Administrative Offenses Code by the antimonopoly authorities (regarding the termination of cases due to their insignificance)).

⁵⁵⁶ А Ю Кинев and А С Тимошенко, ‘Обзор Судебной Практики По Дела о Картелях и Других Антиконтурентных Соглашениях’ (2016) 3 Законы России: опыт, анализ, практика 10 (Review of the Judicial Practice for the Cartels and Other Anti-Competitive Agreements).

⁵⁵⁷ *A02-1449/2011* (Арбитражный Суд Республики Алтай).

⁵⁵⁸ *Постановление О некоторых вопросах, возникших в судебной практике при рассмотрении дел об административных правонарушениях* [2004] Пленум Высшего Арбитражного Суда 10 [18.1] (On some issues of the judicial practice in the cases of administrative violations); А Ю Кинев and А С Тимошенко (n 554).

⁵⁵⁹ Guidelines on the method of setting fines imposed pursuant to Art. 23(2)(a) of Regulation No. 1/2003 2006.

⁵⁶⁰ Table ‘The key stages of methodologies of setting corporate fines by Federal Antimonopoly Service in comparison with the European Commission’

cartel deterrence which are the common purposes of this sort of sanction.⁵⁶¹ Deterrence has never been claimed as a specific purpose of anti-cartel fines in Russia, although prevention of new offences by the offender and other persons is among the general purposes of administrative sanctions.⁵⁶² An offender can predict the level of sanctions with great certainty because, unlike the EU methodology⁵⁶³, there is no discretionary increase for fining corporations. Also, Russia’s fines are calculated exclusively for a company in contrast to penalizing an economic entity as it happens in the EU. Table 3 illustrates the key stages of methodologies of setting corporate fines by the Federal Antimonopoly Service⁵⁶⁴ in comparison with the European Commission.⁵⁶⁵

Table 3

The key stages of methodologies for setting corporate fines

Steps/elements	EU Commission	FAS Russia
1. Cartel deterrence as the purpose of the fine	The Commission may increase the fine on a sum of between 15 % and 25 % of the value of sales ⁵⁶⁶ and has to take deterrent effect of fines determining the gravity of the infringement ⁵⁶⁷ and defining fines. ⁵⁶⁸	Deterrence has never been claimed as a specific purpose of anticartel fines although prevention of new offences by the offender and other persons is mentioned among the general purposes of the administrative sanctions. ⁵⁶⁹
2. The cap of the fine	10 % of total turnover of each undertaking in the preceding business year.	The cap is 4 % of the total turnover of each undertaking in the preceding business year (3 % if the violator’s turnover or expenses on the market where the cartel operated exceeds 75 % of the total turnover, or if a

⁵⁶¹ Whelan, ‘Cartel Criminalization and the Challenge of “Moral Wrongfulness”’ (n 54).

⁵⁶² Art 3.1 The Code of Administrative offences(n 194) .

⁵⁶³ Guidelines on the method of setting fines 2006 (n 559).

⁵⁶⁴ Рекомендации по расчету величины административного штрафа, рассчитываемого исходя из суммы выручки правонарушителя и налагаемого на юридических лиц, за совершение административных правонарушений, предусмотренных статьями 14.31, 14.31.1, 14.31.2, 14.32 и 14.33 Кодекса Российской Федерации об административных правонарушениях 2012 (Guidelines on Calculating the Amount of the Fine on Legal Entities for Committing Administrative Offences Pursuant Articles 14.31, 14.31.1, 14.31.2, 14.32 and 14.33 of the Code of the Russian Federation).

⁵⁶⁵ Guidelines on the method of setting fines 2006 (n 559).

⁵⁶⁶ ibid para 25.

⁵⁶⁷ *Bolloré and Others v Commission* (2007) II ECR 00947 (EUECJ) [540].

⁵⁶⁸ Guidelines on the method of setting fines 2006 (n 559).

⁵⁶⁹ Art 3.1 The Code of Administrative offences (n 194).

		violation has been committed on the market of goods (services) with regulated prices).
3. The minimum and maximum fine	The minimum or maximum fine is not determined	Fines vary from 1 % to 15 % of the value of sales or from 0.3 % to 3 % if the violator's turnover or expenses on the market where the cartel operated exceeds seventy-five % of the total turnover, or if a violation has been committed on the market of goods (services) with regulated prices) ⁵⁷⁰ but not less than 100,000 RUB (£1,000 – £1,300)
4. Methodology		
4.1. Basic amount	The basic amount of the fine will be related to a proportion of the value of sales, depending on the degree of gravity of the infringement, multiplied by the number of years of infringement. ⁵⁷¹ As a general rule, the starting proportion of the value of sales is up to 30 %. ⁵⁷²	The basic amount is defined as the sum of minimum fine added to a half of the difference between the maximum fine and the minimum fine: Basic fine = (Maximum fine – Minimum fine)/2 + Minimum fine. Therefore, the basic amount is 8 per cent (1.95 % if the violator's turnover or expenses on the market where the cartel operated exceeds 75% of the total turnover, or if a violation has been committed on the market of goods (services) with regulated prices).
4.2. Other factors for the basic amount		
4.2.1 Duration of cartel	A multiplying factor for a basic fine	Duration is to be counted as an aggravating factor only (1.75 % of sales or 0.3375 % of sales if the violator's turnover or expenses on the market where the cartel operated exceeds 75 % of the total turnover, or if a violation has been committed on the market of goods (services) with regulated prices)).
4.2.2. Geographic scope	The geographic scope can be taken into account due to the economic implications since 'the wider the geographic scope of the cartel, the more effective it is likely to be'. ⁵⁷³	The geographic scope is neither a factor of gravity nor an aggravating factor; however, determining geographic scope is a necessary element in the market analysis of cartel cases.
4.2.3. Market share	Market share is taking into account for assessing the gravity of the infringement.	Market share is neither a factor of gravity nor an aggravating factor; however, determining it is a necessary element in the market analysis of cartel cases.

⁵⁷⁰ Д.Гришкин, 'Суть Дела: Мы Готовы к Дискуссии' *Ведомости* (30 November 2009) <<https://www.vedomosti.ru/newspaper/articles/2009/11/30/sut-dela:-my-gotovy-k-diskussii>> accessed 16 June 2017 (The Essence of the Cause: We Are Ready for a Discussion).

⁵⁷¹ Guidelines on the method of setting fines 2006 (n 559).

⁵⁷² *ibid* para. 21

⁵⁷³ Torre (n 536) 379.

4.3. Adjustment		
4.3.1 Aggravating factors	A non-exhaustive list of aggravating circumstances. The amount of the increase is defined by the Commission. In some cases, the basic amount can be increased by up to 100 % for each factor. ⁵⁷⁴	An exhaustive list of aggravating factors. Each factor adds a percentage of sales defined as one-eighth of the difference between the maximum fine and the minimum fine: $\text{Aggravating factor} = (\text{Maximum fine} - \text{Minimum fine})/8$. Therefore, the cap for each factor is 1.75 % of sales (0.3375 % of sales if the violator's turnover or expenses on the market where the cartel operated exceeds 75 % of the total turnover, or if a violation has been committed on the market of goods (services) with regulated prices).
4.3.2. Mitigating factors	A non-exhaustive list of mitigating circumstances	The FAS uses an exhaustive list of mitigating factors when calculating cartel fines. The Code of Administrative Offences provides that there is no limitation on the circumstances that may be considered as mitigating factors. Each factor deducts a percentage of sales, defined as one-eighth of the difference between the maximum fine and the minimum fine: $\text{Mitigating factor} = (\text{Maximum fine} - \text{Minimum fine})/8$. Therefore, the cap for each factor is 1.75 % of sales (0.3375 % of sales if the violator's turnover or expenses on the market where the cartel operated exceeds 75 % the total turnover, or if a violation has been committed on the market of goods (services) with regulated prices).
5. The courts' powers to reduce fines	Despite unlimited jurisdiction to review the decisions of the Commission, ⁵⁷⁵ courts seem timid in reviewing fines. ⁵⁷⁶	The courts have unlimited jurisdiction to review the decisions of the FAS and use it broadly for reducing fines. The most common grounds for decreasing the fine is an extension of mitigating circumstances because the character of the committed offence, property and financial assets and all mitigating circumstances have to be taken into account. ⁵⁷⁷

⁵⁷⁴ Guidelines on the method of setting fines 2006 (n 559).

⁵⁷⁵ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (Text with EEA relevance) 2002 para 31.

⁵⁷⁶ Ian S. Forrester, 'A Challenge for Europe's Judges: The Review of Fines in Competition Cases' (2011) 36 European Law Review 185, 193.

⁵⁷⁷ Постановление О некоторых вопросах, возникших в судебной практике при рассмотрении дел об административных правонарушениях (n 558) para 19.

The minimum and maximum fines are determined as 1% to 15% of the value of sales as a general rule and as 0.3% to 3% if the violator's turnover, or expenses on the market where the cartel operates, exceeds 75% of the total turnover, or if a violation has been committed on the market of goods (services) with regulated prices. Under no circumstances does the fine exceed the cap of 4% of the total turnover of each legal entity in the preceding business year (3% if the violator's turnover or expenses on the market where the cartel operates exceeds 75% of the total turnover, or if a violation has been committed on the market of goods (services) with regulated prices). The basic amount is defined as the sum of the minimum fine added to a half of the difference between the maximum fine and the minimum fine:

$$\text{Basic fine} = (\text{Maximum fine} - \text{Minimum fine})/2 + \text{Minimum fine}.$$

As the minimum and maximum fines are determined as 1% to 15% of the value of sales (0.3% to 3% as exemption), the basic amount of the fines is 8% (1.65% if the violator's turnover or expenses on the market where the cartel operates exceeds 75% of the total turnover, or if a violation has been committed on the market of goods (services) with regulated prices). In Russia's methodology, the duration of the cartel, its geographic scope and the market shares of the violators hardly affect the level of sanctions. Importantly, the duration is not a multiplying factor and is counted as an aggravating factor only. The geographic scope and the market share are not considered even as aggravating factors despite being determined in cartel cases in the process of market analysis.

The adjustment stage includes the application of aggravating and mitigating factors. The list of aggravating factors is exhaustive while the regulations governing the application of mitigating factors are less certain. Each aggravating factor adds a percentage of sales defined as an eighth of the difference between the maximum fine and the minimum fine:

$$\text{Aggravating factor} = (\text{Maximum fine} - \text{Minimum fine}) / 8$$

Therefore, the cap for each factor is 1.75% of sales (0.3375% of sales if the violator's turnover or expenses on the market where the cartel operates exceeds 75% of the total

turnover, or if a violation has been committed on the market of goods (services) with regulated prices).

The FAS sets the exhaustive list of mitigating factors,⁵⁷⁸ deducting the fine on the percentage of sales defined as an eighth of the difference between the maximum fine and the minimum fine:

$$\text{Mitigating factor} = (\text{Maximum fine} - \text{Minimum fine}) / 8$$

Therefore, the cap for each factor is 1.75% of sales (0.3375% of sales if the violator's turnover or expenses on the market where cartel operated exceeds 75% of the total turnover, or if a violation has been committed on the market of goods (services) with regulated prices).

However, the Code of Administrative Offences provides that there are no limitations for considering any circumstance to be a mitigating factor⁵⁷⁹, and the courts have unlimited jurisdiction to review the decisions of the FAS; they use it broadly for reducing fines. In practice, the courts often reduce fines even further. For example, in addition to mitigating circumstances, the High Commercial Court of Russia requires courts to consider the 'character of the committed offence, property and financial assets'⁵⁸⁰ without providing criteria for assessing a specific financial situation.

To illustrate the calculation, let us take a company with an annual turnover of 100,000,000 RUB which is found guilty of entering the cartel agreement with one aggravating and three mitigating factors. In this case, the basic fine would add up to 8,000,000 RUB. The aggravating factor adds 1.75% or 1,750,000 to the fine while the mitigating factors decrease the fine by 3*1.75% or 5,250,000 RUB. The final fine is amount to 8,000,000 + 1,750,000 – 5,250,000 = 4,500,000 RUB.

⁵⁷⁸ Guidelines on Calculating the Amount of the Fine on Legal Entities for Committing Administrative Offences Pursuant Articles 14.31, 14.31.1, 14.31.2, 14.32 and 14.33 of the Code of the Russian Federation (n 564).

⁵⁷⁹ Art. 4.2 The Code of Administrative offences (n 194).

⁵⁸⁰ *Постановление О некоторых вопросах, возникших в судебной практике при рассмотрении дел об административных правонарушениях* (n 558) para 19.

Another justification for reducing the fine is the unavailability or uncertainty of data on the offender's turnover. For example, on one occasion the court decreased fines imposed by the competition authorities 465-fold from 46,527,730 RUB (1% of the turnover on the market where the cartel operated) to 100,000 RUB because the defendant did not provide information on revenue separately for every entity⁵⁸¹ and had only consolidated financial reports for the entire company.⁵⁸²

Considering that the basic fine in Russia is 8% of the value of sales and the unlimited mitigating factors can be applied, the fine is unlikely to achieve the maximum rate of 15% of the values of sales. Nevertheless, the final amount of fine is capped to 4 (3) % of the annual company revenue. Such small values of fines and their limits decisively prevent Russia's anti-cartel fines from acting as a collective deterrence.⁵⁸³ The state of administrative enforcement in Russia confirms that the reality of anti-cartel fines is very far from the theory of optimal deterrence.⁵⁸⁴ Indeed, the expected costs of the sanction are insignificant, and fines do not create a severe threat for cartel members because they are far lower than the average cartel overcharge⁵⁸⁵ both for domestic (18.2%⁵⁸⁶) and for international cartels (23%⁵⁸⁷). Also, a huge gap between the values of fines and cartel overcharges causes recidivism in cartel cases.⁵⁸⁸

⁵⁸¹ Sanctions for refusing to provide information to competition authorities were introduced in 2013 only. They are small enough to make concealment of evidence more advantageous than cooperation with competition authorities. Para 7 of Article 19.8 of the Code of Administrative Offences introduced by the Federal law dated N 285-ФЗ 02.11.2013 sets fines from 10,000 to 15,000 RUB (appr. From £125 to £190) for managers and from 100,000 to 500,000 RUB (appr. £1250 to £6250) for companies, thus many defendants prefer to pay these fines rather than cartel fines much time to exceed them.

⁵⁸² *A4049210/2011* (Федеральный Арбитражный Суд Московской Области).

⁵⁸³ Simon J Evenett, Margaret C Levenstein and Valerie Y Suslow, 'International Cartel Enforcement: Lessons from the 1990s' (2001) 24 *World Economy* 1221, 1235.

⁵⁸⁴ Wardhaugh, *Cartels, Markets and Crime: Normative Justification Criminalisation Economic Collusion* (n 17) 283.

⁵⁸⁵ There is no credible data for Russia particularly

⁵⁸⁶ Connor, 'Price-Fixing Overcharges' (n 3).

⁵⁸⁷ *ibid.*

⁵⁸⁸ 'Картельный сговор оказался слишком сложно доказуем для ФАС' (*ИПАРОВО.Ru*) <https://pravo.ru/court_report/view/126155/> accessed 30 August 2018 (The cartel is too difficult to prove for FAS).

Other types of anti-cartel sanctions do not contribute to deterrence either. For instance, the recovery of income gained from antitrust violations to the budget of the Russian Federation⁵⁸⁹ remains unenforceable for most cartel cases since there is no methodology or resources to assess the gain. Individual administrative fines for entering horizontal agreements are symbolic⁵⁹⁰ and get often compensated by the company.

Disqualification of managers involved in cartels for a term of up to three years,⁵⁹¹ circumventing many of the problems and costs associated with a criminal offence, could provide the possibility of aligning the incentives of directors to comply with cartel laws.⁵⁹² Wils regards disqualification of directors as a defensible second-best alternative to imprisonment.⁵⁹³ However, Stephan points out that ‘in order for this deterrent effect to be felt, disqualifications must be applied and enforced effectively’,⁵⁹⁴ and for this very reason disqualification of directors in Russia has a very limited impact on cartel deterrence. Being imposed in a very small number of cases,⁵⁹⁵ it is rather a missed opportunity to improve deterrence as the administrative law regulating disqualification does not consider specifics of forming cartels. Disqualification can be imposed only on individuals holding positions in the executive body, or the supervisory board of the legal entity,⁵⁹⁶ while the decision to enter cartel can also be

⁵⁸⁹ Para 3 of Art. 51 On Protection of Competition (n 233).

⁵⁹⁰ 20,000 to 50,000 RUB, approximately from 250 GBP to 625 GBP

⁵⁹¹ Para 1 Article 14.32 The Code of Administrative offences (n 194).

⁵⁹² A Stephan, ‘Disqualification Orders for Directors Involved in Cartels’ (2011) 2 Journal of European Competition Law & Practice 529, 535.

⁵⁹³ WPJ Wils (n 21) 583.

⁵⁹⁴ Stephan, ‘Disqualification Orders for Directors Involved in Cartels’ (n 592) 535.

⁵⁹⁵ There is no sufficient data to provide a full analysis of disqualification as an anti-cartel sanction. In *Обзор практики рассмотрения дел об административных правонарушениях, связанных с привлечением лиц к административной ответственности за нарушения антимонопольного законодательства, а также дел указанной категории по жалобам на постановления антимонопольных органов и судей, рассмотренных судами Саратовской области за 10 месяцев 2011 года* (Президиум Саратовского областного суда) (the Review of the Practice of Hearing the Cases on Administrative Wrongdoings for Breaches Competition Laws and the Same Category of Cases On Appeal of Resolutions of Competition Authorities and Judges Hear in the Courts of Saratov Region in 10 months 2011) the court underlines that disqualification is stipulated by the personality of the wrongdoer and his financial situation.

⁵⁹⁶ The note to Article 2.4 The Code of Administrative offences (n 194).

made by other directors and managers. Also, competition authorities have no power to disqualify an individual, and disqualification is to be imposed by courts.

Overall, the design of the administrative regime in Russia does little to stigmatise cartels or to deter them. The methodology of calculating fines turns financial sanctions into the equivalent of license fees, which may encourage recidivism,⁵⁹⁷ small sanctions are not effective at deterring serious cartels or at punishing corporations violating the law. Therefore, to achieve deterrence, either fines are to be raised, or detection should be maintained on a high level. Increasing financial penalties is always a sensitive issue. In the case of Russia, it is also aggravated by the failure to stigmatise cartels as severe infringements of the law. Russian competition authorities have been widely criticised for excessive administrative enforcement against a great number of explicitly insignificant cases.⁵⁹⁸

As odds of increasing fines do not look realistic, the administrative regime is expected to demonstrate the solid rate of uncovered cartels. This indicator is also important for the criminal anti-cartel regime because there is the only way to establish a cartel for opening a criminal enquiry. However, there is a significant flaw in the application of cartel prohibition by the courts obstructing cartel detection.

4.2. *Per Se* and effects-based approaches in court acts

This section focuses on a small number of the FAS and court decisions in benchmark hard-core cartel cases to illustrate that both *per se* prohibition and effects-based approaches can be applied by the courts and that there is no criterion enabling them to choose between the two approaches or a clear test to prove the effect. As there is no precedent law in Russia, the principles determining case selection have yet to be clarified. The illustrative cases have been selected from a range of cases heard between

⁵⁹⁷ Wardhaugh, *Cartels, Markets and Crime: Normative Justification Criminalisation Economic Collusion* (n 17) 100.

⁵⁹⁸ The FAS reports over 200 detected horizontal agreements every year where the majority of defendants can be small and medium companies or even self-employed individuals: ЛВ Варламов, СВ Габестро and АС Ульянов, *От Батуттов До Попкорна: 100 Псевдомонополистов Современной России* <http://antitrusteconomist.ru/uploads/article/1427956329_wPhGyktW.pdf> accessed 30 July 2018 (From Trampolines to Popcorn: 100 Pseudo-monopolists of Contemporary Russia).

2009 and 2016 because the most recent and consistent cartel prohibition is dated 2009.⁵⁹⁹ The first group of cases show how the courts interpret and apply the binding interpretation of the cartel wrong-doing given by the Russian High Commercial Court. The second group concerns fish cartel cases. All the cases of this group have a lot in common as they embody similar schemes of conspiracy and operate on the market of similar goods. However, the outcomes of these cases differ significantly. Altogether, these cases demonstrate the range of variations in interpreting the cartel wrong-doing and the danger of ignorance of the binding interpretation of the High Commercial Court. The section also introduces the distinctiveness of the principle of uniformity and certainty in Russian law that allows the prohibition of hard-core cartels to be interpreted in several different ways.

4.2.1. The meaning of certainty and uniformity in the interpretation of cartel prohibition

In Russia meanings of ‘legal certainty’ and ‘uniformity’ differ from those established in the opinion of the European Court of Human Rights. The European Court of Human Rights states that the lack of legal certainty is observed if the court decides contrary to the same legal situation in the jurisdiction, and the highest judicial authority does not solve these contradictions in justice.⁶⁰⁰ The Russian judiciary system considers legal certainty as an important principle of justice. However, this principle not oblige courts to interpret the law in a particular way. The Russian Constitutional Court⁶⁰¹ justifies the uniform application of laws based on the constitutional principles of judicial independence,⁶⁰² the supremacy of the Constitution and the federal laws⁶⁰³ and the

⁵⁹⁹ Федеральный закон О внесении изменений в Федеральный закон О защите конкуренции и отдельные законодательные акты Российской Федерации (n 464).

⁶⁰⁰ *Sergey Zolotukhin v Russia* [2009] European Court of Human Rights 14939/03, 2009–I Reports of Judgments and Decisions.

⁶⁰¹ *Постановление По делу о проверке конституционности абзаца первого пункта 1 статьи 1158 Гражданского кодекса Российской Федерации в связи с жалобой гражданина МВ Кондрачука* [2013] Конституционный Суд Российской Федерации N 29-П [5] (Resolution of the constitutional Court of the Russian Federation).

⁶⁰² Para 1, Art. 120 *Конституция Российской Федерации 1993* (The Constitution of the Russian Federation).

⁶⁰³ Para 2 Art. 4, Paras 1, 2, Art. 15 *ibid*.

equality of all individuals before the law.⁶⁰⁴ It means that enforcing agencies⁶⁰⁵ and courts⁶⁰⁶ have a uniform understanding of the law.

This understanding of uniformity does not exclude different or even contradictory interpretations that can be seen in the application of Russia's tax law,⁶⁰⁷ corporate

⁶⁰⁴ Para 1, Art. 19 *ibid*.

⁶⁰⁵ *Постановление По Делу о Проверке Конституционности Частей Первой и Второй Статьи 54 Жилищного Кодекса РСФСР в Связи с Жалобой Гражданки ЛН Ситаловой* [1995] Конституционный Суд Российской Федерации N 3-П; *Постановление По делу о проверке конституционности отдельных положений Закона РСФСР 'О Государственной налоговой службе РСФСР' и Законов Российской Федерации 'Об основах налоговой системы в Российской Федерации' и 'О федеральных органах налоговой полиции'* [1999] Конституционный Суд Российской Федерации N 11-П; *Постановление по делу о проверке конституционности пункта 10 статьи 75 Федерального закона 'Об основных гарантиях избирательных прав и права на участие в референдуме граждан Российской Федерации' и части первой статьи 259 Гражданского процессуального кодекса Российской Федерации в связи с запросом Верховного Суда Российской Федерации Именем Российской Федерации* [2004] Конституционный Суд Российской Федерации N 4-П; *Постановление По делу о проверке конституционности положения пункта 11 статьи 38 Федерального закона "О воинской обязанности и военной службе" в связи с жалобой гражданина ИИ Куаиева* [2009] Конституционный Суд Российской Федерации 7-П; *Постановление По делу о проверке конституционности положений статьи 211 и пункта 7 статьи 22 Федерального закона 'О государственной регистрации юридических лиц и индивидуальных предпринимателей' в связи с жалобой гражданина АВ Федичкина* [2011] Конституционный Суд Российской Федерации N 26-П; *Постановление По делу о проверке конституционности положения части десятой статьи 13 Федерального закона 'Об оружии' в связи с жалобами граждан ГВ Белокриницкого и ВН Тетерина* [2012] Конституционный Суд Российской Федерации N 16-П; *Постановление По делу о проверке конституционности статей 3, 4, пункта 1 части первой статьи 134, статьи 220, части первой статьи 259, части второй статьи 333 Гражданского процессуального кодекса Российской Федерации, подпункта 'з' пункта 9 Статьи 30, Пункта 10 Статьи 75, Пунктов 2 И 3 Статьи 77 Федерального Закона 'Об Основных Гарантиях Избирательных Прав и Права на Участие в Референдуме Граждан Российской Федерации', Части 4 и 5 Статьи 92 Федерального Закона 'О Выборах Депутатов Государственной Думы Федерального Собрания Российской Федерации' в Связи с Жалобами Граждан АВ Андропова, ОО Андроновой, ОБ Белова И Других, Уполномоченного по Правам Человека в Российской Федерации и Регионального Отделения Политической Партии Справедливая Россия в Воронежской Области* [2013] Конституционный Суд Российской Федерации N 8-П; *Постановление по делу о проверке конституционности положений частей 3 и 10 статьи 40 Федерального закона 'Об общих принципах организации местного самоуправления в Российской Федерации' и пункта 3 части первой статьи 83 Трудового кодекса Российской Федерации в связи с жалобой гражданина АВ Дубкова* [2013] Конституционный Суд Российской Федерации 15-П (Resolutions of the Constitutional Court of the Russian Federation NoNo 3P (25.04.1995); 11P (15.07.1999); 4P (25.02.2004); 7P (20.04.2009); 27P (06.12.2011); 16P (29.06.2012); 8P (22.04.2013); 15P (27.06.2013)).

⁶⁰⁶ *Обзор Практики Конституционного Суда Российской Федерации за первый квартал 2014 года* (Конституционный суд Российской Федерации) (Overview of the practice of the Constitutional Court for the first quarter 2014, approved by the Decision of the Constitutional Court).

⁶⁰⁷ А В Демин, 'Неопределенность в налоговом праве и правовые средства ее преодоления' (Уральская Государственная Юридическая Академия 2014) (Uncertainty in Tax Law and Legal Consequences of Its Overcoming, PhD thesis) <https://msal.ru/common/upload/Demin_Doktorskaya_dissertatsiya_2014.pdf> accessed 15 June 2016.

law,⁶⁰⁸ and in competition law. The only inconsistency of a court decision with particular acts of the High Court shall be considered as a breach of certainty and uniformity. A court decision can be reversed if it is inconsistent with the uniform interpretation of a Resolution of the Plenum of the Supreme Court of the Russian Federation clarifying issues of judicial practice; the Resolution of the Presidium of the Supreme Court, acts of the Judicial Board on Civil Cases and the Appeal Board of the Supreme Court in specific cases providing binding interpretations of substantive and procedural law; reviews of judicial practices and answers to questions officially published by the Supreme Court⁶⁰⁹ and similar acts of the High Commercial Court if they have not been cancelled or replaced.⁶¹⁰ A regular resolution of the Supreme Court in a particular case is not formally binding for other courts.

Meanwhile, a decision of competition authorities can be appealed against⁶¹¹ up to six times⁶¹² within the pre-trial (extrajudicial) procedure or at all levels of the commercial courts.⁶¹³ Each of the appeal bodies can amend the appealed decision, annul it wholly or partially, increase or reduce the fine imposed by competition authorities. Considering that there are just a few binding court acts explaining a small number of competition law issues at present, it is little wonder that in theory up to six different positions can be issued for one case, which will not be counted as breaching uniformity.

⁶⁰⁸ И.А. Валинкина, 'К Вопросу Об Отнесении к Подведомственности Арбитражных Судов Корпоративных Споров' (2011) 3 Вестник Омского университета. Серия: Право 142, 145 (The Question of Relativity the Corporative Disputes to Arbitration Courts).

⁶⁰⁹ 56ПВ09 [2009] Президиум Верховного Суда Российской Федерации 56ПВ09; 3ПВ06 [2006] Президиум Верховного Суда Российской Федерации 3ПВ06.

⁶¹⁰ Art. 3 Федеральный конституционный закон от 15.02.2016 N 2-ФКЗ "О внесении изменений в статью 43.4 Федерального конституционного закона Об арбитражных судах в Российской Федерации и статью 2 Федерального конституционного закона О Верховном Суде Российской Федерации 2016; Art. 2 Федеральный Конституционный Закон О Верховном Суде Российской Федерации 2014.

⁶¹¹ Art. 52 On Protection of Competition (n 233).

⁶¹² The appeals are relatively cheap: litigation fee adds up to 2,000 RUB (less than £25) for corporations and 200 RUB (£2.5) for individuals: ss. 3 s 1 Art. 333.21 Налоговый Кодекс Российской Федерации 1998 (Tax Code of the Russian Federation).

⁶¹³ Art. 198 Арбитражный Процессуальный Кодекс Российской Федерации 2002 (Arbitration Procedural Code of the Russian Federation).

4.2.2. The first binding interpretation of a cartel offence as prohibited *per se* and its implementations

In the early days of Russian anti-cartel enforcement, courts often struggled to distinguish hard-core cartels from other concerted practices⁶¹⁴ so on 21 December 2010 the Presidium of the High Commercial Court of Russia issued a binding interpretation⁶¹⁵ of the cartel prohibition. The High Commercial Court declared that a hard-core cartel is prohibited by its object, underlining that ‘an infringement means the achievement of the agreement among members of the association, which leads or may lead to the consequences mentioned in paragraph 1 of Article 11 of the Law on Protection of Competition.’

This interpretation is of particular importance for three reasons. First, the reasoning of the lower courts in the *Siberian Alcohol Cartel*⁶¹⁶ case that the execution of the agreement, its adverse effect on the market and restriction or elimination of competition were to be proved, was dismissed, and, therefore, the effects-based approach was explicitly rejected. Second, the Court distinguished hard-core cartels from concerted actions underlying that effect or negative result were to be proved for concerted actions, while a proved agreement is sufficient for imposing sanctions in the case of a hard-core cartel. Finally, the High Commercial Court held that this position on cartel violations was an official interpretation of the law and should be applied by courts hearing related cases.

Apparently, this interpretation of cartel offences was binding, and many courts followed this interpretation when hearing cartel cases. However, there are also some examples of when its application was inconsistent, either too narrow or too broad. For example, in the *Insulin cartel case*,⁶¹⁷ an Appeal Court interpreted the cartel prohibition and the resolution of the Presidium High Commercial Court No 9966/10

⁶¹⁴ *A27-24421/2009* (Федеральный Арбитражный Суд Западно-Сибирского Округа).

⁶¹⁵ *Постановление* [2010] Президиум Высшего Арбитражного Суда 9966/10.

⁶¹⁶ *A27-12323/2009* (Арбитражный суд Кемеровской области, Седьмой арбитражный апелляционный суд, Федеральный Арбитражный Суд Западно-Сибирского округа).

⁶¹⁷ *Постановление по делу CV 06-06/2011-40* [2013] Семнадцатый Апелляционный Суд 17AP-7467/2012-АК.

21.12. 2010 in an interesting way. The court held that with the results of the violation relating to concerted practice only;⁶¹⁸ competition authorities have to prove the fact of achieving agreement if they wish to prosecute the cartel and dismiss economic evidence of the agreement. In other cases, the courts expanded *per se* prohibition not only to cartels but also to other concerted practices, blurring the boundary between hard-core cartels and other violations. For instance, in the *Buckwheat Cartel Case*⁶¹⁹ the Federal Commercial Court of the Povolzhsky zone found that paragraph 1 of Article 11⁶²⁰ prohibited both *per se* horizontal agreements and concerted practices, and pointed out that for concerted practices there was no need to prove negative consequences, including an effect on competition or harm to the interests of others.

4.2.3. *Per se* and calls for effect in Fish cartels

A shift towards an effects-based approach in cartel cases was observed after the powers of the abolished High Commercial Court of Russia had been passed to the Russian Supreme Court.⁶²¹ The most illustrative are three fish cartel cases. The Pollock Cartel,⁶²² the Pangasius Cartel⁶²³ and the *Norway Fish Cartel*⁶²⁴ were organised in a way similar to the *Alcohol cartel*.⁶²⁵ Russian fish companies incorporated associations to fix prices and allocate quotas; in the Norway Fish Cartel, the associations also aimed at influencing the state agencies responsible for the control and surveillance of fisheries; using this administrative leverage, companies worked on their suppliers in other countries in order to restrict their business with non-members of the associations and to allocate quotas amongst themselves. Despite their similarities, the outcomes of the fish cartel cases were drastically different.

⁶¹⁸ *Постановление О некоторых вопросах, возникающих в связи с применением арбитражными судами антимонопольного законодательства* (n 234).

⁶¹⁹ A05-309 / 2011, A05-311 / 2011, A05-325 / 2011, A05-326 / 2011, A05-326 / 2011, A05-327 / 2011 (Федеральный Арбитражный Суд Поволжского Округа).

⁶²⁰ On Protection of Competition (n 233).

⁶²¹ Федеральный Конституционный Закон О Верховном Суде Российской Федерации (n 610).

⁶²² [A40-14219/13-94-135 \(Арбитражный Суд Города Москвы\)](#).

⁶²³ A40-143256/2013 (Арбитражный Суд Города Москвы).

⁶²⁴ A40-97512/13 (Арбитражный Суд Города Москвы).

⁶²⁵ *Постановление* (n 615).

In the *Pollock Cartel case*, the court held that an agreement constituted a cartel offence. In the other two cases, *per se* prohibition was dismissed. In addition, the court acts in these cases should be analysed as only a few represent the approaches of the Supreme Court as a new agency in the anti-cartel enforcement. Although none of the analysed judgments can be qualified as formally binding, they illustrate the danger of the radical turn from *per se* to effects-based interpretations of cartel wrongdoing, due to the informal power of the Russian Supreme Court in the judiciary system.

In the *Pollock Cartel Case*⁶²⁶ the Commercial Court of Moscow applied the Resolution of the Presidium of the High Commercial Court No 9966/10 and upheld the decision of the FAS against fifteen cartel members; the court underlined that there was no need to prove either effect or execution of the agreement by its parties and reminded that pursuant to articles 4, 11, 12 and 13,⁶²⁷ horizontal agreements are prohibited if they may result in the effects listed in paragraph 1 of Article 11; therefore, a mere agreement was sufficient to establish a violation of prohibition, and there was no need to prove the effects of its implementation. This approach was upheld by the 9th Appeal Commercial Court⁶²⁸ and the Federal Commercial Court of the Moscow region.⁶²⁹ Importantly, in this case, the defendants' argument that agreement was lawful as it was aimed at protection and the rational use of marine species was rejected by the court reasoning that these intentions did not disprove the fact of violation of the anti-cartel law.⁶³⁰ By the same token, the court rejected the argument that all the agreements were exclusively related to the export of Pollock and fixed prices on the international market, and thus did not affect the market of the Russian Federation.

Therefore, in this case, the court interpreted paragraph 1 of Article 11⁶³¹ abiding by the binding interpretation and accepted that proving the agreement is sufficient for establishing a cartel offence. An entirely different outcome was observed in the

⁶²⁶ [440-14219/13-94-135 \(Арбитражный Суд Города Москвы\)](#).

⁶²⁷ On Protection of Competition (n 233).

⁶²⁸ *Постановление по делу No 440-14219/2013* (Девятый Апелляционный Арбитражный Суд).

⁶²⁹ *Постановление по делу No 440-14219/2013* (Арбитражный Суд Московского Округа).

⁶³⁰ *Pollock Cartel Case* (n 622).

⁶³¹ On Protection of Competition (n 233).

Pangasius and Norway Fish Cartel cases. In the *Pangasius Cartel Case*, the FAS raids on six fish retailers and the non-profit organisation, ‘Association of the producing and selling enterprises of the fish market’ (The Association) discovered that defendants concluded the anti-competitive agreement with the assistance of The Association. Competition authorities imposed fines on the defendants and issued orders to terminate the violation. The Commercial Court of Moscow⁶³² applied the Resolution,⁶³³ clarifying *per se* prohibition, and ruled that the defendants’ conduct could be used to prove the offence.⁶³⁴ The court found that the agreement on fixing and maintaining prices for Pangasius, the allocation of market shares by sales and purchase within the geographical boundaries of the Russian Federation, product boundaries, namely frozen Pangasius fillets produced in Vietnam (further – Agreement 1), constituted a cartel offence. The court also underlined two critical points. First, at the date of the hearing the case market analysis had not been mandatory for cartel cases, and second, there was no need to prove any effect, including implementation of the agreement, although competition authorities demonstrated that by reducing supply volumes of Pangasius to the Russian market the participants of Agreement 1 established and maintained market prices and increased their shares.

This judgement was reversed in the 9th Appeal Court⁶³⁵ with controversial reasoning. First of all, the Appeal Court found that the prohibition of Article 11 of the Law on Protection of Competition at that moment prohibited horizontal agreements among sellers only and, therefore, did not cover cartels of buyers. The main criticism at this point is that the Pangasius cartel shared the market by the composition of buyers while subparagraph 3 of paragraph 1 of Article 11 of the Law on Protection of Competition directly prohibits the allocation of markets by any principle, including the composition of buyers or sellers. Also, if paragraph 1 of Article 11 did not cover cartels of buyers, there would be no need for further analysis. However, in the next paragraph, the

⁶³² *Решение по делу А40-143256/2013* (Арбитражный Суд Города Москвы).

⁶³³ *Постановление* (n 615).

⁶³⁴ *Постановление О некоторых вопросах, возникающих в связи с применением арбитражными судами антимонопольного законодательства* (n 234) para Para 2.

⁶³⁵ *Постановление по делу No А40-143256/13* (Девятый Апелляционный Суд).

Appeal Court noted that competition authorities had to analyse the market of the Russian Federation and to establish the fact of allocation of sellers or buyers. The Appeal Court ignored the Resolution of the Presidium of the High Court 9966/10 on *per se* prohibition of agreements and pointed out that the direct evidence of impact made by defendants on the market was required because ‘the changes in the market could have resulted from various factors including the reduction of a number of Vietnamese suppliers’.

The Appeal Court also considered all activities of The Association lawful because the coordination of business was mentioned among its purposes in the Articles of Association,⁶³⁶ neglecting that the purposes of the association should not have infringed the laws.⁶³⁷ The Appeal Court rejected written evidence, pointing out that mere communications between market players were not sufficient to prove an anti-competitive agreement if there was no evidence of a negotiation process between the competitors. In addition, the Appeal Court interpreted the correspondence among the defendants as evidence of tough competition between them. Thus, the Appeal Court ruled that neither the cartel agreement nor coordination has been proved. Later, this reasoning would be repeated word for word in the Norway fish case.

The Commercial Court of the Moscow Region reversed the resolution of the Appeal Court and upheld the first decision, reasoning there was no need to prove the execution of the agreement nor the effects of its implementation, and that the horizontal agreement between defendants and coordination by the Association had been proved by the FAS. The Supreme Court initially upheld this position and agreed that defendants had achieved a horizontal agreement and coordinated its implementation.⁶³⁸ However, later, the Judicial Board on Economic Disputes of the Supreme Court annulled the Commercial Court decision and the resolution of the Commercial Court of the Moscow Region, upholding the resolution of the 9th Appeal

⁶³⁶ Para 1 Art. 123.8 Гражданский Кодекс Российской Федерации 1994 (The Civil Code of Russian Federation).

⁶³⁷ Para. 1 Art. 11 Федеральный Закон О некоммерческих организациях 1996 (The Federal Law on Non-Commercial Organisations No 7-FZ).

⁶³⁸ Постановление по делу No 305-АД15-10488 от 14.09.2015 (Верховный Суд Российской Федерации).

Court.⁶³⁹ The Supreme Court found that neither cartel offence nor coordination had been committed; however, the reasoning is not clear: it repeats almost word for word the arguments of the 9th Appeal Court, with no explanation for the dismissal of the findings in the first decision and the resolution of the Commercial Court of the Moscow Region.

The Supreme Court insisted that until 2016, only cartels of sellers were prohibited and that competition authorities had to prove the impact of the horizontal agreement on the market and to analyse the market. The resolution of the Supreme Court in the *Pangasius Cartel Case* is of particular importance because the Supreme Court was inexperienced in hearing this sort of case and had to either follow the binding interpretation of the High Commercial Court or to reject this interpretation and issue its own interpretation of the cartel prohibition. However, the Supreme Court ignored the Resolution of the High Commercial Court No 9966/10 and at the same time did not declare the new approach as a binding one. This decision increased uncertainty for other courts hearing cartel cases: on the one hand, they have to apply the unmodified official interpretation of the cartel offence from the Resolution of the High Commercial Court No 9966/10, while on the other, the courts find that the Supreme Court, which is authorised to review their decisions, declines *per se* prohibition. Considering the specific legal culture of Russia's judiciary system, inherited from the Soviet judiciary, preventing the formulation of independent judgment,⁶⁴⁰ the Resolution of the Supreme Court in the *Pangasius Case* is likely to be perceived by lower courts as an informal signal to turn away from prohibiting cartels and focusing on examining the effects of cartels instead

Moreover, this position of the Supreme Court does not seem accidental, as it was repeated in another fish cartel case. The Association and one of the Pangasius cartel members, The Russian Fish Company, have also been found among Norway fish cartel members.⁶⁴¹ In this case, the FAS imposed sanctions on a number of companies for

⁶³⁹ *Постановление по делу No 305-АД15-10488 от 17.02.2016* (Верховный Суд Российской Федерации).

⁶⁴⁰ Kathryn Hendley, 'Assessing the Rule of Law in Russia' (2006) 14 *Cardozo Journal of International and Comparative Law* 347, 354.

⁶⁴¹ *A40-97512/13* (n 624).

the anti-competitive agreement between The Association and The Federal Service for Veterinary and Phytosanitary Surveillance (further FSVPS) and the horizontal agreement between suppliers to share the market (hard-core cartel) and coordination of economic activity. In addition to fines, the violators have been ordered to terminate violations and to inform Norway suppliers about that. The Commercial Court of Moscow reversed the FAS decision,⁶⁴² and this move was upheld by Commercial Court of the Moscow region,⁶⁴³ the 9th Appeal Court⁶⁴⁴ and the Supreme Court.⁶⁴⁵ All courts have agreed that not only an agreement but also its impact has to be proven for cartel offences. Regarding the agreement, the courts pointed out that communications between market players were not sufficient to prove an anti-competitive agreement again and highlighted the lack of evidence for the negotiation process between competitors.

Furthermore, the courts assessed the competition between defendants and concluded that it was strong enough according to the correspondence provided by the defendants. Then, the courts established that a retrospective analysis of the market was required and that the negative impact of the agreement on competition or negative effects for consumers had to be proven. Moreover, the courts accepted the defendants' justification of the agreements as 'a natural reaction of the business on the issues of quality of the product, a peculiarity of the market regulation that can be justified economically'⁶⁴⁶ although the law does not provide any defence for hard-core cartels. Finally, the court took one more step towards an effects-based interpretation of the cartel offence by accepting the economic analysis from the agency hired by the defendants as evidence of the beneficial effects of the strategic partnership agreements for the fish market in the Russian Federation. The court ruled that findings of this economic analysis exempted the horizontal agreement from the prohibition of Article

⁶⁴² *Решение по делу А40-97512/13* (Арбитражный Суд Города Москвы).

⁶⁴³ *Постановление No 09АП-11880/2015 по делу А40-97512/13* (Арбитражный Суд Московского Округа).

⁶⁴⁴ *Постановление по делу No А40-97512/13-130-921* (Девятый Апелляционный Суд).

⁶⁴⁵ In *Определение об отказе в передаче жалобы в Экономическую Коллегию (Верховный Суд Российской Федерации)* (the Resolution on Rejection to pass the case to the Economic Panel dated 16.02.2016) the judge of the Supreme Court declined to pass FAS appeal for cassation, upholding the reasoning of the lower courts

⁶⁴⁶ *Решение по делу А40-97512/13* (n 642).

11,⁶⁴⁷ although the law does not establish any defence for the cartel offence. The court also paid attention to the implementation of the cartel agreement, noting that the scheme ‘one importer – one exporter’ had not always been implemented.

These three cases demonstrate that the anti-cartel regime in Russia is still evolving. The courts can take either a *per se* or effects-based approach in cartel cases, and there is no indication which of them is to be chosen in a particular case. Although formally, the recent decisions of the Supreme Court are not binding, their actual impact on cartel enforcement should not be underestimated. The lower courts often follow the acts of the Supreme Court to avoid the risk of having their decision annulled. Thus, there is a risk that an effects-based interpretation of the cartel offence could become a blueprint for the judiciary.

This turn may destroy anti-cartel administrative enforcement because of the difference in interpretations of the cartel offence by competition authorities and some courts. The FAS argues that Russia’s anti-cartel law prohibits hard-core cartels *per se*,⁶⁴⁸ proving the fact of achieving a horizontal agreement only and the whole inquiry system, including the investigating power of the FAS, is designed for this approach. Proving a cartel effect would be a very complex and expensive exercise which is unlikely to be affordable for competition authorities with limited power and funds.

The courts can take one of two opposite approaches: in some cases, they rule that an agreement is sufficient to establish a cartel, while in others, they reverse the FAS decisions as the effect or other types of cartel impact on the market have not been proved. This uncertainty means that in many cases, competition authorities are powerless to prove an offence. A particular pattern in the choice of ‘*per se*’ or ‘effect’ has not been found in recent judgements. Thus, it is impossible to define what exactly has to be proved if, for any reason, the prohibition of paragraph 1 Article 11 of the FZ 135 implies effect: courts seek for evidence of implementation of the agreement, completed market-sharing or negative consequences of fixed prices, the negative impact on the market or the lack of positive impact.

⁶⁴⁷ On Protection of Competition (n 233).

⁶⁴⁸ И Ю Артемьев, С А Пузыревский and А Г Сушкевич (n 551) 175.

This lack of certainty affects both the productivity of competition authorities and trust in the rule of law of the business community. It unnecessarily obstructs cartel inquiries as the enforcement agency is forced to investigate not knowing in advance what the burden of proof will be. Turning back to the ability of Russia's administrative regime to secure cartel deterrence, the uncertainty also means an additional factor undermining deterrence. As courts can take either of opposite approaches to cartel prohibition, many decisions of competition authorities are reversed or cancelled. Therefore, the odds to escape liability for hard-core cartel are high.

4.3. Russia's administrative anti-cartel enforcement problem and its causes

Section 1 and Section 2 show that Russia's cartel enforcement problem embraces nominal fines and inconsistency of the *per se* prohibition of cartels. This enforcement problem undermines the anti-cartel regime in at least two dimensions. First, the unpredictability of choice between a *per se* and effects-based approach in the administrative regime affects the criminal regime undermining legal certainty which is a key principle of the criminal law.⁶⁴⁹ Although an investigator can open a case immediately upon an announcement of a decision by the competition authorities, the development of the criminal investigation depends on the results of the appeal procedure and courts' choice of the *per se* or effects-based approach in the administrative procedure. Second, the uncertainty around the question of what conduct is unlawful and which is not⁶⁵⁰ destroys the general deterrence of cartels. Finally, an uncertain regime for hard-core cartels undermines the administrative leniency programme, and, consequently, the detection of cartels, as there is no incentive to apply for leniency if courts deny *per se* prohibition, or at least regularly reduce the fines to insignificant amounts.

⁶⁴⁹ Francis Geoffre Jacobs, Clare Ovey and Robin CA White, *The European Convention on Human Rights* (4th edn, Oxford University Press 2006) 209.

⁶⁵⁰ Whelan, 'Legal Certainty and Cartel Criminalisation within the EU Member States' (n 307).

A few factors may cause this enforcement problem: unclear laws, ignorance of social norms when cancelling possible defences for a cartel offence and introduction of misleading market analysis in cartel cases.

4.3.1. The unclear statute as a contributing factor to the enforcement problem

The statute suffers from a lack of clarity as it provides a ground to reverse at least 15 % of the total number of decisions by competition authorities in cartel cases and up to two-thirds of the appealed decisions.⁶⁵¹ First, the prohibition of paragraph 1 of Article 11 formulates the aims of the agreement so that they may be interpreted like its results ('agreements that lead or may lead to'). This collocation - 'lead or may lead' - is usually used in Russian legislation for the introduction of consequences or tangible results of an act. This linguistic negligence is strengthened by the resemblance of the hard-core cartel prohibition with other agreements. For example, paragraph 4 of Article 11 of the Law on Protection of Competition prohibits other agreements (excluding vertical agreements) if they lead or may lead to restriction of competition.

For these agreements the following elements have to be proven: restriction of competition in the form of forcing a counterparty to accept unfavourable conditions; setting unjustifiably different prices (tariffs) for one and the same product; creating barriers to entrance into the market or exit from it; establishing conditions of membership (participation) in trade and other associations. Considering that the law uses 'lead or may lead' both for cartel prohibition and for other agreements, a deeper analysis is required to conclude that paragraph 1 of Article 11 refers to the aims of the hard-core cartel and not its results. Similarly, the prohibition of agreements with state bodies⁶⁵² requires evidence of preventing, restricting or eliminating competition. This sort of agreement with state institutions performing their public power functions⁶⁵³ has been detected in the course of the investigation into the Norway Fish Cartel and the

⁶⁵¹ Andrey Makarov, 'Anti-Competitive Agreements in Russian Courts (2008-2012): Antitrust Law Implementation and Interpretation' (Social Science Research Network 2016) SSRN Scholarly Paper ID 2813100 <<https://papers.ssrn.com/abstract=2813100>> accessed 31 August 2018.

⁶⁵² Art. 16 On Protection of Competition (n 233).

⁶⁵³ Ch 30 Criminal Code of Russian Federation (n 172).

Wagon Cartel.⁶⁵⁴ In such cases, anti-competitive conduct is composed of agreements between economic entities and an agreement between economic entities and a state body, and competition authorities qualify it as two different offences: a cartel offence and an offence under Article 16 of the Law on Protection of Competition. The problem is that one of them is a *per se* offence, and the other is an effects-based offence; in practice, it is hardly ever possible to separate these agreements and their aims from one another.

The excessive interference of competition law into agreements with state agencies weakens the priorities of anti-cartel enforcement. It also withdraws resources from competition authorities, while the law provides a sufficient set of tools to address illegal acts committed by state bodies beyond competition law: their acts and decisions can be appealed in court⁶⁵⁵ or, if the effect of state intervention is significant, a criminal investigation can be initiated.⁶⁵⁶

Misapplication of the *per se* prohibition for the effects-based infringements also prevents achieving consistency of anti-cartel enforcement. The *per se* approach has been observed in the judgements on coordination in the Buckwheat Cartel⁶⁵⁷ and in some cases on vertical agreements.⁶⁵⁸ The lack of understanding of the reasons for *per se* prohibition of cartels blurs the distinction between a cartel offence as the most harmful infringement and other violations of the competition law.

Excessive enforcement of the anti-cartel law for agreements without any appreciable effect also triggers the search for any material results of hard-core cartels. Until 2009,⁶⁵⁹ horizontal agreements in Russia had been prohibited only for market players

⁶⁵⁴ A65-9084/2011.

⁶⁵⁵ Art. 46 Конституция Российской Федерации 1993 (n 600); Art. 197 Арбитражный Процессуальный Кодекс Российской Федерации 2002 (n 611).

⁶⁵⁶ Criminal Code (n 172)

⁶⁵⁷ A05-309 / 2011, A05-311 / 2011, A05-325 / 2011, A05-326 / 2011, A05-326 / 2011, A05-327 / 2011 (n 619).

⁶⁵⁸ Makarov (n 651).

⁶⁵⁹ Art 1 О внесении изменений и дополнений в Закон РСФСР О конкуренции и ограничении монополистической деятельности на товарных рынках 2002 (The Federal Law On Amendments

who held at least 35% of the market. This threshold, on the one hand, granted an exemption from liability to members of a great number of hard-core cartels and created long-lasting confusion regarding cartels with abuse of dominance. On the other hand, that threshold guaranteed the focus of the competition authorities on significant infringements only, thereby protecting small business and competition authorities from the expenditure of resources on weak and insignificant cases. In 2009, that threshold was cancelled, and Article 11 was amended in order to harmonise Russia's anti-cartel prohibition with Article 101 of TFEU,⁶⁶⁰ but the concept of the EU's appreciable effect on trade⁶⁶¹ has not been considered. Thus, the application of cartel prohibition to arrangements between small enterprises and self-employees became the primary focus for public criticism.⁶⁶²

These two factors – an unjustified mixture of *per se* and effect in proving anti-competitive offences and the qualification of insignificant arrangements as hard-core cartels – can be particularly confusing for the Supreme Court as a new appeal court. The Supreme Court inherited the specific legal culture of the Soviet judiciary, preventing the formulation of independent judgment⁶⁶³ and specialised in individual litigations only for many decades. Lack of expertise of the judges in complex cartel cases can lead to misinterpretation of the cartel offence.

4.3.2. Market analysis as a part of the investigation

Recently, the introduction of market analysis for cartel cases has brought more issues to the fore in understanding *per se* ban and anti-cartel enforcement. Now market

and Supplements to Law of the RSFSR On Competition and Limitation of Monopolistic Activities on Goods Markets).

⁶⁶⁰ И Ю Артемьев, С А Пузыревский and А Г Сушкевич (n 551).

⁶⁶¹ *Völk v Vervaecke* (1969) 1969 ECR 00295 (ECJ) [7]; *John Deere Ltd v Commission of the European Communities* 1998 1 ECR 03111 (ECJ) [77]; *Carlo Bagnasco and Others v Banca Popolare di Novara soc coop arl (BNP) (C-215/96) and Cassa di Risparmio di Genova e Imperia SpA (Carige) (C-216/96)* (1999) 1 ECR 135 (ECJ) [34]; *Asnef-Equifax, Servicios de Información sobre Solvencia y Crédito, SL and Administración del Estado v Asociación de Usuarios de Servicios Bancarios (Ausbanc)* (2006) 1 ECR 11125 (ECJ) [50].

⁶⁶² Варламов, Габестро and Ульянов (n 598).

⁶⁶³ Kathryn Hendley (n 640) 14.

analysis is required for all horizontal agreements except bid-rigging.⁶⁶⁴ The Guidance on Market Analysis in Cartel Cases has been incorporated into the Order of Federal Antimonopoly Service, regulating market analysis for the investigation of anticompetitive offences,⁶⁶⁵ after a number of judgements reversing⁶⁶⁶ or annulling⁶⁶⁷ the decisions of competition authorities and consultations with the non-profit organisation ‘The Association of Antimonopoly Experts’⁶⁶⁸ which represents law firms and business. These reforms aimed to prevent effects-based interpretation of the cartel offence.⁶⁶⁹ However, they have been done in a way that strengthens the effects-based approach to hard-core cartels rather than preventing it.

Although the question of the market definition occasionally arises at the beginning of the anti-cartel enforcement, the effect of hard-core cartels has not become an element of the cartel offence. For example, in the Italian Flat Glass Cartel, the Court of First Instance found that the definition of the market is a necessary precondition for a judgement.⁶⁷⁰ Later, the Court of Justice disagreed and stated that it is not necessary to provide a market definition in cartel cases, although the parties can refer to market conditions to justify their actions.⁶⁷¹ Also, in *Seamless Steel Tubes* the Court of First Instance highlighted that ‘if the actual object of an agreement is to restrict competition by market-sharing, it is not necessary to define the geographic markets in question precisely’.⁶⁷² The Competition Tribunal of South Africa generously cited the result of

⁶⁶⁴ Приказ N 220 (n 530).

⁶⁶⁵ *ibid.*

⁶⁶⁶ *Постановление по делу А40-24308/12-139-226* (Девятый Апелляционный Арбитражный Суд); *Постановление по делу 305-АД14-3832* (Верховный Суд Российской Федерации).

⁶⁶⁷ *Решение по делу А40-24308/12* (Арбитражный Суд Города Москвы); *Постановление по делу А40-24308/12-139-226* (n 666); *Постановление по делу N А40-35775/13* (Федеральный Арбитражный Суд Московского Округа); *Постановление по делу N А07-22878/11* (Федеральный Арбитражный Суд Уральского Округа).

⁶⁶⁸ ‘Ассоциация антимонопольных экспертов’ (*Ассоциация антимонопольных экспертов*) <<http://competitionsupport.com/>> accessed 31 August 2018.

⁶⁶⁹ Андрей Тенишев and Мухамед Хамуков, ‘Роль Экономического Анализа При Доказывании Картелей’ (2016) 1 Вестник АКСОП 214 (The Role of Economic Analysis for Proving Cartels).

⁶⁷⁰ *Cocietà Italiana Vetro SpA, Fabbrica Pisana SpA and PPG Vernante Pennitalia SpA v Commission of the European Communities* (1992) II ECR 1403 (ECJ) [159].

⁶⁷¹ Ingeborg Simonsson (n 525) 116.

⁶⁷² *Mannesmannröhren-Werke AG v Commission of the European Communities* [2004] General Court T-44/00, II ECR 2223 [132].

the market analysis in the judgement in the *Bread Cartel Case* but did not include it in the reasoning.⁶⁷³ Given that *per se* prohibition of cartels⁶⁷⁴ was clearly expressed in the decision of the South Africa Tribunal, the effect seems to be employed for educational and promotional purposes: in doing so, the Tribunal demonstrated the harmfulness of cartels for the economy and consumers.

The market analysis for cartel investigation in Russia includes determining the following: the time interval for the analysis; product boundaries based on the object of a horizontal agreement; the geographical boundaries of the market and establishment of the fact of competition among the parties to the agreement.⁶⁷⁵ The order was intended to clarify the procedure and restrict effect-based interpretations of the cartel offence. However, it did not work in this way, and now the Guidance on Market Analysis is being interpreted in a way that is destroying the administrative anti-cartel regime. For example, the recent judgements in the *Norway Fish* and *Pangasius Cases* demonstrate that market analysis can be used as a tool to restrict the effects-based approach. In these cases, the Courts interpreted elements of the market analysis more broadly and considered them as compulsory elements of the offence to be proved. In other cases, competition authorities simplify the market analysis, for example, by excluding substitutes from the analysis, and this simplification results in the annulment of their decisions.⁶⁷⁶

There are at least three objections to the way market analysis is used in Russia's anti-cartel enforcement. First, even this limited analysis requires economic expertise which is not always available in the early stages of an inquiry. The main danger is that in cartel cases, economic evidence will almost certainly be conflicting,⁶⁷⁷ and the court

⁶⁷³ *Competition Commission v Pioneer Foods (Pty) Ltd* [2010] Competition Tribunal Republic of South Africa 15/CR/Feb07, 50/CR/May08.

⁶⁷⁴ s4(1)(b) Competition Act of South Africa 1998.

⁶⁷⁵ Приказ N 220 (n 530).

⁶⁷⁶ *Решение по делу А40-24308/2012 (Арбитражный Суд Города Москвы)*; in the same case *Постановление по делу А40-24308/2012 (Арбитражный Суд Московского Округа)*.

⁶⁷⁷ Christopher Harding and Jennifer Edwards, *Cartel Criminality: The Mythology and Pathology of Business Collusion* (Routledge 2015) 66 <<https://www.routledge.com/Cartel-Criminality-The-Mythology-and-Pathology-of-Business-Collusion/Harding-Edwards/p/book/9781409425298>> accessed 31 August 2018.

will focus on weighting conclusions on the effect on the market from opposite parties instead of analysing the evidence of the agreement, as happened in *the Norway Fish Cartel* where the court accepted the opinion of the defendants' economists and concluded that the Norway Fish cartel was beneficial to the market, despite the fact that public interest does not constitute a defence for cartels.

Second, since the geographic boundaries of the market are determined according to the materials of the case, including the territories specified in the horizontal agreement,⁶⁷⁸ competition authorities are tempted to define the market too narrowly, as a particular address in the town in *The Outdoor Trampolines Case*.⁶⁷⁹ In this case, competition authorities investigated a price-fixing agreement between two sole traders placing their trampolines on one square and setting equal prices for those children's attractions. This approach unreasonably extends administrative anti-cartel enforcement to hundreds of cases every year against small businesses, instead of focusing on strong cases.

Finally, there are some doubts as to whether provisions of the guidance issued by the FAS on market analysis in cartel inquiries are constitutional because they seem to be modifying the cartel offence established by the federal law and strengthening effects-based considerations. Paragraph 5 of Article 45 of the law On Protection of Competition establishes that market analysis is required in the scope that is sufficient for deciding on whether competition laws have been broken. Paragraph 2 of Article 23 of the same law authorises the Federal Antimonopoly Service to approve the order of market analysis. However, these provisions do establish that market analysis is compulsory for hard-core cartels.

Paragraph 1.1 of the Order of the Federal Antimonopoly Service No 220 of 28 April 2010 states that the purpose of this regulation regarding market analysis is to determine the occurrence of a violation, i.e. the prevention, restriction or elimination of competition. Paragraph 17 of Article 4 of the Law on Protection of Competition defines certain results as characteristics of the restriction of competition. Therefore, a question of whether a detected horizontal agreement is sufficient for opening the cases

⁶⁷⁸ Приказ N 220 (n 530).

⁶⁷⁹ A02-1449/2011 (n 557).

without market analysis arises, and this consideration contradicts the provisions of paragraph 1 Article 11. Furthermore, the order⁶⁸⁰ states that the fact of competition among market players is to be established. This may create difficulties in cases where an agreement involves potential competitors arranging the future. Thus, the scope of market analysis in cartel cases is far beyond the limitations of the prohibition of the horizontal agreement in paragraph 1 of Article 11. In addition to the market analysis, the courts often investigate circumstances presented as defences despite the fact that the law does not contain these factors.

4.3.3. In search of the defence

In the *Norway Fish Cartel Case*, the defendants argued that their agreements were in the public interest and were aimed at improving the quality of the product, balancing market risks, supporting the market regulation and were justified economically.⁶⁸¹ The fact that the Supreme Court accepted this argumentation and put it into the reasoning of the Courts' act raises some considerations.

Until 1995, undertakings could prove that their agreements (concerted actions) had contributed or would have contributed to the saturation of the market of goods, or to an improvement in the consumer characteristics of goods and an increase in competitiveness, especially in the foreign market.⁶⁸² This defence was more generous than the EU defences from Article 101 (3) and did not require avoiding restrictions which are not indispensable to the attainment of the objectives⁶⁸³ or eliminating competition concerning a substantial part of the products in question.⁶⁸⁴ Despite this apparent simplicity, there is no evidence that Russia's defence has ever been enforced in cartel cases. Since amendments in 1995,⁶⁸⁵ Russia's law does not provide any

⁶⁸⁰ Приказ N 220 (n 530).

⁶⁸¹ A40-97512/13 (n 624).

⁶⁸² Law on Competition and the Limitation of Monopolistic Activity in Markets (n 385).

⁶⁸³ Treaty on European Union and the Treaty on the Functioning of the European Union 1957 Subpara (a) of Article 101 (3).

⁶⁸⁴ *ibid* Subpara (b) of Article 101 (3).

⁶⁸⁵ Федеральный закон О внесении изменений и дополнений в Закон РСФСР О конкуренции и ограничении монополистической деятельности на товарных рынках (n 549).

defence for hard-core cartels or block exemptions. Only joint venture agreements can be exempted from responsibility if there is prior consent of the competition authorities.⁶⁸⁶

Defences for Russia's cartel offences seem significant for enforcement in two respects. First, long-standing social norms supporting neutral or even positive social attitudes to all sorts of cooperation, inherited from the state economy, seem to have a serious impact on people's mindset.⁶⁸⁷ In these circumstances, the introduction of the defence would guide and limit the courts' discretion. Second, as there is a belief that a horizontal agreement can be acceptable or even beneficial, the burden of proof of these benefits would be shifted onto the defendants possessing the necessary evidence. Thus, defences as exemptions with the burden of proof on cartel members can save the cartel offence from transformation into an effects-based offence.

4.4. Concluding remarks

This chapter has provided insights that are essential for understanding why it is so difficult to enforce the cartel offence in Russia and why cartel criminalisation is needed despite these difficulties. The findings of this chapter regarding the obstacles in the administrative regime are essential for answering the question on the specifics of bid-rigging in Chapter 5 and developing a coherent policy in Chapter 6.

The administrative fines against companies and individuals are so insignificant that they are unlikely to achieve deterrence or effectively signal cartel wrongfulness. The current design of administrative sanctions and the methodology of calculating fines reflects deficiencies in understanding of the economics of cartels and peculiar social norms tolerating collusion. As fines are likely to be perceived as mere license fees, there is no lack of evidence that unusually small fines may encourage recidivism.⁶⁸⁸ On the other hand, a very formalistic approach to the definition of the cartel agreement

⁶⁸⁶ Para 10 Art. 11 On Protection of Competition No 135-Φ3 2006 (n 229) (as amended 05.10.2015 N 275-Φ3).

⁶⁸⁷ Joskow and others (n 56).

⁶⁸⁸ Wardhaugh, *Cartels, Markets and Crime: Normative Justification Criminalisation Economic Collusion* (n 17) 100.

resulted in abnormal figures on anti-cartel enforcement: hundreds of the detected and reported cartels are the agreements among small and medium companies or even self-employed individuals.⁶⁸⁹ The evident insignificance of these cases prevents the emergence of social stigma around cartel activities.

However, the mere increasing of fines and establishing a threshold for opening a case cannot improve the deterrent effect of the administrative regime, because there is no certainty in the application of the *per se* prohibition of cartels by the courts: none of the recent judgements settle on a set of criteria for choosing between ‘*per se*’ or ‘effect’ in a particular case. Therefore, it is still uncertain whether defendants enter a prohibited agreement or operate a business in the usual way, until the last instance of the judiciary ruling on the case. In some cases, an agreement can be sufficient to establish a cartel, but in others, the FAS has to prove implementation of the agreement, completed market-sharing or negative consequences of fixed prices, the negative impact on the market or the lack of positive impact.

Thus, there is considerable uncertainty for business in defining their strategy in the market or organising their compliance efforts, and for enforcers in opening a criminal investigation. This uncertainty complicates the job of the enforcement authority, which cannot prepare the case if they do not know in advance what the burden of proof will be. It also undermines cartel deterrence because it sends mixed messages to the business community and, more practically, turns the investigation in incredibly expensive and unpredictable business. This approach also differs significantly from the prohibitions of hard-core cartels *per se* or by the object in most jurisdictions, which makes international cooperation in this area difficult and extradition barely possible.

Insufficient fines and inconsistency of *per se* prohibition of cartels create Russia’s cartel enforcement problem. This problem is important for the criminal regime because it eliminates incentives to apply for leniency, as there is no threat of enforcement. It consequently destroys the prospect of criminal enforcement, which to a great extent depends on self-reporting. In addition to social norms, its problem is caused by unclear statute and introduction of misleading market analysis in cartel

⁶⁸⁹ Варламов, Габестро and Ульянов (п 598).

cases. Also, it demonstrates that defences may play an important role in distributing the burden of proof: if the law does not address the question ‘what if the agreement is beneficial for consumers,’ this does not mean that the question will be simply omitted in court, but without guidance, this question can be addressed to the wrong party.

All these discrepancies signal that it is unlikely that the legislator intended cartel deterrence as an objective of the current anti-cartel regime. Rather, this confirms the findings of the previous chapter on very formal forced adoption of anti-cartel laws. As the threat and frequency of punishment remain insignificant for businesses, cartel activity looks very profitable when fines based on a small proportion of the turnover for the one year are far below any cartel overcharge. Thus, criminal enforcement is even more desirable to secure cartel deterrence than in other jurisdictions. However, first, the issues of random choice between *per se* or effects-based prohibition are to be fixed.

There are a few factors to be considered for those considering criminalisation of cartel laws. First of all, the language of the offence should specifically target horizontal agreements but not their results. Then, the market analysis in cartel cases should be limited by provisions which are necessary for calculating fines (for example, the provisions on defining markets), but any linkage between establishing the fact of the cartel offence and its results or manifestations should be eliminated to avoid misinterpretations of the cartel offence. Finally, the priorities of anti-cartel enforcement should be articulated clearly. Understandable objectives of this strategy help to understand why the laws are enforced, and thus to set criteria for the sustainable use of the principle of appreciability and to establish guidance for defences with respect to social norms and public interests.

These steps will free the resources of the competition authorities and encourage the courts to apply the *per se* principle more consistently to serious infringements. The consistent application of the *per se* principle is necessary to make sanctions inevitable and give stronger grounds for initiating criminal cases. However, an increase in fines is very unlikely until there is greater distrust of the anti-cartel regime due to the high number of reversed decisions. An explicit and sound success story strengthening public awareness of cartel wrongfulness is required to attract positive public attitudes

to anti-cartel enforcement and thus to justify the growth of fines. Sadly, there has been only one successful prosecution of cartelists, and this success relates to a bid-rigging case. The next chapter highlights the differences of bid-rigging from other forms of cartels and explains why it should be treated differently.

Chapter 5. Should Bid-Rigging be Treated Differently?

Chapter 2 demonstrated that the cartel offence in Russia is barely enforceable. In January 2018, the Federal Antimonopoly Service came up with a Bill introducing a separate offence for bid-rigging in addition to the general cartel offence. This suggestion has sparked a discussion on whether special treatment of this particular cartel practice is justified. At first glance, it is not unusual for countries to have a special bid-rigging offence. For example, Germany has criminalised only horizontal agreements on tenders in public procurement. However, this is not generally the case in jurisdictions where all forms of horizontal hard-core cartel conduct are criminalised.

Russia's motivation stems from a practical consideration: bid-rigging cases appear far more common than other forms of cartel practices. So, there is the belief that treating bid-rigging separately from other cartels would benefit more consistent enforcement, since the separation will align criminal anti-cartel sanctions with administrative sanctions which are different for anticompetitive agreements on tenders. Also, the reform is driven by more severe penalties than those for other forms of cartels. These suggestions are worthy of examining both from practical and doctrinal angles.

Interestingly, some jurisdictions where all forms of cartels are criminalised punish bid-rigging with more severe sanctions than other forms of cartels.⁶⁹⁰ For instance, the US Sentencing Guidelines provide a one-level increase in the sentencing calculations for bid rigging offences.⁶⁹¹ In *United States v. Heffernan*⁶⁹² the court ruled that bid-rigging

⁶⁹⁰ Baker (n 422).

⁶⁹¹ Sentencing Guidelines for the United States 18 U.S.C. 2000 para 2R1.1.

⁶⁹² *United States of America, Plaintiff-appellee, v James P Heffernan, Defendant-appellant*, (7th Cir 1994) [1994] 43 F3d 1144, 1147 in Kara L Haberbusch, 'Limiting the Government's Exposure to Bid Rigging Schemes: A Critical Look at the Sealed Bidding Regime' (2000) 30 Public Contract Law Journal 97, 98.

differs from other forms of anti-competitive agreements. The court found that the volume of commerce used for calculating penalties for other crimes of this type understates the gravity of a bid-rigging offence, where not all bid-rigging participants will end up with some volume of commerce. Connor⁶⁹³ found that the US fines for bid-rigging in government-sector are nine times higher than those in the private sector; very similar policy for bid-rigging of government-sector purchases exists in Canada.

The European Commission and the National Competition Authorities of the EU Member States impose heavier median fines on violators that rig government tenders. Even court-ordered restitution for government agencies in bid-rigging cases may be nearly three times more intense than other private settlements.⁶⁹⁴ These findings are consistent with public choice theory⁶⁹⁵ as state agencies enforcing anti-cartel laws take bid-rigging against their governments personally. In the case of Russia, the public choice theory seems backed up by social norms and long-standing traditions providing the enhanced protection for State funds and a success story of the only custodial sentence for bid-rigging connected with fraud and corruption offences.

Also, bid-rigging has more common characteristics with fraud and theft than other cartel agreements. Wardhaugh points out that

in a monopoly, a producer is appropriating consumer surplus in a manner which resembles theft presupposes an inappropriate (or inapplicable) property rights regime. This presupposition is magnified by the terms 'consumer' and 'producer surplus', which connote ownership. From this connotation, it is an easy, but fallacious, inference to an accusation of theft.⁶⁹⁶

⁶⁹³ John M Connor, 'Governments as Cartel Victims' [2009] AAI Working Paper No. 09-03 <<https://papers.ssrn.com/abstract=1412463>> accessed 1 September 2018.

⁶⁹⁴ *ibid.*

⁶⁹⁵ Dennis C Mueller, 'Public Choice, Social Choice, and Political Economy' (2015) 163 *Public Choice* 379; John Meadowcroft, 'Exchange, Unanimity and Consent: A Defence of the Public Choice Account of Power' (2014) 158 *Public Choice* 85; Pierre Lemieux, "'The State" and Public Choice' (2015) 20 *The Independent Review* 23.

⁶⁹⁶ Wardhaugh, 'A Normative Approach to the Criminalisation of Cartel Activity' (n 347) 386.

This connotation has a lot of practical implications. For example, in Germany cartel members can be convicted in both bid-rigging and fraud offences where the requirements for both provisions are met, and parallels with theft and fraud are often used by competition authorities looking for the bottom-up moral outrage of cartels for criminalisation.⁶⁹⁷

The existing literature points to the normative difference between cartels on tenders and other forms of cartels. Particularly, there is a presumption that the normative justification of criminalisation works better for the bid-rigging offence and thus attracts less typical objections.

As cartels must be treated as effectively as any other infringements of the law, a compelling answer how to reconcile deterrence, prevent social harm and meet social norms determines the long-term success of cartel criminalisation.⁶⁹⁸

Often cartel criminalisation is driven by deterrence argumentation,⁶⁹⁹ but the deterrence argument does not address the risks of over-criminalisation of the behaviour which may be perceived as a morally neutral one.⁷⁰⁰ A ‘morally-neutral criminal offence’⁷⁰¹ is difficult to enforce, as morally ambiguous conduct does not cause moral outrage.⁷⁰² Indeed, even in the US moral opprobrium is not associated with the act of forming a cartel:⁷⁰³ the cartel offence under the Sherman Act initially

⁶⁹⁷ Stephan, ‘An Empirical Evaluation of the Normative Justifications for Cartel Criminalisation’ (n 310).

⁶⁹⁸ Stephan, ‘Why Morality Should Be Excluded from the Cartel Criminalisation Debate’ (n 80); C Harding, ‘Business Collusion as a Criminological Phenomenon’ 14 *Critical Criminology* 181; Angus D MacCulloch, ‘The Cartel Offence and the Criminalisation of United Kingdom Competition Law.’ [2003] *Journal of Business Law* 616.

⁶⁹⁹ Stephan, ‘How Dishonesty Killed the Cartel Offence’ (n 114).

⁷⁰⁰ Andrew Ashworth, ‘Is the Criminal Law a Lost Cause?’ (2000) 116 *The Law quarterly review* 225; Andrew Ashworth and Lucia Zedner, ‘Defending the Criminal Law: Reflections on the Changing Character of Crime, Procedure, and Sanctions’ (2008) 2 *Criminal Law and Philosophy* 21; Douglas Husak, *Overcriminalization: The Limits of the Criminal Law* (Oxford University Press 2007).

⁷⁰¹ Whelan, ‘Cartel Criminalization and the Challenge of “Moral Wrongfulness”’ (n 54) 541; Peter Whelan, ‘Morality and Its Restraining Influence on European Antitrust Criminalisation’ (2009) 12 *Trinity College Law Review* 40.

⁷⁰² Jones and Williams (n 62) 102.

⁷⁰³ John J Flynn, ‘Criminal Sanctions Under State and Federal Antitrust Laws’ (1966) 45 *Texas Law Review* 1301 in Gregory J. Werden, ‘Sanctioning Cartel Activity: Let The Punishment Fit The Crime’

was classified as *malum prohibitum* crime⁷⁰⁴ rather than *mala in se* crime⁷⁰⁵ because there was the consensus that cartels were ‘not crimes of moral turpitude’.⁷⁰⁶ However, bid-rigging is viewed differently.

In Russia, tenders are mainly used in the public sector. Thus, bid-rigging has a significant adverse effect not only on a considerable number of consumers but also on the state funds. Notably, anti-bid-rigging enforcement is more common, as detected infringements in public procurement constitute up to 80% of all discovered cartels.⁷⁰⁷ However, neither the distinctiveness of Russia’s bid-rigging from other forms of cartel offence, nor the sufficiency of the fraud offence for prosecuting cartels on auctions has been examined yet. The chapter investigates whether bid-rigging in Russia should be treated differently to other types of cartels and if so whether a fraud offence can do this job.

This chapter argues that the suggested reform is not justified, and a bid-rigging offence should not be treated differently from other cartel offences in Russia, for a number of theoretical reasons and practical considerations. The author challenges the argument based on the number of cases and argues that anti-cartel laws are being misused against violations that are less serious than cartels. Also, the delinquency of the conduct making it an offence is the same for bid-rigging and other cartels even though the normative justification for criminalising bid-rigging is stronger than for other cartel practices. The moral wrongfulness of cartels on tenders emerging from deception demonstrates that bid-rigging is similar to fraud. Then, to make the analysis thorough, this chapter considers whether fraud can deal with the practice better than the general cartel offence. It finds that that the mere focus on the enforcement of the current

(25 June 2015) <<https://www.justice.gov/atr/sanctioning-cartel-activity-let-punishment-fit-crime>> accessed 1 September 2018.

⁷⁰⁴ An unlawful act only by virtue of statute

⁷⁰⁵ Conduct that is evil in and of itself

⁷⁰⁶ John J Flynn, ‘Criminal Sanctions Under State and Federal Antitrust Laws’ (1966) 45 *Texas Law Review* 1301, 1315 in Gregory J. Werden, ‘Sanctioning Cartel Activity: Let The Punishment Fit The Crime’ (25 June 2015) <<https://www.justice.gov/atr/sanctioning-cartel-activity-let-punishment-fit-crime>> accessed 1 September 2018.

⁷⁰⁷ ‘ФАС России | Андрей Цариковский: Мы Должны Изменить Тактику Нашей Борьбы с Картелями. Иначе Мы Безнадежно Отстанем’ <<https://fas.gov.ru/news/24951>> accessed 20 September 2018 (It Is Time to Change Our Tactics of Fighting Cartels).

offence is sufficient to address the arguments for the separating bid-rigging. Also, the more explicit deception discovered in bid-rigging can be used for strengthening an educative function of cartel laws for the public.

The chapter is structured as follows. Section 1 sets the background and the scope for the chapter identifying bid-rigging practices and introducing their regulation in Russia. The next section examines the enormous statistics of reported bid-rigging cases and discovers that many of them should not be treated as cartels. This type of infringements on tenders, ‘imitation of competition,’ is not as harmful as cartels. Section 2 concludes that in the cases of ‘imitation of competition’ cartel laws are misused and draws a line between cartels and imitation of competition. Section 3 provides a doctrinal analysis of the specifics of bid-rigging, in comparison with other forms of cartels with emphasis on normative justification. It demonstrates that the only difference between bid-rigging and other cartels is a degree of moral condemnation rather than fundamental differences in phenomenon caused the outrage. The findings of this section are backed up by the next sections focusing on practical reasons not to single out the bid-rigging offence and the specifics of Russia’s context. Section 4 explains why Russia’s fraud offence cannot be used against cartels on tenders in Russia, despite some similarities to bid-rigging. This section shows that although application of a fraud offence to cartels on tenders may be a reasonable substitution for the general cartel offence in theory, there are a number of factors to be considered for a particular jurisdiction before this simplification. In Russia, replacement of the bid-rigging offence with fraud may entail new issues to enforcement of criminal law by detaching criminal investigation from its administrative counterpart. Then, there are some socio-legal tendencies in the enforcement of the fraud offence which may undermine enforcement of cartel laws and, considering very low fines, these tendencies exempt individuals from responsibility for other forms of cartels. Application of a fraud offence to cartels on tenders would remove all drivers for leniency and thus may affect deterrence of cartels and their detection. Section 5 uses the only successful conviction for bid-rigging to illustrate the findings and to demonstrate that elements of enforcement rather than a difference in law made the prosecution in this case successful. The concluding remarks wrap up the discussion by declining the reform.

The chapter contributes to the discussion on the frames of the cartel offence, the specific characteristics of the bid-rigging offence and the literature examining antitrust enforcement in public procurement in Russia.⁷⁰⁸

5.1. Bid-rigging in Russia appears different from other forms of cartels

5.1.1. Definition of a bid-rigging practice

OECD defines bid rigging as a practice ‘when businesses that would otherwise be expected to compete secretly conspire to raise prices or lower the quality of goods or services for purchasers who wish to acquire products or services through a bidding process.’⁷⁰⁹ A competitive bidding process is often viewed as a way to achieve better value for money. Better products for lower prices are especially of interest for governments and public organisations seeking either to save or to free resources up for use on other goods and services. Thus, bid-rigging practices are particularly harmful to public procurement because they take ‘resources from purchasers and taxpayers, diminish public confidence in the competitive process, and undermine the benefits of a competitive marketplace.’⁷¹⁰

Tenders are organised in a different way compared to other forms of trade which may be affected by cartels agreements, and the simplest concepts of auction theory are required to understand why tenders are used for securing lower prices or better quality. As with perfect information, most auction models are relatively easy to solve, a key feature of auctions is the presence of asymmetric information.⁷¹¹ This asymmetry arises between private information relating to how much each bidder values the object for sale. For example, a bidder’s value for a painting may depend on their private

⁷⁰⁸ Ostrovnaya and Podkolzina (n 48).

⁷⁰⁹ Guidelines for Fighting Bid Rigging in Public Procurement 2009.

⁷¹⁰ *ibid.*

⁷¹¹ Paul Klemperer, ‘Auction Theory: A Guide to the Literature’ (1999) 13 *Journal of Economic Surveys* 229 <<https://papers.ssrn.com/abstract=176729>> accessed 1 September 2018.

information (how much they like it) but also on others' private information (how much they like it).⁷¹²

Although there are many theories and classifications of auctions,⁷¹³ this chapter considers two types of auctions: ascending-bid auctions and sealed-bid auctions as they are most frequently used in public procurement in Russia. At an ascending-bid auction, each bidder submits multiple bids until no bidder is willing to raise it further. As bidders typically gather at the time of the auction in a room or online, they can observe the current high price. The bidder submitting the final bid wins the object and pays the amount of its bid.⁷¹⁴ At a sealed-bid auction, each bidder submits only one bid in secret from the other bidders. The auctioneer evaluates bids, and the winner pays the amount of its bid.⁷¹⁵

The sealed-bid auctions seem to be less susceptible to collusion than ascending-bid auctions where cartel members can coordinate their bids without *ex-ante* communication among the cartel members about their values. For instance, they can use a simple rule 'if a cartel member is actively bidding, then no one else from the cartel can bid. If a cartel member withdraws from the bidding, then another cartel member can bid, but no cartel member can bid against it.'⁷¹⁶ Collusion at sealed-bid auctions requires *ex-ante* communication. At this auction, 'the cartel must drop the bid of its highest-valuing member below what it would have bid acting non-cooperatively'⁷¹⁷ for securing a collusive gain. Theoretically, there is a possibility of profitable deviant behaviour. For instance, slightly outbidding this reduced bid a cartel member wins a bid that they would never have won if the highest-valuing bidder acted

⁷¹² *ibid.*

⁷¹³ *ibid.*

⁷¹⁴ Paul Klemperer, 'Using and Abusing Economic Theory' (2003) 1 *Journal of the European Economic Association* 272.

⁷¹⁵ William E Kovacic and others, 'Bidding Rings and the Design of Anti-Collusive Measures for Auctions and Procurements', *Handbook of Procurement* (Cambridge University Press 2006) 6 </core/books/handbook-of-procurement/bidding-rings-and-the-design-of-anticollusive-measures-for-auctions-and-procurements/DF1DEFEC8D703A70769FA708CD7D8A47> accessed 1 September 2018.

⁷¹⁶ *ibid.*

⁷¹⁷ *ibid.*

non-cooperatively. Also, it is easier to prosecute collusion at sealed-bid versus ascending-bid auctions. Thus, a sealed-bid auction is usually the best option for a procurer if the collusive behaviour is a concern.

Briefly, the horizontal bid-rigging schemes can be summarised as market allocation, bid rotation, bid suppression and cover (complimentary, courtesy, token, or symbolic) bidding. Bid-rigging schemes are not mutually exclusive and may implement a variety of common strategies. For example, the popular way to collude in Russia is ‘ram’, when cartel members aggressively decrease prices to eliminate independent competitors from the auction and then withdraw their bids so that the only ‘selected’ bidder wins. Market allocation means that colluding bidders determine who will be the winning bidder based on geographic areas or class of buyers. Other competitors do not bid or will submit only a cover bid on contracts offered by certain customers.⁷¹⁸ In bid rotation, colluding bidders agree taking turns at being the ‘winning’ bidder based on various criteria. Bid-rotation scheme can be based on the size of the project, characteristics of each participant, the geographic distribution of projects, a chronological order etc. Bid suppression involves agreements among competitors not to submit a bid for final consideration or to withdraw an existing bid to ensure that the predetermined bidder will be selected by the purchaser. A bid-rigging scheme may involve subcontracting or risk-sharing arrangements when competitors receive subcontracts in exchange for the successful low bidder, and thus they divide the illegally obtained higher price between them.⁷¹⁹

In Russia private auctions are not very common, so they are rarely the subject of competition law enforcement. By contrast, anticompetitive agreements in public procurement constitute the majority of cartels in Russia reaching up to 80 % of all detected cartels.⁷²⁰ Anti-competitive agreements on auctions in Russia are fined

⁷¹⁸ Guidelines for Fighting Bid Rigging in Public Procurement (n 709).

⁷¹⁹ ‘Price Fixing, Bid Rigging And Market Allocation Schemes: What They Are and What to Look For. An Antitrust Primer’ (25 June 2015) <<https://www.justice.gov/atr/price-fixing-bid-rigging-and-market-allocation-schemes>> accessed 1 September 2018.

⁷²⁰ ‘Большая часть картелей в I полугодии 2017 года пришлась на здравоохранение’ (*Новости GMP*, 24 August 2017) <<https://gmpnews.ru/2017/08/bolshaya-chast-kartelej-v-i-polugodii-2017-goda-prishlas-na-zdravooxranenie/>> accessed 1 September 2018 (Most of the cartels in the first half of 2017 are detected in health care).

differently than other forms of cartels,⁷²¹ but the criminal offence under Article 178 of the Criminal Code catches all forms of anticompetitive horizontal agreements including those on tenders.

The unified official portal⁷²² supports the system of public procurement contracts. This system contains information about the terms, prohibitions and limitations on access for products originating from a foreign state or a group of foreign states, as well as the work (services) performed (provided) by foreign undertakings; a list of foreign states that have signed international treaties with the Russian Federation mutually to apply the national regime for purchases and the terms under which the national regime is applied. Public tendering is compulsory for two groups of purchasers.

5.1.2. Tenders for state and municipal institutions

Federal Law No. 44-FZ ‘On the System of Public Procurement Contracts for Products, Work or Services for State and Municipal Needs’, 5 April 2013 (44-FZ) covers tenders organized by government bodies, including public authorities; the State Atomic Energy Corporation Rosatom; a governing body of the state non-budgetary fund or state public institution acting on behalf of the Russian Federation or the constituent entities of the Russian Federation, authorized to accept budget commitments; municipal authorities or municipal public institutions acting on behalf of the municipality, authorized to accept budget commitments and carrying out procurements⁷²³. They place orders on tenders (an open tender, a tender with limited participation, a two-stage tender, a closed tender, a closed tender with limited participation, a closed two-stage tender), auctions (an auction in electronic form (further also – an electronic auction), a closed auction), and request for quotations or for proposals.⁷²⁴

⁷²¹ Para 2 Article 14.32 Кодекс Российской Федерации об административных правонарушениях 2001; see S 5.1.5. below.

⁷²² ‘Главная Портал Закупок’ <<http://www.zakupki.gov.ru/epz/main/public/home.html>> accessed 1 September 2018.

⁷²³ Paras 5, 6 Article 3 О контрактной системе в сфере закупок товаров, работ, услуг для обеспечения государственных и муниципальных нужд No 44-ФЗ 2013 (On contract system for procurement of goods, works, services for of state and municipal needs).

⁷²⁴ Para 2 Art 24 *ibid*.

If the price proposed by the winner is lower than the starting (maximum) price of the contract by 25% or more, the contract security is to be provided by special measures⁷²⁵ to avoid dumping. These anti-dumping rules aim to stop unfair practices when extremely low prices were set without any correlation with suppliers' resources and expertise, and the suppliers failed to comply with deadlines or decreased quality of goods, works and services, which resulted in the embezzlement of budget funds. The amount of such a contract performance security adds up to 150 % of the amount of a contract performance security, specified in the tender documentation, but not less than the upfront payment. An alternative way to secure performance for contracts with the initial (maximum) contract price up to fifteen million roubles⁷²⁶ is to provide information from the register of contracts confirming that a participant had been acting in good faith if the price of any of the previous contracts is at least 20% of the price proposed by the participant.

5.1.3 Regulation of tenders for specific types of companies

Federal Law No. 223-FZ 'On Procurement of Goods, Works and Services by Certain Legal Entities' 18.07.2011 (223-FZ) sets the basic principles and requirements for procurement of goods, works and services for the specific types of legal entity: state-owned corporations, public (state-owned) companies; natural monopolies, entities involved in regulated operations (electricity, gas, heat and water supply, etc.); state and municipal unitary enterprises; autonomous institutions; business entities in which the Russian Federation, a constituent entity of the Russian Federation or a municipality holds an aggregate of over 50%; subsidiaries in which the above types of legal entity hold a cumulative share of over 50%; subsidiaries in which the above types of subsidiary hold a cumulative share of over 50%.⁷²⁷

These companies must select suppliers of goods, works and services by a tender, auction or other selection procedure provided for in a procurement regulation, adopted

⁷²⁵ Art 37 *ibid.*

⁷²⁶ Approximately £200,000

⁷²⁷ Art 1 О закупках товаров, работ, услуг отдельными видами юридических лиц No 223-ФЗ 2011 (On purchases of goods, works, services for certain types of legal entities).

internally by each Procuring Entity, and posted on the official website www.zakupki.gov.ru. The procurement contains requirements on purchases, including a procedure for preparing and carrying out a purchase (in particular, purchasing methods - by tender, auction or otherwise), for conclusion and performance of contracts.⁷²⁸

Procurements should rely on the principles of equal eligibility criteria and the absence of arbitrary requirements or discriminatory restrictions for potential suppliers, the absence of ungrounded restrictions or unmeasurable requirements on transaction participants. Information about the purchase should be accessible free of charge. Some of these principles are general in nature and lacking specific details. In particular, it is unclear whether restricted tendering complies with 223-FZ Law and under what circumstances the use of direct contracting may be justified in the case of purchases of goods from a single supplier.⁷²⁹

Certain types of contracts (sale and purchase of securities and foreign currency, purchase of commodities on a commodity exchange, purchase of military products, and purchase of goods, works or services in accordance with an international treaty which provides for a different method of procurement) and contracts below a certain value⁷³⁰ are excluded from the formal tendering procedures.⁷³¹

Practitioners from competition authorities notice that cartel agreements on tenders are often confused with other prohibited agreements, and this confusion obstructs anti-cartel enforcement.⁷³² These other, non-horizontal agreements on tenders are worth to be outlined for further analysis of the specific of bid-rigging in Russia.

⁷²⁸ Para 2 Article 3 *ibid*.

⁷²⁹ Subpara 2 Para 19 Art 4 *ibid*.

⁷³⁰ Less than RUB 100 000 or for procuring entities with annual revenues of over RUB 5 billions - less than RUB 500 000

⁷³¹ Para 15 Article 4 On purchases of goods, works, services for certain types of legal entities No 223-ФЗ (n 725).

⁷³² Interview with Aleshin (n 34).

5.1.4. Other anticompetitive agreements on tenders

Apart from cartel agreements in the form of bid-rigging raising, lowering, or maintaining prices,⁷³³ the legislator has prohibited a few more types of agreements on tenders as anti-competitive practices. Interestingly, all these administrative wrongdoings banned by competition law, constitute corruption offences in criminal law.

Article 16⁷³⁴ prohibits agreements amongst purchasers (federal executive authorities, public authorities of the constituent entities of the Russian Federation, bodies of local self-government, other bodies or organisations exercising the functions of the above-mentioned bodies and public extra-budgetary funds) or with a participant or participants of a tender if these agreements lead or can lead to increasing, decreasing or to maintaining prices (tariffs) if there is no a special exemption in federal laws or statutory legal acts of the President or the Government of the Russian Federation;⁷³⁵ unjustified establishment of different prices (tariffs) for the same goods;⁷³⁶ allocation of markets by territory, quotes for sales or purchase, composition of sellers or buyers;⁷³⁷ barriers for entering or leaving the market and elimination of competitors from the market.⁷³⁸

Some special prohibitions for public tenders are set in Article 17⁷³⁹ and include coordination of activities of the bidders by the purchasers and agreements amongst them if these activities may lead to creating preferences or restriction of competition; creation of preferential conditions for participation in the tender to one or several bidders, including illegal access to information; violation of the procedure for determining a winner or winners of a tender; participation of the tender organisers and

⁷³³ point 2, part 1 Article 11 On Protection of Competition (n233).

⁷³⁴ *ibid.*

⁷³⁵ Para 1 Art 16 *ibid.*

⁷³⁶ Para 2 Art 16 *ibid.*

⁷³⁷ Para 3 Art 16 *ibid.*

⁷³⁸ Para 3 Art 16 *ibid.*

⁷³⁹ *ibid.*

(or) employees of the tender organisers in the tender.⁷⁴⁰ Sometimes the agreements under Article 17 of FZ-135 are confused with cartel agreements.⁷⁴¹

5.1.5. The system of sanctions for bid-rigging

The individual administrative sanctions for anti-competitive agreements on tenders are equal to individual fines for other forms of cartels and similarly insignificant. The corporate fine depends on the values of the contract rather than on company turnover and adds up to from one-tenth to a half of the starting auction price but not less than 100,000 RUB. Bidders who avoid entering into a contract they won are included in the register of *mala fide* suppliers⁷⁴² which bans a company from any tender for state or municipal needs for up to 2 years.⁷⁴³

By the date, the criminal offence under Article 178 of the Criminal Code caught all anticompetitive agreements including bid-rigging. However, the Bill⁷⁴⁴ aims to single out bid-rigging as a more severe offence within Article 178 of the Criminal Code. There are three main arguments justifying this reform. First, to facilitate enforcement of anti-cartel laws as by the date, the only successful conviction under Article 178 was for the agreement among bidders; second, to redress a huge number of detected agreements on tenders; finally, there is sentiment that the immorality of cartels on tenders is more obvious to the public and enforcers. Therefore, bid-rigging encroaching on public funds seems deserving more severe sanctions. The next sections examine these considerations.

⁷⁴⁰ Art 17 *ibid*.

⁷⁴¹ Interview with Aleshin (n 34).

⁷⁴² ‘Сведения Из Реестра Недобросовестных Поставщиков (Подрядчиков, Исполнителей) и Реестра Недобросовестных Подрядных Организаций’ <<http://zakupki.gov.ru/epz/dishonestsupplier/quicksearch/search.html>> accessed 1 September 2018.

⁷⁴³ Art 104 On contract system for procurement of goods, works, services for of state and municipal needs No 44-ФЗ (n 721).

⁷⁴⁴ 02/04/10-17/00074514 at The Official Website for Information on Bills and Their Public Discussion (n 277) <<https://regulation.gov.ru/projects?type=Grid#search=02/04/10-17/00074514%20>> accessed 1 September 2018.

5.2. Is ‘imitation of competition’ a form of bid-rigging?

The examination of the phenomenon of an enormous number of detected agreements on tenders revealed that not all the violations fined as cartel agreements should be counted as horizontal agreements between competitors, and thus would lead to enforcement of Article 178 of the Criminal Code.

Importantly, various forms of bid-rigging are embraced by a common objective ‘...to increase the amount of the winning bid and thus the amount that the winning bidders will gain’.⁷⁴⁵ If X is the lowest bid anyone can make without losing money and Y is the second lowest bid, then at a well-designed auction, the firm will win the contract at a price of Y, thereby making the profit Y-X. If through bid-rigging, a firm manages to get the contract at the price Z, then the harm from the rigged bid is Z-Y, where Y is the counterfactual. Therefore, collusion among competitors on tenders impedes ‘the efforts of purchasers to obtain goods and services at the lowest possible price.’⁷⁴⁶

The protecting, complementary, courtesy or cover bids are not intended to win; they are submitted just to create ‘the appearance of competition to conceal secretly inflated prices’.⁷⁴⁷ The cover pricing schemes are the most frequently occurring forms of bid rigging in the US. However, the harmfulness of this form of bid-rigging for the competition is doubtful.⁷⁴⁸ The frames of cover pricing are of particular interest for analysis of some bid-rigging cases in Russia where the vast majority of the violations detected on tenders did not pursue the goal of obtaining goods and services at the lowest possible price.

Courts establishing this sort of violation call it ‘imitation of competition.’ For example, in case No 1-00-110/00-22-16, the Commission of the FAS established that companies ‘created the appearance of competition in its actual absence.’ All

⁷⁴⁵ Guidelines for Fighting Bid Rigging in Public Procurement (n 709).

⁷⁴⁶ *ibid.*

⁷⁴⁷ ‘Price Fixing, Bid Rigging And Market Allocation Schemes: What They Are and What to Look For. An Antitrust Primer’ (n 719).

⁷⁴⁸ Andreas Stephan and Morten Hviid, ‘Cover Pricing and the Overreach of “Object” Liability Under Article 101 TFEU’ (Social Science Research Network 2015) SSRN Scholarly Paper ID 2705409 <<https://papers.ssrn.com/abstract=2705409>> accessed 1 September 2018.

companies made bids on auctions from one IP address, with the least possible step (less than 1 % of the start price) so that LLC Tozilesh and LLC SK Sozidanie won auctions in the rotation. Eight bidders were exempted from responsibility as members of the group under Para 7 of Article 11 FZ-135. Two companies, LLC Tozilesh and LLC SK Sozidanie were not granted an exemption under Para 7 of Article 11 FZ-135 even though they were affiliated with other companies.⁷⁴⁹ Later, the Commercial Court of Tatarstan Republic reversed the FAS decision in this case on some procedural grounds but also noticed that the FAS did not investigate if all companies are competitors.⁷⁵⁰

What makes this case outstanding is that all companies claimed that they belong to one group, were controlled by each other and thus their conduct did not constitute a cartel agreement pursuant to subparagraph 7 para 1 Article 11 of FZ-135. A brief review of many other bid-rigging cases revealed that quite a significant share of reported cases is based on the same scheme: affiliated companies which under Article 101 of TFEU would be treated as a single undertaking, make bids on public tenders with minimal steps, often in the absence of other participants.⁷⁵¹ Competition authorities call this form of collusion ‘imitation of competition’.⁷⁵²

In another case⁷⁵³ where only two bidders placed their bids, the Appeal Court pointed out that those bidders were not competitors as one of them was a subsidiary to the second one. The subsidiary company simply copied the conduct of the parent company lowering the bid by 0.5%. Therefore, the court ruled that this strategy would not be profitable for the undertaking and upheld the decision of the lower court to overrule the decision of competition authorities to impose sanctions. Then the question arises of why undertakings follow such an odd pattern without any benefit. If companies try to avoid the unwanted attention of competition authorities to the purchases from the sole supplier, this strategy might indicate over enforcement of anti-bid rigging laws.

⁷⁴⁹ subpara 7 para 1 Art. 11 On Protection of Competition (n 233).

⁷⁵⁰ *No A65-21680/2017* (Арбитражный Суд Республики Татарстан) [12].

⁷⁵¹ *Решение по делу 1-11-1622/77-17* (ФАС).

⁷⁵² *Решение по делу № 1-00-110/00-22-16* (ФАС).

⁷⁵³ *Постановление по делу N A56-2023/2017* (Арбитражный Суд Северо-Западного Округа).

For example, in case A40-206175/16-122-1795, the Court overruled the decision of competition authorities and pointed out that the auction with the sole bidder would be invalid, and the contract with the sole bidder, in this case, was to be approved by the state body authorised to supervise state procurement.⁷⁵⁴ The process of approval takes a long time what did not suit the interests of the procurer. Therefore, as the competition is supposed to be plausible if at least three bids are placed, and there are not many competitors in the market for the product, the buyer is tempted to invite the supplier who wants and two others who would not want the contract, or one of the sellers invites its parent company and other ‘amicable’ firms to place bids to prevent the auction to be announced invalid. Therefore, many of the cases treated and reported like bid-rigging are the cases where buyers rather than the sellers are essentially breaking the rules.

One may think that this practice resembles cover pricing where companies seek ‘a non-winning bid from a competitor so that he can participate in a tender process without securing the contract’⁷⁵⁵ and thus violate a restriction by object. Hviid and Stephan point out that cover pricing very rarely has any anti-competitive effect so long as there is at least one bidder who is unaware of rivals seeking a cover price, and thus cover pricing should not be treated as a restriction by object.⁷⁵⁶ However, in the case of so-called ‘imitation of competition,’ firms are not competitors and do not need each other to guarantee a cover price for future tenders. Moreover, the fact that all bidders are affiliates makes collusion useless for achieving the common objective of bid-riggers to sell the product for the highest price or to buy it at the highest or buy it at the lowest possible prices.

Unlike cover pricing which ‘was apparently driven by the procurers threatening to remove from their tender lists any contractor who failed to bid for every tender’⁷⁵⁷ the motivation of imitators is less clear. Considering pressure in media and from state

⁷⁵⁴ Subpara 24 para 1 Article 93 On contract system for procurement of goods, works, services for of state and municipal needs No 44-Φ3 (n 721).

⁷⁵⁵ Stephan and Hviid (n 748) 507.

⁷⁵⁶ Stephan and Hviid (n 748).

⁷⁵⁷ *ibid* 508.

bodies regarding procurement,⁷⁵⁸ it might be suggested that the ‘imitation of competition’ aims ‘to please’ or to comfort a purchaser or its stakeholders as the bidders are not driven by the risk to lose the contract. Indeed, if only one bidder places a bid, an auction would be declared invalid, and the contract would be concluded with his bidder.⁷⁵⁹

Also, in the case of imitation, the characteristic of cover pricing of being ‘deceptive from the perspective of the procurer, who wrongly believes that there is one more serious bidder than exists in practice’⁷⁶⁰ is to be dismissed as the procurer seems to be aware of imitation. Moreover, this practice of ‘imitation of competition’ is unlikely to do any harm to competition as it does not prevent entering the bidding and often emerges as a response to the lack of interest in the bid. Thus, imitation of competition appears even a less serious violation of rules than cover pricing which is less serious than bid-rigging.

The practice in question cannot really be considered as intra-group coordination which takes place when a corporate group owns a number of competing brands. In the cases above firms never competed, and, as the decision of competition authorities held, competition was not restricted or eliminated: it was imitated, while ‘all forms of bid-rigging schemes have one thing in common: an agreement among some or all of the bidders which predetermines the winning bidder and limits or eliminates competition among the conspiring vendors.’⁷⁶¹

To sum up, hundreds of detected collusions which exceed the average statistics for comparable economies and application to them of prohibitions of Article 11 of FZ-135 prohibiting cartels as the most serious and harmful infringements, are the signs of over-enforcement of cartel laws. Treatment of ‘imitation of competition’ as harmful

⁷⁵⁸ ‘РБК – Новости в Реальном Времени. Все Материалы с Тегом «госзакупки»’ (*РБК*) <<https://www.rbc.ru/>> accessed 4 September 2018 (All Materials with the "Public procurement" tag); ‘Газета Коммерсантъ Раздел “Закупки”’ (*Коммерсантъ*) <<https://www.kommersant.ru/theme/1473>> accessed 4 September 2018 ("Purchasing" section).

⁷⁵⁹ Para 1 Art. 447 *The Civil Code of Russian Federation 1994* (n 634); subpara 15 para 1 Art. 17.1 *On Protection of Competition No 135-ФЗ 2006* (n 229).

⁷⁶⁰ Stephan and Hviid (n 748) 516.

⁷⁶¹ ‘Price Fixing, Bid Rigging And Market Allocation Schemes: What They Are and What to Look For. An Antitrust Primer’ (n 719).

bid-rigging could weaken legal certainty and thus obstruct compliance and deterrence seeing that courts are overcautious with prohibition by the object.⁷⁶² Misapplication of cartel laws to the practices imitating competition resulted from the inability of the definition of the group under para 7 of Article 11 FZ-135 to distinguish some arrangements with ambivalent effects from the most serious cartel practices. The inclusion of the affiliated companies in the group will stop overenforcement and facilitate the understanding of cartel economics for those enforcing cartel laws.

Moving back to the suggestion for reforming the cartel offence by separating bid-rigging from it, the conclusion is that the great number of infringements discovered on tenders should not be taken as justification.

5.3. Normative justification: a ground to differentiate bid-rigging from other forms of cartels

As for any other offence, there is a need for justifying a separate bid-rigging offence. Although the harmful effect of cartels for the markets and society is indisputable and connected with deterrence theory, the harm argument is not a good ground to justify the general cartel offence. One shortcoming of harm arguments is that harmful effects of the cartel for consumer may often be somewhat balanced by the use of conspiracy as a remedy against a crisis in the industry or bankruptcy of the undertaking.⁷⁶³ In this case, it is not easy to condemn conspirators as price-fixing is caused by the fear of losing one's livelihood.⁷⁶⁴ Also, as cartel harm is determined as an increase in price to a level higher than the price on market unaffected by the cartel, often it is not clear how to distinguish the cartel overcharge from legitimate reasons to increase prices.⁷⁶⁵

⁷⁶² Chapter 4

⁷⁶³ Andreas Stephan, 'Price Fixing during a Recession: Implications of an Economic Downturn for Cartels and Enforcement' (2012) 35 *World Competition Law and Economics Review* 511.

⁷⁶⁴ Whelan, *The Criminalization of European Cartel Enforcement* (n 28) 92–95.

⁷⁶⁵ OXERA, Assimakis P Komninos and Directorate-General for Competition, 'Quantifying Antitrust Damages: Towards Non-Binding Guidance for Courts : Study Prepared for the European Commission' (EUR-OP 2009)
<http://ec.europa.eu/competition/antitrust/actionsdamages/quantification_study.pdf> accessed 10 February 2018.

The normative justification relying on the attitude of members of society towards bid-rigging and other forms of cartels is more suitable for examining whether the bid-rigging offence differs from the general cartel offence. However, the difference in normative elements of the general cartel offence and the bid-rigging offence is not sufficient to justify the introduction of a special bid-rigging offence in addition to the cartel offence covering all forms of cartels in Russia.

5.3.1. Is bid-rigging better justified for criminalisation than other forms of cartels?

Three aspects should be considered for the formulation of normative justification of a cartel offence. First, the moral wrongfulness of cartel conduct emerges not only from an anticompetitive agreement but also from a determination to hide it from detection.

Harding and Joshua find a ‘spiral of delinquency’ in the act of hiding the anticompetitive agreement from customers and the authorities because in this case a perception of delinquent behaviour is heightened by determination of cartel members to violate the prohibition.⁷⁶⁶ This spiral of delinquency becomes greater when cartelists go further to disguise the offence. For instance, a good understanding that it is illegal is the only plausible explanation why cartelists try to conceal their behaviour as conventional criminals do going as far as meeting in secret locations, communicating through private email accounts and using codenames.⁷⁶⁷ This argument may be less important for the general Russian cartel offence because the conduct transmits from an administrative wrongdoing to a crime only if cartel inflicts a certain amount of damage or gain, and thus does not have strong connections with the immoral nature of the act itself. However, the argument remains relevant for bid-rigging as bidders well understand that they are invited to the tender to compete, not to collude against an organiser.

⁷⁶⁶ Harding and Joshua (n 11) 51.

⁷⁶⁷ Andreas Stephan, ‘See No Evil: Cartels and the Limits of Antitrust Compliance Programs’ (2010) 31 *The Company Lawyer* 231.

The second argument in favour of moral offensiveness of cartel offences determines cartels as a form of cheating⁷⁶⁸ or the ‘subversion of competition’⁷⁶⁹ which might be viewed as equivalent to insider trading:

[b]oth represent the concern that cartel behaviour is wrong in that the act of making or implementing a cartel arrangement denies the marketplace of the legitimate expectation of a competitive process. The cartelist ‘subverts’ that process or ‘cheats’ the marketplace by stepping outside of the legitimate process that other market players, and the wider economy, legitimately expect. The wrong in the conduct is that the cartel members have chosen to break the rules of the game.⁷⁷⁰

Stuart Green agrees that pure deterrence or harm-prevention theories are not sufficient to justify criminalisation, links ‘moral wrongfulness’ of such offences with deception and cheating⁷⁷¹ and considers the intentional violation, concealment and defiance of the law as the source of moral content.⁷⁷²

Wardhaugh develops this argument further pointing out that in a liberal society the market is an instrument of distributive justice and thus an important social institution. Therefore, cartel activity can legitimately be criminalised as it undermines a valuable institution that provides an individual with the ability to secure their welfare.⁷⁷³ This argument allows justifying cartel criminalisation on the grounds that cartelists fail to ‘play by the rules’ of the marketplace. Arguments regarding the importance of markets for liberal society may be less convincing for cartel criminalisation of the general offence in Russia as there is no evidence that the rules of the market are somewhat

⁷⁶⁸ Stuart P. Green (n 204); Beaton-Wells, ‘Capturing the Criminality of Hard-Core Cartels’ (n 199).

⁷⁶⁹ Caron Beaton-Wells and Brent Fisse, *Australian Cartel Regulation: Law, Policy and Practice in an International Context* (Cambridge University Press 2011).

⁷⁷⁰ Macculloch (n 51) 85.

⁷⁷¹ Green (n 362) 1551.

⁷⁷² *ibid* 1603.

⁷⁷³ Wardhaugh, *Cartels, Markets and Crime: Normative Justification Criminalisation Economic Collusion* (n 17) ch 1.

valuable. Nevertheless, there are some parallels between bid-rigging and the fraud offence in Russian criminal law.⁷⁷⁴

The retribution theory suggesting that individuals should be punished for choices that society deems wrong⁷⁷⁵ considers stealing as a possible source of moral offensiveness of cartels. Whelan points out that the ownership of the overcharge could be questioned. He also assumes that cartels undermine consumers' 'right to a competitive market' that arises out of the 'endorsement of free market economics by European citizens'.⁷⁷⁶ Although this presumption is consistent with competition law's concern of consumer welfare and consumers' right to obtain compensation as victims of cartel overcharging, it is hardly reconcilable with the firm's ownership over its profits.⁷⁷⁷ A company entering an agreement may persuade to maximise its profits rather than deliberately deprive consumers of their money except for placing a bid with the intention to deprive the purchaser of more funds than it would be if a tender were competitive.

Thus, the extent to which public expect markets to be competitive and recognise the harmfulness of cartels are the key elements of the retribution argument for the normative justification of the bid-rigging cartel offence:

[f]or a cartel activity to have a negative impact, one must demonstrate a positive feature of the counterfactual: one must demonstrate that a free market is valued by society The strength of a retribution-based criminalisation argument, therefore, depends upon the acceptance by society of the value of the free market.⁷⁷⁸

⁷⁷⁴ See s 5.4.

⁷⁷⁵ Whelan, *The Criminalization of European Cartel Enforcement* (n 28) ch 4.

⁷⁷⁶ Peter Whelan, 'Morality and Its Restraining Influence on European Antitrust Criminalisation' (2009) 12 *Trinity College Law Review* 40 in Andreas Stephan, 'An Empirical Evaluation of the Normative Justifications for Cartel Criminalisation' (2017) 37 *Legal Studies* 621.

⁷⁷⁷ Stephan, 'An Empirical Evaluation of the Normative Justifications for Cartel Criminalisation' (n 18).

⁷⁷⁸ Whelan, *The Criminalization of European Cartel Enforcement* (n 28) 92.

Some scholars believe that anticompetitive agreements are inherently immoral. For example, Wardhaugh points out that cartel immorality emerges from their harm to the market which is a substantial element of liberal society.⁷⁷⁹ In this case, the competitiveness of the market is presumed. However, there is no credible empirical data to prove that Russia's society expects markets to be competitive even though it may be assumed that competitive prices become the norm.⁷⁸⁰ Also, judiciary and members of society do not appreciate that cartel conduct itself is harmful: as it is established in Chapter 4, courts expect competition authorities to prove the effect of cartels for imposing fines and the threshold for criminal sanctions for cartels is higher than the one for fraud or theft.

However, the tender system of the state procurement is designed as either an artificial market or an alternative to the market system using similar conflicts to reveal information about what is the most competitive price. Participation in tenders depends on bidders playing the role they are supposed to play, and any violation of the established rules certainly harms the organiser. In this context, deception looks like a more promising source of moral opprobrium. If a cartel member falsely tells their customer that they are not price fixing, this is deceptive. Thus, cartels on tenders are clearly deceptive and morally repugnant as bidders take part in the explicitly competitive process but submit a false bid or arrange in advance which bid will win.⁷⁸¹ Other forms of cartels fall into the more problematic scenario. Often the cartel member is silent as to whether they are price fixing. Then only if consumers expect firms to behave competitively in a free market, this silence is deceptive.

To sum up, bid-rigging may attract more moral opprobrium than other forms of cartels agreements because, in bid-rigging, bidders are well aware that they have to compete, and the pay-out of cartel overcharge from public funds is deemed wrong by society. Nevertheless, the moral outrage in both cases is aimed at deception and the act of hiding the anticompetitive agreement.

⁷⁷⁹ Wardhaugh, 'A Normative Approach to the Criminalisation of Cartel Activity' (n 347).

⁷⁸⁰ Harding and Joshua (n 11) chs 2, 3.

⁷⁸¹ Stephan, 'An Empirical Evaluation of the Normative Justifications for Cartel Criminalisation' (n 18) 636.

5.3.2. Some normative objections to criminalising cartels are inapplicable for bid-rigging

Bid-rigging is more resistant than other forms of cartels to normative objections to criminalisation. The existing literature does not provide an answer to what extent the Russian cartel offence draws upon normative justification. However, there is a common belief of academics from other jurisdictions that criminal law should be reserved exclusively ‘for conduct that reflects the traditional conception of criminality.’⁷⁸² Over-criminalisation and the revealed misuse of law and institutional resources point to lack of sufficient moral opprobrium of conduct:

applying criminal sanctions to morally neutral conduct is both unjust and counterproductive. It unfairly brands defendants as criminals, weakens the moral authority of the sanction, and ultimately renders the penalty ineffective. It also squanders scarce enforcement resources and invites selective and potentially discriminatory prosecution.⁷⁸³

In Russia, the cases of economic crimes are heard by professional judges but not the jury. Thus, the success of one cartel prosecution on the tender⁷⁸⁴ is not conclusive as evidence of society’s moral condemnation of cartel conduct or any awareness of cartel harm. However, the examples from other jurisdictions indicate that members of the public often do not view cartel conduct as immoral. For instance, in some cases, British prosecution did not manage to persuade a jury to convict defendants for cartel conduct as many jurors did not find it dishonest⁷⁸⁵ in spite of the fact that dishonesty, a moral element of the UK offence, came from the law of theft and fraud.⁷⁸⁶ Moreover, in

⁷⁸² Green (n 362) 1536; Francis A Allen, ‘The Morality of Means: Three Problems in Criminal Sanctions’ (1980) 42 *University of Pittsburgh Law Review* 737, 738; Francis Bowes Sayre, ‘Public Welfare Offenses’ (1933) 33 *Columbia Law Review* 55, 79–80.

⁷⁸³ Green (n 362) 1536.

⁷⁸⁴ The case analysis is introduced in Section 5.5 of this chapter

⁷⁸⁵ *R v Dean and Stringer* [2015] unreported (Southwark Crown Court); ‘CMA Statement Following Completion of Criminal Cartel Prosecution’ (*GOV.UK*, 24 June 2015) <<https://www.gov.uk/government/news/cma-statement-following-completion-of-criminal-cartel-prosecution>> accessed 1 September 2018.

⁷⁸⁶ Stephan, ‘An Empirical Evaluation of the Normative Justifications for Cartel Criminalisation’ (n 18) 629.

contrast to unclear moral motives behind the Russian cartel offence, the UK's cartel offence⁷⁸⁷ was meant to 'send out a strong message to the perpetrators, their colleagues in business, the general public and the courts.'⁷⁸⁸ In reality, many jurors were members of the public who did not consider cartel conduct as dishonest.⁷⁸⁹ For example, it took the jury only two hours to acquit defendants in *R v Dean and Stringer*.⁷⁹⁰ The jury did not accept that cartel was a crime and in fact agreed with defendants that their conduct was not dishonest⁷⁹¹ dismissing evidence demonstrating 'that the conduct was actively hidden from customers and that it resulted in margins increasing significantly'.⁷⁹²

In Russia's case, the lack of moral opprobrium of cartel conduct has also had some other specifics as it originates from the factors emerging during massive reforms the 1990s⁷⁹³ and goes beyond overuse of the cartel offence in its traditional context. In addition to the ineffectiveness of penalties and over-criminalisation, there is evidence of the misuse of the cartel offence and its under-enforcement.

The problem of moral opprobrium relates to the mental element of the cartel offence and its distinctiveness from the administrative wrongdoing. The difficulties of providing clear distinctions between a cartel as a criminal offence or as a civil wrongdoing are common for many jurisdictions⁷⁹⁴ and were unlikely to be solved by copying criminal cartel laws of other states. For instance, the common law world uses descriptive criteria which are criticised as misleading. Indeed, if a guilty mind, which

⁷⁸⁷ The Enterprise and Regulatory Reform Act s 188.

⁷⁸⁸ 'Patricia Hewitt, Secretary of State for Trade and Industry. Hansard HC Deb, Vol 383, Col 48' (2002) <<https://api.parliament.uk/historic-hansard/commons/2002/apr/10/enterprise-bill>> accessed 1 September 2018.

⁷⁸⁹ Stephan, 'An Empirical Evaluation of the Normative Justifications for Cartel Criminalisation' (n 18) 630.

⁷⁹⁰ *R v Dean and Stringer* (n 785); Stephan, 'An Empirical Evaluation of the Normative Justifications for Cartel Criminalisation' (n 18).

⁷⁹¹ Department for Business, Innovation and Skills, 'A Competition Regime for Growth: A Consultation on Options for Reform' (2011): dishonestly as the moral element of the offence rather hindered offence enforceability than shaped negative attitude to cartel conduct.

⁷⁹² Stephan, 'An Empirical Evaluation of the Normative Justifications for Cartel Criminalisation' (n 18) 630.

⁷⁹³ Chapter 3

⁷⁹⁴ Stephan, 'An Empirical Evaluation of the Normative Justifications for Cartel Criminalisation' (n 18) 629.

is a generally required mental element of a criminal act, could be considered as a way to express moral culpability, cartels as other strict liability offences require only a guilty act.⁷⁹⁵

Unlike bid-rigging, other forms of cartel may be viewed as more sophisticated to provoke public outrage, so normative arguments are often not too convincing for policymakers who can accept deterrence of cartels and the prevention of social harm as sufficient justifications for cartel criminalisation. This is because theories based solely on the lack of moral condemnation do not consider that the scale of harm inflicted to society by the hidden corporate offences is more significant than harm from traditional property offences such as theft or fraud.

Some over-criminalisation scholars suggest that moral culpability representing a guilty mind is more significant than a guilty act for making a decision whether to criminalise or not any conduct because the ability to signal society's moral condemnation of the harmful behaviour is the key to the use of criminal law.⁷⁹⁶ For example, Jones and Williams criticise criminalisation of cartels when anticompetitive agreements were not perceived as being morally wrong and point out that 'in order to generate moral stigma, therefore, it would seem to be crucial for it to be identified with sufficient clarity what is morally reprehensible about cartel conduct; and what features of such activity distinguish it from other anti-competitive conduct that is not criminalised'⁷⁹⁷ Stephan summarises the criticism of cartel criminalisation that cartel offences may be viewed as lacking legitimacy. In many jurisdictions, the cartel offence failed to signal the seriousness of cartel conduct as it was not clear what is morally reprehensible about cartel conduct. Moreover, either society's moral condemnation of cartel conduct or its awareness about cartel harmfulness has been barely proved yet.⁷⁹⁸

⁷⁹⁵ *ibid.*

⁷⁹⁶ *ibid* 630.

⁷⁹⁷ Jones and Williams (n 62) 116.

⁷⁹⁸ Stephan, 'An Empirical Evaluation of the Normative Justifications for Cartel Criminalisation' (n 18).

As it is established above,⁷⁹⁹ the line between Russian administrative wrongdoing and a criminal offence is drawn by the vague concept of ‘social danger.’ In the cartel offence, it is manifested in an ambiguous criterion of the amount of revenue/damage inflicted by cartels⁸⁰⁰ and also does not refer to moral opprobrium. Social danger as a central criterion for criminalisation in Russia is a weak argument for the justification of cartel criminalisation. While this concept to some extent resembles arguments based on social harm,⁸⁰¹ it should be born in mind that neither traditional harm-oriented approach nor Russian social danger can be considered as a general ground to the cartel offence from wrongdoings. The attempt to bring revenue or harm as an effects-based element to Article 178 of the Criminal Code made it hardly enforceable while in other jurisdictions cartel laws punish infringements regardless of their effect and there was ‘little or no attempt to quantify the harm caused.’⁸⁰² However, an automatic mental element emerges for bid-rigging at the moment of submitting a bid for a tender in collusion with other bidders, and the price of the bid counts to the necessary amount of revenue.

Also, owing to the long-standing tradition of protecting state (public) funds, the bid-rigging offence is less susceptible to the flaws of normative justification of criminalising other forms of cartels in Russia. As it is demonstrated in Chapter 2, many issues of the general cartel offence arose from using this tool as a ‘quick political fix’⁸⁰³ and exploiting criminal law ‘as a form of preference shaping disincentive to deter violations of anti-cartel rules’⁸⁰⁴ in order to support market liberalisation in the 1990s. The hasty attempt to use cartel criminalisation in this context resulted in the design of the general cartel offence which is not clearly different from the administrative wrongdoing and appears simply as ‘different points on a continuous spectrum.’⁸⁰⁵ This difference is more obvious for the bid-rigging offences where the

⁷⁹⁹ Chapter 3

⁸⁰⁰ Art 178 Criminal Code.

⁸⁰¹ *On the judicial practice of imposing criminal sanctions* (n 171) [1 subpara 3].

⁸⁰² Stephan, ‘An Empirical Evaluation of the Normative Justifications for Cartel Criminalisation’ (n 18) 633.

⁸⁰³ *ibid* 627.

⁸⁰⁴ Jones and Williams (n 62) 102.

⁸⁰⁵ *ibid*.

product and its price are specified, and it is clear for the public and enforcers ‘how the [cartel offence] reflects or builds moral stigma of prohibited conduct.’⁸⁰⁶ Elimination of the individual administrative sanctions from Article 14.32⁸⁰⁷ so that individuals bear only criminal responsibility would strengthen this stigmatisation.

Williams points out that the perils of the forward-looking offence are that ‘the law cannot pull itself up by its own bootstraps in this way, any attempt to do so risks damaging both the process of cartel criminalisation and the criminal law more generally.’⁸⁰⁸ Comparing to the general cartel offence, which, like the UK cartel offence, is a result ‘of a top-down policy reflecting the general willingness by the [...] government to use a wide range of policy tools in regulatory control, including criminal ones,’⁸⁰⁹ bid-rigging may cause bottom-up moral outrage from other bidders, the tender organiser and the public as the potential consumers of the product bought for the higher price because of breaching the rules. For these reasons, in the case of bid-rigging, the risks of over-criminalisation are less possible than for the general cartel offence introduced in the environment historically tolerating horizontal arrangements.

5.3.3. Focus on enforcement of the bid-rigging offence can perform the educative function for anti-cartel enforcement

Chapters 2-4 identified several issues obstructing the criminal anti-cartel enforcement in Russia. As many of them originate from lack of understanding why cartel practices are wrong, advocating anti-cartel enforcement should be recognised as a way to educate both the public and the judiciary. Deterrence theory by its own is too simple to explain the use of criminal law against cartels because it does not embrace ‘the complex normative and social contexts in which cartel behaviour and enforcement occur’.⁸¹⁰ Although deterrence often predetermined cartel criminalisation, the

⁸⁰⁶ *ibid*; Ashworth (n 360); Packer (n 350) 359; Sayre (n 782).

⁸⁰⁷ The Code of Administrative offences.

⁸⁰⁸ R Williams (n 72) 289.

⁸⁰⁹ Stephan, ‘An Empirical Evaluation of the Normative Justifications for Cartel Criminalisation’ (n 18) 630.

⁸¹⁰ Christine Parker (n 216).

distinctive characteristic of the criminal law apart from the administrative liability is not its deterrent effect.

Despite the fact that Goodin believes that there is ‘something fundamentally flawed in the criminal law informing the public of what constitutes a crime,’⁸¹¹ there is a consensus that a signal of moral condemnation of an act ‘by creating a specific criminal label that has a special condemnatory meaning’⁸¹² makes criminal sanctions different even from severe administrative fines. This feature of moral condemnation means, principally, that the law can educate and guide people’s behaviour. To serve this social function, the offence should be criminalised in a way, so people can ‘intuit without detailed investigation of what the law is for most common and most important cases of their conduct.’⁸¹³

Although the delinquency of both bid-rigging and other hard-core cartels contains the same elements, the normative element of the bid-rigging offence is more evident than that of the cartel. As bidders conspire to deceive a purchaser anticipating purchasing good for the lowest price, bid-rigging associates more clearly with the criminal law which comes up from ‘our knowledge of what is wrong, morally.’⁸¹⁴

The better capacity of the bid-rigging to name deception and to stigmatise the prohibited conduct than the general cartel offence should be deployed for advocating cartel criminalisation and promoting the application of the cartel offence. Then, the stigmatising impact of the offence can take the first place in the criminalisation debate as ‘it must make clear what is morally reprehensible about the activity in question.’⁸¹⁵ At the same time, despite the criticism for the educative function of the law, prioritising the consistent enforcement of the cartel offence against cartels on tenders is not an obstacle for other purposes of the criminal competition law. However, the

⁸¹¹ Robert E Goodin, ‘An Epistemic Case for Legal Moralism’ (2010) 30 *Oxford Journal of Legal Studies* 615.

⁸¹² Stephan, ‘An Empirical Evaluation of the Normative Justifications for Cartel Criminalisation’ (n 18) 628.

⁸¹³ Goodin (n 811).

⁸¹⁴ *ibid* 623.

⁸¹⁵ Jones and Williams (n 62) 113.

role of deception for recognising and condemning bid-rigging makes it important to examine a relationship between bid-rigging and fraud.

5.4. Treating of bid-rigging as a fraud: pros and contras

The examination of imitation of competition reveals that the principal characteristic of bid-rigging distinguishing it from other infringements on tenders is the element of deception. Deception highlighting the moral wrongfulness of cartels on tenders also draws some explicit parallels between bid-rigging and fraud. As it has been established above, cartel criminalisation in Russia does not work as it was expected. Considering similarity of the bid-rigging offence to the fraud offence, the natural question arises why not apply a fraud offence as a substitute for the cartel offence against cartel members and remove hardly enforceable cartel offence .

Although this idea looks reasonably acceptable for some jurisdictions, its applicability for Russia's cartel enforcement is less straightforward if issues of cartel enforcement, some socio-legal patterns and specifics of administrative anti-cartel enforcement are considered. In the Russian case, this option brings significant risks for the functioning of the leniency programme and consequently for cartel detection.

5.4.1. Fraud and deception in anti-bid rigging enforcement

The practice of applying the fraud offence to anticompetitive agreements of tenders is not unknown as 'the very thin doctrinal line between fraud provisions and price fixing (and other hardcore horizontal cartels) should amply demonstrate that from a moral perspective there is hardly any difference at all.'⁸¹⁶ In contrast to other forms of cartels, bid-rigging can be viewed not only as a strict-liability offence but also as a secretive scheme intentionally designed to take property in violation of the antitrust laws. The scheme for obtaining property by deception or false pretences constitutes a form of fraud if there is the natural or default public expectation that markets usually are

⁸¹⁶ Florian Wagner-von Papp and others, 'Individual Sanctions for Competition Law Infringements: Pros, Cons and Challenges' (2016) 2 *Concurrences Review* 14, 22.

competitive.⁸¹⁷ As fraud and deception are commonly condemned as immoral, they can attract criminal liability.⁸¹⁸

Connor, Foer and Udwin agree that fraudulent representation is particularly evident in bid-rigging because if the bidders are not competing with one another, the very idea of auctions is meaningless.⁸¹⁹ This confrontation of fraudulent conduct with the reasoning of public tenders caused the criminalisation of bid-rigging in the jurisdictions where other forms of cartels are the subject of administrative sanctions only.⁸²⁰ The same considerations underlie more severe penalties for bid-rigging in US federal sentencing guidelines.⁸²¹

Whelan also notices that bid-rigging is principally different from other forms of cartels. The situation when bidders enter the cartel while they falsely tell the purchaser that they are competitors is straightforwardly deceptive and can be easily viewed as fraud.⁸²² Stephan finds that the clandestine act of the cartel agreement is immoral, both as deception and as an act of delinquency because of the consumers' expectation of competitive pricing and object to collusion.⁸²³ Thus the submission of a false bid could, in fact, have been pursued by the procurer as a fraud.

Notably, in Germany the criminal courts started to apply the general fraud provision to bid-rigging cartels in 1992, although they never applied the fraud provision to cartels other than those rigging bids.⁸²⁴ The first case of applying the general fraud provision to the collusion on tender happened five years before the introduction of the

⁸¹⁷ John M. Connor, Albert A. Foer and Simcha Udwin, 'Criminalizing Cartels: An American Perspective' (2010) 1 *New Journal of European Criminal Law* 199.

⁸¹⁸ *ibid.*

⁸¹⁹ *ibid.*

⁸²⁰ Florian Wagner-von Papp (n 82); ICN, 'Anti-Cartel Templates, Laws and Related Materials' <<http://www.internationalcompetitionnetwork.org/working-groups/current/cartel/templates.aspx>> accessed 1 September 2018.

⁸²¹ Robert Engelbrecht Hauberg (ed), *Sentencing Guidelines in Antitrust: A Practitioner's Handbook* (American Bar Association 1999) 3.

⁸²² Whelan, 'Cartel Criminalization and the Challenge of "Moral Wrongfulness"' (n 54) 550–555.

⁸²³ Stephan, 'An Empirical Evaluation of the Normative Justifications for Cartel Criminalisation' (n 310) 19.

⁸²⁴ *Norris v United States of America and Others* (n 117) para 61.

bid-rigging offence into s 298 of the German Criminal Code (StGB).⁸²⁵ In the *1992-Rheinausbau I* the court ruled that the rigged price had been higher than the hypothetical competitive price would have been.⁸²⁶ In other cases, the courts established that bids responding to public calls for tender, or to calls for tender addressed to at least two addressees,⁸²⁷ contain either an express or at least an implied representation that the bids are not rigged.⁸²⁸

Financial losses are the crucial element of the offence in Germany subsuming bid-rigging under two offences. If financial losses cannot be proved, bid-rigging falls under §298 StGB as competition-restricting agreements in procurements and is to be punished with imprisonment up to five years or a fine. However, if a cartel on tender causes significant financial damage or involves an abuse of power, §263 StGB punishes bid-riggers for fraud and penalty reaches up to 10 years.

In the US, the DOJ uses various statutes to prosecute bid-riggers.⁸²⁹ They may apply sanctions for making false statements to government agencies;⁸³⁰ making false claims for payment to the Government;⁸³¹ conspiring to defraud the Government;⁸³² committing mail or wire fraud;⁸³³ or (5) violating any of the provisions of the Racketeer Influenced and Corrupt Organizations Act.⁸³⁴ For example, when federal power to attack the bid-rigging activity under the Sherman Act was not settled yet,

⁸²⁵ Florian Wagner-von Papp (n 82).

⁸²⁶ *BGH*, 8 January 1992, 2 *StR* 102/91, [1992] *NJW* 921, 922 – *Rheinausbau I*; *BGH* 11 July 2001, 1 *StR* 576/00, 47 *BGHSt* 83, [2001] *NJW* 3718 – *Flughafen München*; Florian Wagner-von Papp (n 82).

⁸²⁷ *BGH* 11 July 2001, 1 *StR* 576/00, 47 *BGHSt* 83, [2001] *NJW* 3718 – *Flughafen München* (n 826); Florian Wagner-von Papp (n 82).

⁸²⁸ *OLG Hamm* 17 September 1957, 1 *Ss* 772/57, [1958] *NJW* 1151; *BGH* 11 July 2001, 1 *StR* 576/00, 47 *BGHSt* 83, [2001] *NJW* 3718 – *Flughafen München* (n 826); *BGH* 4 November 2003, *KRB* 20/03, [2004] *NJW* 1539 – *Frankfurter Kabelkartell*; Florian Wagner-von Papp (n 82).

⁸²⁹ *Haberbush* (n 692) 102.

⁸³⁰ 18 U.S.C. 1996 para 1001.

⁸³¹ *ibid* 287.

⁸³² *ibid* 371.

⁸³³ *ibid* 1341, 1343.

⁸³⁴ *ibid* 1962(c).

bid-riggers in *Roadrunner* cases⁸³⁵ were ‘charged not only with defrauding the United States and the individual state governments of money but with defrauding them of their "intangible" right to have the bid-letting statutes and regulations operate as envisioned, without collusive activity.’⁸³⁶ The conviction was based on a provision in the federal laws requiring prospective bidders ‘to file an affidavit swearing that their bids were not the result of collusion.’⁸³⁷ Thus, bidders simply lied when they were formulating their bids and swearing that they had not committed a criminal violation of the Sherman Act.

5.4.2. The fraud offence catches bid-rigging practices in Russia

In Russian criminal law, fraud is defined as acquiring someone’s property or the right to someone else’s property by deception or abuse of trust⁸³⁸ and apparently catches bid-rigging. For instance, the Supreme Court points out that it is fraud if someone acquires any assets without intention to fulfil all obligations related to the terms of transfer the assets to them and a person’s intention to commit a crime (*mens rea*) arises before acquiring assets.⁸³⁹ Thus, if bidders win contracts on tenders without competing for them as required by law, it may be interpreted as a fraud because bid-rigging requires preliminary communications and meetings.

⁸³⁵ *United States v Lyons*, 670 F2d 77 (7th Cir), cert denied, 102 S Ct 2965 (1982); *United States v Koppers Company, Inc*, 652 F2d 290 (2d Cir 1981), cert denied, 454 US 1083 (1982); *United States v Azzarelli Construction Co*, 612 F2d 292 (7th Cir), cert denied, 447 US 920 (1980); *United States v Azzarelli Construction Co*, No 79-C-3178, slip opinion (CD Ill, Jan 10, 1980), aff’d, 647 F2d 757 (7th Cir 1981); *United States v Rodgers*, 624 F2d 1303 (5th Cir 1980), cert denied, 450 US 917 (1981); *United States v Brighton Bldg & Maintenance Co*, 435 F Supp 222 (ND Ill 1977), aff’d, 598 F2d 1101 (7th Cir), cert denied, 444 US 840 (1979); *Peter Kiewit Sons’ Co v US Army Corps of Eng*, 534 F Supp 1139, 1148 (DDC 1982) (*debarment proceedings*); G. Richard Strafer, ‘Operation Roadrunner: The Misapplication of Federal Criminal Sanctions to Bid-Rigging in the Highway Construction Industry’ (1983) 11 Am. J. Crim L. 1.

⁸³⁶ G. Richard Strafer (n 835) 3.

⁸³⁷ *ibid*.

⁸³⁸ Art 159 Criminal Code (n 172).

⁸³⁹ Para 4 *Постановление О судебной практике по делам о мошенничестве, присвоении и растрате* [2007] Пленум Верховного Суда 51 (Resolution On judicial practice in cases of fraud, misappropriation and embezzlement).

Other elements of fraud could also be found in bid-rigging for prosecution under Article 159 of the Criminal Code. The purchaser ‘being under the influence of deception transfers the property or the rights to the violator’, so deception is the method of committing the offence. Deception is interpreted not only as conscious submission of false information but also as non-disclosure of facts,⁸⁴⁰ for example, that bidders are not going to place competitive bids. Deception in fraud relates to any information transmitted by a violator: facts, quality or price of goods, infringer’s personality or their powers or intentions.⁸⁴¹ As a fraud, bid-rigging is ‘unlawful, committed with a mercenary purpose uncompensated acquiring of someone else’s property in favour of the guilty person or other persons.’⁸⁴²

Anticompetitive price paid by a purchaser includes cartel surcharge which constitutes financial losses as a compulsory element of fraud. The threshold for fraud is set far below the threshold for bid-rigging. If financial losses are below 2,500 RUB,⁸⁴³ the conduct is subject to administrative fines.⁸⁴⁴ For applying criminal sanctions, losses should exceed 2,500 RUB. Thus, the difference with 50,000,000 RUB of gain or 10,000,000 RUB of damage, which are necessary for opening a criminal investigation against cartels, is impressive. However, does this mean that the fraud offence is a good alternative to the cartel offence in pursuing bid-rigging?

5.4.3. Why is the fraud offence not suitable for dealing with bid-rigging?

Interestingly, in other jurisdictions the bid-rigging offence introduced in addition to fraud typically is distinguished from the latter by the absence of the need to show an ‘economic loss’ on the victim’s part in order to establish liability under the bid-rigging offence.⁸⁴⁵ Although in Russia prosecution must prove an economic loss on the victim’s side for both offences, there are some other reasonable arguments for

⁸⁴⁰ Para 2 *ibid.*

⁸⁴¹ Para 2 *ibid.*

⁸⁴² Para 22 *ibid.*

⁸⁴³ Appr. 30 GBP

⁸⁴⁴ Art 7.27 The Code of Administrative offences (n 194).

⁸⁴⁵ Florian Wagner-von Papp (n 82).

switching from the cartel offence, which is very complex and yet problematic for enforcement, to the fraud offence for bid-rigging cases in Russia.

In Russia, enforcing agencies may view the fraud offence as better (and easier) option to prosecute bid-riggers due to its lower threshold than bid-rigging⁸⁴⁶ and well-established judicial practice for fraud cases. Also, fraud may be used as a tool against many forms of collusion on tenders outside including anticompetitive arrangements among bidders and procurer in cases of ‘imitation of competition’ if the ‘submission of a false bid could, in fact, have been pursued by the procurer as a fraud.’⁸⁴⁷ Proper framing of the fraud offence is far more achievable than the scope of the cartel offence to avoid overdeterrence.⁸⁴⁸ It is more understandable for offenders why fraud is to be punished according to the marginal deterrence argument.⁸⁴⁹ Also, as the only bid-rigging conviction in Russia emerged from the investigation of the fraud scheme, the police seem better-trained detecting and investigating fraud rather than cartels.

Fraud is better justified from a moral and historical perspective. While the close relation of hard-core cartels to fraud or theft on a grand scale⁸⁵⁰ is just a general argument⁸⁵¹ for cartel criminalisation, from a moral perspective fraud is more consistent internally than a cartel offence. As well as in other forms of cartels, bid-rigging affects social welfare and reflects ‘the perpetrators’ lawless attitude.’⁸⁵² What differs bid-rigging from other cartels and brings it to fraud is that governments can be viewed as victims of bid-rigging.⁸⁵³ The close connection with public procurement

⁸⁴⁶ 2,500 RUB

⁸⁴⁷ Stephan and Hviid (n 748).

⁸⁴⁸ Florian Wagner-von Papp (n 82).

⁸⁴⁹ Gregory J Werden and Marilyn J Simon, ‘Why Price Fixers Should Go to Prison’ (1987) 32 *The Antitrust Bulletin* 917.

⁸⁵⁰ ME Stucke, ‘Morality and Antitrust’ [2006] *Columbia Business Law Review* 443, 508; Scott D Hammond, ‘The Fly On The Wall Has Been Bugged--Catching An International Cartel In The Act’ (25 June 2015) <<https://www.justice.gov/atr/speech/fly-wall-has-been-bugged-catching-international-cartel-act>> accessed 1 September 2018; T Calvani, ‘Cartel Penalties and Damages in Ireland: Criminalization and the Case for Custodial Sentences’ in KJ Cseres and others, *Criminalization of Competition Law Enforcement: Economic and Legal Implications for the EU Member States* (Edward Elgar Publishing 2006) 275.

⁸⁵¹ Florian Wagner-von Papp (n 82).

⁸⁵² *ibid* 179.

⁸⁵³ Connor, ‘Governments as Cartel Victims’ (n 693).

gives good reasons to consider bid-rigging as fraud besides the historic path-dependency⁸⁵⁴ because state funds and usually large stakes are involved.⁸⁵⁵ In addition, bid-rigging cartels have an inherent tendency to repeat themselves.⁸⁵⁶

As fraud is to be investigated by police investigators,⁸⁵⁷ the risk of a deterioration in the relationship between competition authority and business because of criminalisation of bid-rigging⁸⁵⁸ would be eliminated. Moreover, applying the fraud offence to bid-rigging may free some resources for competition authorities. More certainty regarding police competence to detect and investigate may benefit defenders as the increased rights of defence argument⁸⁵⁹ is already addressed in procedural legislation and judiciary practice.

The attitude of public and courts to cartels is quite indifferent while moral offensiveness of the fraudulent conduct is heightened when a rigged bid is submitted in the tender process.⁸⁶⁰ Also, the inner consistency of the fraud offence with the moral argument and its clarity for the judiciary can bring a political and social consensus which are essential for effective enforcement.⁸⁶¹ Finally, applying the fraud offence to anti-competitive agreements on tenders is already consistent with Whelan's retribution-based criminalisation argument, relating to deception⁸⁶² as procurers wrongly assume that prices are competitive.

Nevertheless, all these benefits do not address the revealed challenges of the criminal anti-cartel enforcement in Russia. The similarity of the Russian fraud offence with

⁸⁵⁴ S 3.2

⁸⁵⁵ WE Kovacic, 'Competition Policy and Cartels: The Design of Remedies' in KJ Cseres and others, *Criminalization of Competition Law Enforcement: Economic and Legal Implications for the EU Member States* (Edward Elgar Publishing 2006) 52.

⁸⁵⁶ Florian Wagner-von Papp (n 82) 180.

⁸⁵⁷ Art 151 Уголовно-Процессуальный Кодекс Российской Федерации (Code of Criminal Procedure of Russian Federation) (n 44)

⁸⁵⁸ Florian Wagner-von Papp (n 82) 174.

⁸⁵⁹ Spagnolo, 'Criminalization of Cartels and Their Internal Organization' (n 79) 135.

⁸⁶⁰ Stephan, 'An Empirical Evaluation of the Normative Justifications for Cartel Criminalisation' (n 310).

⁸⁶¹ Baker (n 422).

⁸⁶² Whelan, *The Criminalization of European Cartel Enforcement* (n 28) 80–111.

bid-rigging does not solve the issues of effects-based approaches in the anti-cartel criminal regime. Proof of economic loss looks more realistic for bid-rigging, and application of Article 159 of the Criminal Code setting lower bars for investigators is very tempting. However, this economic loss can hardly be proved for other forms of cartels. Therefore, the general cartel offence remains unenforceable.

Treatment of bid-rigging as fraud omits the specifics of the market state in Russia which is particularly important with regard to morality and positive law.⁸⁶³ The essence of deception for all cartel cases originates from breaching a tacitly ‘implied promise that prices are formed independently’.⁸⁶⁴ However, there is no credible evidence that the assumption that prices are formed independently is valid for the Russian markets and that courts would rely on this understanding of deception for considering agreements on tenders sufficient for conviction.

The next set of arguments against applying the fraud offence to bid-rigging relates to institutions and risks of over-enforcement of the fraud offence. Although there is no formal requirement to involve competition authorities in the investigation of cartels under Article 178, usually there are semi-formal communications between agencies so that the criminal cases are being open upon petition from competition authorities or investigators of criminal cases transfer information to competition authorities and require to establish a cartel agreement.⁸⁶⁵ It may not work in this way if bid-rigging is persecuted as fraud and then police acquire the unlimited power to investigate anticompetitive agreements on auctions. Considering that the general criminal law institutions ‘are not tailored to the requirements of competition law,’⁸⁶⁶ and the bar is set far lower for the fraud offence, the risk of extensive application of criminal law to business affairs arises.

This problem is not hypothetical. Socio-legal studies show that ‘law enforcement officers put violent pressure on entrepreneurs using the official capability to start

⁸⁶³ Whelan, ‘Cartel Criminalization and the Challenge of “Moral Wrongfulness”’ (n 54) 550–555.

⁸⁶⁴ Florian Wagner-von Papp and others (n 816) n 74.

⁸⁶⁵ Interview with Aleshin (n 34).

⁸⁶⁶ Florian Wagner-von Papp, ‘Introduction to Individual Sanctions for Competition Law Infringements: Pros, Cons and Challenges’ (2016) 2 *Concurrences* 14, 22.

criminal prosecution'.⁸⁶⁷ There is evidence that in some cases 'the reason of starting prosecution could be far-fetched with the sole purpose to seize assets.'⁸⁶⁸ Also, there is a specific 'KPI system' for police, and each level of Ministry of Interior Affairs 'has to show improvement in their field of activity, that is, growth in a number of registered cases and the percentage of investigated criminal cases for certain articles of Criminal Code'.⁸⁶⁹ The system causes that law enforcer prefers either 'to initiate proceeding which could be easily solved only' or 'to start fake proceeding' in order to achieve KPIs.⁸⁷⁰ For very complex bid-rigging cases these approaches mean that the issues can be overlooked due to lack of expertise in competition law and incentives to open only those cases that can be cracked easily, while for the less significant violation they may bring undesirable over enforcement.

In addition, there is enough evidence in the press that Russians perceive the police with a great suspicion⁸⁷¹ while trust to enforcers of competition laws is paramount for anti-cartel criminal enforcement.⁸⁷² Some scholars argue that long-standing cultural norms⁸⁷³ caused deep distrust in the Russian police. Nowadays, Russia's police is centralised and less accountable to the public, and its violence and corruption are

⁸⁶⁷ Eugenia Nazrullaeva, Alexey Baranov and Andrei Yakovlev, 'Criminal Persecution of Business in Russia's Regions: Private Interests vs. "Stick" System' [2012] Working Paper Higher School of Economics <https://extranet.sioe.org/uploads/isnie2013/nazrullaeva_baranov_yakovlev.pdf> accessed 16 February 2018.

⁸⁶⁸ *ibid.*

⁸⁶⁹ *ibid.*

⁸⁷⁰ *ibid.*

⁸⁷¹ 'Путин Ужесточил Наказание За Незаконное Уголовное Преследование Бизнеса' (*РБК*) <<http://www.rbc.ru/rbcfreenews/5858f9659a79472d83368be5>> accessed 4 September 2018 (Putin Toughs Punishment for Illegal Criminal Prosecution of Business); 'Как Защитить Бизнес От Уголовного Преследования – ВЕДОМОСТИ' <<https://www.vedomosti.ru/politics/articles/2017/04/11/685040-zaschitit-biznes>> accessed 4 September 2018 (How to Protect Business From Criminal Prosecution); 'Борис Титов: Бизнес Под «статьей» – ВЕДОМОСТИ' <<https://www.vedomosti.ru/opinion/articles/2014/12/02/biznes-pod-statej>> accessed 4 September 2018 (Boris Titov: Business Under the Persecution); 'Как обезвредить ст. 159 УК РФ для бизнеса? – Центр общественных процедур «Бизнес против коррупции»' <<http://www.nocorruption.biz/%d0%ba%d0%b0%d0%ba-%d0%be%d0%b1%d0%b5%d0%b7%d0%b2%d1%80%d0%b5%d0%b4%d0%b8%d1%82%d1%8c-%d1%81%d1%82-159-%d1%83%d0%ba-%d1%80%d1%84-%d0%b4%d0%bb%d1%8f-%d0%b1%d0%b8%d0%b7%d0%bd%d0%b5%d1%81%d0%b0/>> accessed 4 September 2018 (How to neutralize Art. 159 of the Criminal Code for business?).

⁸⁷² Stephan, 'Beyond the Cartel Law Handbook' (n 68).

⁸⁷³ Theodore P Gerber and Sarah E Mendelson (n 428).

worrying.⁸⁷⁴ This distrust may worsen public attitude toward not only the police and the courts in Russia⁸⁷⁵ but also anti-cartel regime.

Another area of institutional problem for treating bid-rigging as fraud is the division of competences between the FAS and the Prosecutor's office. The police and public prosecutors have to deal with all sorts of crimes, and competition law concerns will presumably not be their top priority. As informal communications between agencies usually initiated by competition authorities, if bid-rigging is prosecuted under fraud offence, competition authorities may lose access to these complex cases. As the police and prosecutors are not specialised in competition law, some cases may fall out of the spotlight of administrative cartel enforcement.

Considering that competition authorities have never been equal in power and influence on the police and prosecutorial offices,⁸⁷⁶ they may not be involved in the investigation of the fraud offence. As neither police nor prosecutors are stakeholders of the anti-cartel regime, this movement weakens the offence ability to send the signal to the society and the educational potential of cartel criminalisation.

Simplification of criminal bid-rigging enforcement by switching from the general cartel offence to the fraud does not benefit consistent enforcement against other forms of cartels. As it can be seen from many cartel cases, the horizontal agreements often involve a wide range of anti-competitive practices, and focusing on prosecuting only their 'convenient' parts embracing collusions on tenders brings a risk of ignoring other harmful practices. Notably, even in jurisdictions where fraud had been applied to bid-rigging, '[t]he courts have not applied the fraud provision to cartels other than those rigging bids'.⁸⁷⁷ Unsolved problems of the general cartel offence weaken the effective cartel deterrence because unlike other jurisdictions prosecuting only bid-rigging,⁸⁷⁸

⁸⁷⁴ *ibid.*

⁸⁷⁵ *ibid.*

⁸⁷⁶ Chapter 3

⁸⁷⁷ Florian Wagner-von Papp (n 82) 165.

⁸⁷⁸ Florian Wagner-von Papp and others (n 816) 18.

finer for other cartel agreements in Russia are not punitive in their virtue and cannot secure cartel deterrence.⁸⁷⁹

Also, switching to the fraud offence from the cartel offence threatens the leniency programmes, undermines the leniency argument of cartel criminalisation⁸⁸⁰ and thus accelerates the problem of cartel detection. Today, the administrative leniency aims at companies, and the criminal leniency is designed for individuals involved in cartels. Although the effectiveness of the administrative leniency is questionable, there is no evidence of the use of the criminal one.⁸⁸¹ If bid-rigging is treated as fraud, the existing criminal leniency programme would not be applicable,⁸⁸² and other tools for detection are to be introduced.

Thus, although equating fraud deception with cartels corresponds to the retribution theory,⁸⁸³ it does not provide firm arguments to prosecute bid-rigging as fraud in Russia. However, the deception element in cartels on tenders is more noticeable than in other forms of cartels. Also, the effects-based elements are less destroying for these cases, and they appear habitual to investigators. As a result, bid-rigging looks more promising for effective enforcement than the general cartel offence. It attracts ultimate moral opprobrium owing to the tight connection of the bid-rigging with public funds and explicitly deceptive conduct of the cartel members who are supposed to compete for securing the better price.

As only degree of clarity of the normative justification distinguishes bid-rigging from other cartel offences, while there is no principal difference in the elements constituting the justification, the focus on enforcement of the cartel offence against bid-rigging can be used to accelerate cartel criminalisation.

⁸⁷⁹ Chapter 4

⁸⁸⁰ WPJ Wils (n 21) 182.

⁸⁸¹ Chapter 2

⁸⁸² The flaws of other exemptions from criminal sanctions and their counterproductivity for cartel enforcement have been examined in Chapter 2

⁸⁸³ Whelan, *The Criminalization of European Cartel Enforcement* (n 28).

5.5. Assessment of the ‘Road case.’

Road case is of significance for the analysis of benefits of treating bid-rigging differently and for assessment of cartel criminalisation since it is reported as the first custodial sentence for the cartel offence. Thus, since in this case the flaws of the cartel offence discussed above⁸⁸⁴ have been overcome, this case helps to understand the limits of the current cartel offence. Also, for answering the chapter question of whether bid-rigging in Russia should be treated separately, this case illustrates the differences between bid-rigging and other cartels for the practitioners involved in the enforcement.

Road case was just one episode of a profound anti-corruption investigation against a group of at least eight officials including the deputy governor of Novgorod region,⁸⁸⁵ and engagement of the investigating agency at the very first stage became the decisive factor of success, especially in collecting evidence. For example, wiretaps of tenderers and officials have been used to prove all elements of a crime, including date, place, and method, whereas this type of evidence is never available to competition authorities.

In 2012, the first deputy governor of the Novgorod region organised a criminal group consisting of officials of state agencies and a number of entrepreneurs which was aimed at misappropriation of state funds allocated for the repair and maintenance of highways in the Novgorod region. Initially, the affiliated regional state unitary enterprise was supposed to win the tender for the state of a 395 million roubles contract for the maintenance of roads and to share among the parties at least 50 million roubles. Acting in concert, members of the group abused their administrative resource by restricting competition and sought to enter into contracts with the controlled entities. Subsequently, the money was transferred to the bank accounts of affiliated commercial organisations.⁸⁸⁶

⁸⁸⁴ Chapters 2, 4

⁸⁸⁵ ‘Трое фигурантов новгородского “дорожного” дела предстанут перед судом’ (*РАПСИ*, 17 March 2014) <http://rapsi-pravo.ru/incident_news/20140317/270950519.html> accessed 1 September 2018 (Three defendants in the Novgorod "road" case to be brought before the court).

⁸⁸⁶ *ibid.*

As high-level government officials were involved in the offence, unlike most of the other cases, from the very beginning this criminal investigation was led by the Investigation Committee, which is a more experienced and powerful agency than the police. In the course of collecting data about the corruption scheme, an investigator from the Investigative Department of the Investigative Committee of Novgorod region found signs of the cartel agreement and reported to the competition authorities on 20.08.2013. Competition authorities ruled that the defendants concluded the anticompetitive agreement on tenders.⁸⁸⁷

The early detection of the cartel was crucial for the success of the prosecution in this case. Although understanding of what cartels are and how to prove their effect required in Article 178 of the Criminal Code is usually an issue for police investigators, in the given case it was resolved as the investigator was of a higher rank, with more expertise in complex economic crimes and he timely contacted competition authorities for the assessment of the agreement. While in other cases competition authorities discover cartels and then apply to police for opening the criminal investigation, in *Road Cartel* case the reverse order of transferring information between enforcing agencies helped to avoid the usual time lag between the date of entering into the prohibited agreement, the FAS decision establishing the cartel and the start of the criminal proceeding by investigating agency.

Although this factor prevented the termination of the cases due to the expiration of the limitation period and eliminated the risk of insufficient qualification of the investigating agencies, neither this factor nor relationship between cartel members could be counted specific for bid-rigging cases only. Regarding the specifics of the relationship between cartel members, the parties to the anti-competitive agreement in the *Road case* were rather strangers to each other. Thus, cartel secrecy, usually

⁸⁸⁷ *О результатах рассмотрения дела о нарушении Федерального Закона О защите Конкуренции в отношении ООО Новомост-53, ООО Строительная Компания Балтийский Регион и ООО Трансбалтстрой* [2013] Управление Федеральной антимонопольной службы по Новгородской области 67 (Decision of the Novgorod Office of the FAS Russia 'On the results of the proceedings for violation of Federal Law' On Protection of Competition ' by LLC 'Novomost 53', LLC 'Construction Company Baltic region 'and LLC 'Transbaltstroy' No. 67 12.13.2013).

guaranteed by very close relationships among participants,⁸⁸⁸ has been undermined from the beginning. Also, the relationship among cartel members was hostile rather than trusting because one of the parties threatened other tenderers not to pay them for the works performed for the regional state public agency ‘Novgorodavtodor.’

The defendants held direct communications typical for cartel agreements by telephone, without adequate preparation. While competition authorities are not eligible for wiretapping as well as other remedies of investigating cartel cases, the Investigating Committee leading the *Road case* has had sufficient power in a criminal investigation to wiretap, and audio records become conclusive evidence in this case.⁸⁸⁹ The records proved that the agreement in the oral form was achieved to maintain prices in an open auction on the construction of a bridge across the river.

For example, the conversation between V. Samoylov, the founder and director of LLC ‘Novomost 53,’ and first deputy director of the purchaser, the regional state public agency ‘Novgorodavtodor’, G. Vishnyakov about sharing contact details of other bidders demonstrated their intention to persuade potential bidders to refuse to participate in the auction. The audio recording of these communications proved that V. Samoylov also contacted managers of other bidders - LLC ‘SK Baltic region’ and LLC ‘Transbaltstroy’⁸⁹⁰ – to convince them not to participate in the auction. In his turn, he promised ‘SK Baltic region’ to yield them all other construction sites that would be auctioned in Novgorod region.

What makes this case different from other criminal investigations of cartels in Russia and what distinguishes bid-rigging from other forms of cartels for an investigator is that the issues of illegal revenue in large size or large damage⁸⁹¹ did not arise in the *Road case*. The receipt of revenue in a large amount⁸⁹² was also proved by

⁸⁸⁸ Andreas Stephan, ‘Cartel Laws Undermined: Corruption, Social Norms, and Collectivist Business Cultures’ (2010) 37 *Journal of Law and Society* 345, 360.

⁸⁸⁹ *On the results of the proceedings for violation of Federal Law’ On Protection of Competition ‘ by LLC ‘Novomost 53’, LLC ‘Construction Company Baltic region ‘and LLC ‘Transbaltstroy’* (n 745).

⁸⁹⁰ *ibid.*

⁸⁹¹ Para 1 Art Criminal Code (n 172).

⁸⁹² Note 1 to art. 178 *ibid.*

investigative agencies before competition authorities established a cartel on the tender but in an atypical way. Although LLC ‘Transbaltstroy’ refused to join a cartel agreement, its director feared the company would not be able to obtain the necessary permission for building the bridge and might have problems with the payment for work if they won an auction; thus, he decided not to participate in the auction. Since LLC ‘Novomost 53’ turned up as the only bidder, the auction had been declared invalid, and the contract had been concluded with LLC ‘Novomost 53’ at the initial price of 21,065,422 roubles. Therefore, the revenue from the anticompetitive agreement added up to 21,065,422 roubles.⁸⁹³

Thus, despite the *Road case* being the first success story for Russia’s criminal anti-cartel regime, the only factor of this success related to bid-rigging is that the effect required for conviction was easier to prove for collusion on tenders than for other cartels. However, as it has been discussed above⁸⁹⁴, this element of the cartel offence is controversial and should be removed from the offence completely. In other ways, the lack of a close relationship between the parties aided the disclosure of the cartel, while the engagement of more powerful and professional investigators than in other cartel cases made the investigation and prosecution successful. Therefore, the successful conviction in this particular case does not build a strong argument in favour of separating bid-rigging from other cartels for criminal enforcement.

5.6. Concluding remarks

This chapter has argued that bid-rigging should not be treated separately from other forms of cartels. It also revealed that although there are some similarities between bid-rigging and more traditional crimes like theft and fraud, these traditional offences cannot effectively tackle bid-rigging in Russia. However, the findings of this chapter suggest it may be sensible for bid-rigging to be prioritised over other forms of cartel conduct, because the justification for their criminalisation appears to be stronger.

⁸⁹³ *On the results of the proceedings for violation of Federal Law’ On Protection of Competition ‘ by LLC ‘Novomost 53’, LLC ‘Construction Company Baltic region ‘and LLC ‘Transbaltstroy’ (n 745).*

⁸⁹⁴ Chapters 2, 4

Design of the cartel offence should consider not only deterrence theory but also normative element reflecting moral condemnation for the prohibited act. Creating a link of the cartel offence with normative justification is not an easy task. The failure to do it with the dishonesty element in the UK hindered the enforceability of the offence in the UK where jurors did not view cartel conduct as a dishonest act. On the other hand, policymakers are better equipped to deal with deterrent argument and prevention of social harm as the ground for the criminalisation of cartels as the latest are too complicated arrangements and thus are not always related to negative public attitude. In this context, bid-rigging is less problematic for attracting public outrage, because in bid-rigging bidders cheat the purchaser and get cartel overcharge from public funds, which is always deemed wrong and deceptive. Also, this deception in bid-rigging resembles fraud which is more understandable for public and enforcers.

Application of fraud to bid-rigging seems very tempting, due to some practical consideration. For example, since the investigation of fraud is caught by police competence and sufficiently regulated by procedural laws, it will free resources of competition authorities and bring more certainty to enforcement. Also, it will be easier to secure political and social consensus for these cases which is essential for successful criminal enforcement.

However, the fraud offence cannot do its job for bid-rigging in Russia. Rather, it would bring more issues to competition law. First, as the fraud offence includes the value of stolen goods in Russian criminal law, the issue of the effects-based approach resists. Then, application of fraud to bid-rigging would worsen distribution of competence between enforcing agencies: while enforcement of the cartel offence is hardly possible without the involvement of competition authorities, even though law keeps silence on their procedural role, the fraud offence has been enforced for decades by criminal institutions only. Thus, the move may increase the risk of overcriminalisation of business affairs and provoke a negative public reaction rather than anticipated support for cartel cases. Also, without expertise in competition law, the most sophisticated cases may be overlooked.

Narrowing down the cartel offence to the bid-rigging offence only and decriminalisation of others forms of cartels would be counterproductive⁸⁹⁵ for the anti-cartel regime. Although the cartel offence has its flaws, criminalisation of bid-rigging only would significantly affect cartel deterrence. One may argue that Germany following the similar concept of public enforcement does not criminalise all cartels although the bid-rigging offence has been enforced successfully.⁸⁹⁶ The principal difference between Russian administrative fines and the individual sanction imposed by the *Bundeskartellamt* in hardcore cartel cases is that cartel fines in Germany are a way more punitive and may exceed 1,000,000 EURO.⁸⁹⁷ As administrative fines under Article 14.32 of the Code of Administrative Offences are rather symbolic, cartel deterrence cannot be secured by administrative sanctions only. In addition, Germany made a deliberate decision to criminalise bid-rigging only, whereas in Russia having a bid-rigging offence as well as a general offence does not make so much sense.

Stronger and clearer moral condemnation of bid-rigging due to its similarity with more traditional crimes should be used for improving anti-cartel enforcement. First of all, the *moral wrongfulness* of bid-rigging is more obvious because an agreement not to compete on tenders is clearly deceptive. The moral wrongfulness will create a specific criminal label for cartel offences because it is clear what is morally reprehensible about bid-rigging; it also justifies more severe sanctions for the bid-rigging offence than for other forms of cartels. More severe punishment may have a stronger stigmatising impact on violators.

The case study of *Road case* demonstrates that the wrongfulness of the bid-rigging offence is more obvious for investigating agencies. There are many examples⁸⁹⁸ of dismissing petitions of competition authorities to open criminal investigation even when cartel has been established. In the *Road case*, the investigator identified the cartel agreement and informed competition authorities about it. The bid-rigging offence has better odds of success due to the presence of a procurer as a victim and relative

⁸⁹⁵ Florian Wagner-von Papp (n 82).

⁸⁹⁶ *ibid.*

⁸⁹⁷ Florian Wagner-von Papp and others (n 816).

⁸⁹⁸ Interview with Aleshin (n 34).

simplicity of establishing economic loss. If so, the consistent enforcement of the cartel offence against bid-rigging may help courts and enforcers to understand the concept of conspiracy.

The connection of the bid-rigging offence with public funds and long-standing traditions of primary protection of state property can be beneficial for forming new social norms. At the same time, the singling out of bid-rigging is not justified because the argument regarding the overwhelming share of this type of cartels in the total number of detected offences is not convincing: as we found out, in many cases the law is misapplied against the imitation of competition which is a less severe infringement of competition laws than cartels.

To conclude, the existing cartel offence is a sufficient tool to tackle bid-rigging. Also, to prevent the cartel policy from malfunctioning, bid-rigging should not be dealt with the fraud offence. Instead, the reform should focus on consistent enforcement of the general cartel offence against bid-rigging to improve the effectiveness of anti-cartel enforcement. In addition, the distinctiveness of the deception element of bid-rigging should be used for messaging cartel wrongfulness to the public and, therefore, strengthening an educative function of cartel laws.

Chapter 6. Conclusions. Reflections. Dimensions of Policy Reforms

This thesis has sought to assess cartel criminalisation in Russia and to examine shortcomings that had made criminal enforcement of cartel laws ineffective and inconsistent. This research question emerged from the understanding that hard-core cartels are ultimately harmful to markets, consumers and international trade. They are particularly bad for developing countries and economies in transition, as cartel prices can hold back the population's standard of living, contribute to poverty and prevent new competitors from entering the market.

Many states take deterrence against this gravest infringement of competition as the primary objective for the criminal anti-cartel regime. Cartel deterrence is a very complex task. First, the probability of discovering cartels, and thus punishing cartel members, is low because these conspiracies are secret and very well organised. The second problem is that corporate fines appear to be too low to secure something close to optimal deterrence, as it is understood in the economic literature. Simply raising fines is not a solution as, on the one hand, an increase in fines at some point may affect current stakeholders, which is not fair and may cause society other costs, such as those associated with bankruptcy. On the other hand, corporate fines do not provide a real disincentive for the individuals responsible for making the decision to enter a cartel. Therefore, individual criminal sanctions were introduced in many cartel regimes, to secure cartel deterrence and became a subject of academic research in many countries.

This thesis has discussed how the justification for criminalisation is even stronger in Russia. As in other jurisdictions, criminal sanctions are a necessary and appropriate tool to address the enormous harm inflicted by cartels to the economy, consumers and institutions. Also, they supplement administrative fines which are capped at 3 or 4 per cent of the annual turnover of the legal entity caught. This is significantly lower than the level of fines imposed in the EU, US and elsewhere, which is criticised in the existing literature as being inadequate. Moreover, due to the lack of understanding of what is wrong with cartels, courts in Russia tend to reduce fines even further. Fines of

such amount are barely noticeable for big corporations consisting of dozens of legal entities and thus cannot secure cartel deterrence.

Despite the clear need for criminal enforcement, Russia's cartel offence has been demonstrated as being largely unworkable. Yet the roots of Russia's criminal cartel enforcement problem are not the absence of any conventional tool of the criminal regime. Indeed, the criminal offence was adopted many years ago; leniency programmes can be found in administrative and criminal regimes, and at least in the press, authorities express a commitment to prosecute cartels. This thesis has made an original contribution by identifying the weaknesses in Russia's criminal anti-cartel regime and will now suggest ways in which these can be remedied.

As this project is the first comprehensive examination of cartel criminalisation in Russia, the author has relied mainly on literature from outside Russia, as a means of comparing and assessing its criminal cartel regime. Having used doctrinal research methods, and unique interviews with representatives of competition authorities on different levels, the thesis identified drawbacks in Russia's criminal cartel regime, their origin, and determined directions for further developments of the policy consistent with the purposes of competition law. Problems with Russia's criminal cartel regime stem from the impact of social norms, historical factors and the influence of the national legal system, including criminal law, in undermining the design and enforcement of cartel criminalisation. As a result, some tools become less effective than their prototypes, and some of them are being misused continuously.

The purpose of this final chapter is to summarise the main findings of the Thesis and draw on these conclusions to identify recommendations for the improvement of Russia's criminal anti-cartel regime.

6.1. Key findings from the research

One of the most unusual aspects of Russia's cartel offence, uncovered by this research, is the fact it contains effects-based elements, even when applied to hard-core practices. This design, setting the burden of proof far higher than the offences of the most active criminal cartel enforcement regimes around the world, makes the cartel offence

unenforceable even towards such serious cases as the Marine Hose Cartel. A certain amount of damage inflicted by a cartel or gain received by a cartel member was chosen to demonstrate the social danger of an act, which is a compulsory element of a crime in Russian criminal law. Since an individual can be responsible for entering a cartel under both the criminal and administrative regime, this element was aimed at distinguishing between the administrative and criminal offences. However, instead of clarifying what is wrong about cartel conduct, the effects-based element led to the dismissal of many criminal and civil cases, as cartels have been classified as low or medium gravity. Enforcement of the cartel offence is not helped by the application of a very short limitation period, which will typically have expired when the cartel is detected.

As can be seen in chapters 2 and 4, Russia's cartel offence is very hard to enforce in practice because of a number of issues, such as a lack of coordination between administrative and criminal regimes; inconsistency of the offence and insufficient severity of sanctions; the likely tolerant public attitudes to cartel practices and requirements that the harmful effect of cartels must be proved. Chapter 3 established that the misuse of the offence was caused by the untimely criminalisation of cartels and other anticompetitive infringements, when the economy was in transition, and there were no competitive markets. This hastily adopted post-USSR regime did not consider the interplay between administrative and criminal regimes at the beginning of the 1990s. In the decades that followed, the lack of coordination between regimes meant a blurred distinction between the administrative wrongdoing and the criminal offence, a lack of cooperation between agencies and two independent and evenly inefficient leniency programmes.

Since lawmakers followed the principles of the national criminal law without careful implementation of the objectives of cartel enforcement, the offence does not catch the hard-core cartel agreements that have not been implemented yet. Moreover, in its current reading, the offence can be applied only to some bid-rigging cases, as neither damage nor gain can be assessed for other forms of cartels in Russia because of a lack of expertise. Focus on the effects of cartels is also reflected in conditional criminal leniency which has never been used. The administrative leniency policy grants exemptions that are too generous and does not contain requirements of evidence. Thus,

the cartel offence does not secure cartel deterrence, and the leniency policy is unable to improve cartel detection.

The roots of these issues have been found in the history of cartel criminalisation in Russia. The market in post-Soviet Russia was far less competitive than in other jurisdictions at the moment of introducing anti-cartel sanctions; monopolistic and oligopolistic structures dominated across all markets. The thesis revealed that the criminal cartel regime did not pursue cartel deterrence. The motivation to introduce a cartel offence emerged under the influence of international institutions and did not consider the social context and the state of the economy in the country. From the very start, the offence has not been supported by the public attitude to horizontal agreements because cartels had not created a significant threat to consumers' welfare, and the accompanying reforms were very traumatic for the population. Also, scholars and lawmakers of the former USSR disregarded objectives of anti-cartel enforcement, hence there was little understanding of cartel harmfulness and the importance of competition.

As the adoption of the offence did not correlate with criminalisation in jurisdictions taken as a model, the offence became morally neutral; it was often misinterpreted and misused. Anti-cartel tools were borrowed separately from the universal principles and methodologies that should underpin criminal anti-cartel enforcement.

Another source of issues for criminal anti-cartel enforcement in Russia comes from the administrative regime which defines cartels and thus predetermines the criminal enforcement of anti-cartel laws. The size of administrative fines is so small, and figures of fined companies and self-employed individuals are so big that cartel conduct can be viewed by business, courts and consumers as being equivalent to a low-level wrongdoing. As a result, effects-based elements appear in the administrative enforcement: courts are very reluctant to apply *per se* provisions to the arrangements which they do not view as harmful or immoral. Thus, the administrative regime does not equilibrate the issues of written laws and failed to provide any deterrent effect and moral stigma for hard-core cartels.

Underestimation of cartel harm, tolerant attitude towards this sort of collusion and unclear objectives of cartel criminalisation created a base for effects-based interpretation of cartel laws in courts, which is also confirmed by contradictory and unpredictable court decisions, regarding the choice of *per se* prohibition of cartels or effects-based approach in a particular case. Thus, there is a unique situation when in administrative procedure, usually preceding the opening of the criminal investigation, the court may take either a *per se* approach and uphold a decision, or an effects-based approach and reverse the case. Faced with these options, the administrative regime creates many uncertainties that prevent the enforcement of criminal laws, because competition authorities investigating the cartel usually prove the agreement only – as is typical of antitrust regulators in most countries. The court expectations to prove certain results of the prohibited behaviour, which differ from case to case, set the burden of proof in cartel investigation which is hardly achievable but always very expensive. In fact, this peculiar attribute of Russia's cartel enforcement postpones the start of the criminal investigation to the very end of the administrative one which may last for years and thus exceeds the short limitation period and makes it virtually impossible to gather the evidence needed for the criminal case.

However, the issues of the effects-based approach are less significant for the prosecution of anticompetitive agreements on tenders, because illegal gain can be proved for the vast majority of auctions placed on electronic platforms.

While some jurisdictions criminalised only cartels on tenders, introduction of a second specific offence for bid-rigging is not a solution for Russia's anti-cartel regime. As it was mentioned, individual fines under Russian administrative law are very insignificant in contrast to German law,⁸⁹⁹ and that under no circumstances could they perform a punitive function like in Germany. A sharp increase in fines only for cartels seems unrealistic. Even if a legislator can be persuaded to take such an unpopular step against business, the court's broad discretion can counter this by lowering fines. Also, merely restricting the cartel offence to one practice does not solve the issues of the *per se* approach to the offence as well as the disunity of leniency programmes and thus does not contribute much to achieving purposes of criminal cartel enforcement.

⁸⁹⁹ See s. 5.6

In principle, Russia's law on fraud might be suitable for application against bid-rigging arrangements. This thesis has shown that applying the fraud offence to bid-rigging would bring risks of overcriminalisation of business affairs and overlook the most complex cartels. However, bid-rigging attracts enough public outrage for forming an intolerant attitude to cartels because the bidders' conduct is clearly deceptive and its harm to public funds is deemed wrong. The moral wrongfulness of bid-rigging is more apparent for the public and for enforcers. Therefore, it is suggested that a focus on the enforcement of the cartel offence against bid-rigging is a reasonable interim measure to advocate the criminalisation of cartels, because the normative justification of criminalisation is more evident for bid-rigging than for other forms of price-fixing owing to similarities with fraud.

We have also seen how the leniency policy does not perform its function for the criminal regime in Russia. Its twofold design does not fit the purposes of an effective leniency programme. Altogether, small fines and inconsistent *per se* prohibition of cartels remove incentives to apply for leniency as there is no threat of enforcement and thus undermine further immunity programmes.

Summarising what has been said, a complex and significant reform of the anti-cartel enforcement regime as a whole is required. This chapter provides the most practical and realistic policy recommendation for Russia's criminal anti-cartel regime, and hints at a number of further issues – outside the scope of this thesis – that should be the subject of further research and lead to more policy reforms. These include the reform of institutions, the creation of new social norms, perfecting the rule of law and its role in enforcement. Taken together, these measures are necessary for strengthening Russia's criminal cartel regime. Reforms will reinforce the objectives for the criminalisation of cartels, strengthen the *per se* nature of the violation, make cartel wrongfulness understandable for consumers and enforcers, and synchronising two regimes including co-operation of institutions and harmonisation of leniency programmes.

6.2. Lessons to be learned

There is great practical importance to this research, for Russia's criminal cartel enforcement, as the suggestions for the new anti-cartel policy have already attracted the attention of competition authorities in Russia: I have been invited to speak at events in Russia and have had an open dialogue with some FAS officials throughout the research. The revealed degree of misunderstanding of the economics of cartels and objectives of competition law in this area in Russia is significant. Therefore, the suggested clarifications of the purposes of cartel enforcement and the proposal on reforms will improve this aspect and benefit the building of trust between competition authorities and business. This sort of trust is essential for the success of the cartel criminal regime.

In addition to this practical contribution, the project draws attention to some country-specific issues that have not been discussed much in academic literature. The most original findings are findings on the threats of effects-based approaches in cartel prohibition and the need to distinguish imitation of competition on tenders from other types of anticompetitive violations. The thesis also contributes to the live debate on the options for harmonisation and convergence in anti-cartel laws in the Eurasian Economic Community.⁹⁰⁰ This thesis provides a logical justification why cartels should be subject to a *per se* offence and how a focus on enforcement against bid-rigging can improve anti-cartel enforcement in the given circumstances. Also, it reinforces, for Russia's cartel enforcement, the call for clear objectives for anti-cartel enforcement.

The findings also bring new arguments to the global debate on cartel criminalisation. The thesis challenges the popular claim on the danger of over-criminalisation for offences suffering from the lack of normative justification and demonstrates that omitting normative justification does not necessarily cause over-enforcement of cartels laws. On the other hand, the findings strengthen the importance of the

⁹⁰⁰ 'ФАС России | О Создании Эффективных Механизмов Борьбы с Международными Картелями' <<https://fas.gov.ru/p/presentations/123>> accessed 31 July 2018 (On the Creation of Effective Mechanisms for Combating International Cartels); Соглашение о единых принципах и правилах конкуренции 2010 (Agreement on Common Principles and Rules of Competition).

normative element of the cartel offence, since forced criminalisation that came from outside, made the offence unenforceable for many years. This is why the States considering criminalisation of their cartel laws should build their policies on existing social norms, to provide the necessary moral outrage and thoroughly assess the current state of competition to avoid misuse of the offence.

6.3. The missing elements

My observations of Russia's criminal regime demonstrate that it was not particularly successful in fighting cartels, because it was not underpinned by a very clear objective. As cartel harm was underestimated, cartel deterrence was not declared as a primary objective of the criminal regime. The offence was adopted without proper justification and adjustment to Russia's legal system so that by the date the national criminal and administrative laws, shaping the offence, confront cartel deterrence.

The central conflict of the competition criminal law with the national legal system emerges from tolerance towards collusion and the underestimation of cartel harm when cartels were criminalised in the 1990s. At this time, cartels were not viewed as posing any real threat to the economy, to institutions or to consumers. Therefore, the offence was adopted into the national criminal regime without thoughtful consideration of the objectives of cartel criminalisation. Later, this tolerance led to a very narrow understanding of the cartel harm and errors in employing it as an element of the offence in order to draw a line between the criminal and administrative regimes.

For instance, the cartel prohibition is applied to the infringements imitating competition on tenders which are not horizontal agreements amongst competitors and thus less harmful. Misunderstanding of what is wrong about cartel conduct could also explain courts' approach to cartel cases when they deny the *per se* prohibition of cartels from Article 11⁹⁰¹ and require proving the effects of horizontal agreements. Thus, the tools of the criminal cartel enforcement are troubled, cartel deterrence cannot be achieved, and Russia's anti-cartel regime needs to be reformed significantly to meet the objectives of cartel criminalisation.

⁹⁰¹ On Protection of Competition (n 233).

Reinforcing cartel deterrence as the objective on the criminal anti-cartel regime will help to promote the *per se* nature of the violation, make cartel wrongfulness understandable for consumers and enforcers, synchronise two regimes including cooperation of institutions and harmonisation of leniency programmes. If we take cartel deterrence as a primary objective of criminalisation, the first step towards reforms of the regime is defining cartel harm in a way that allows complying with the specifics of national criminal law but demonstrates cartel harmfulness in its full force. The linking of cartel harm, objectives of the criminal anti-cartel enforcement and specifics of the national criminal law altogether will allow to re-define the social danger attribute of the offence. Although the development of new social norms is a long way, articulating cartel harm to the public may also help to change their attitudes to cartels.

The concept of social danger as a compulsory element for criminalisation in Russia can cover cartel harm and thus explain why the participation of an individual in a cartel agreement is a crime rather than a mere wrongdoing. An appreciation of the scale of cartel harm draws a clear borderline between two regimes and eases the move from the effects-based offence to the *per se* offence with careful considerations and respect of the national criminal law principles. Widening the understanding of cartel harmfulness is necessary for the reform of the leniency programmes, too, especially, the criminal one, as it shows why the harm cannot be compensated by an individual and justifies removing this atypical condition within a course of reforms.

To sum up, deterrence should be taken as the objective of the criminal anti-cartel regime. Keeping this in mind, the relationship between the criminal and administrative regimes requires further careful clarification. In particular, the *per se* offence should be introduced to address cartel harm in its full capacity. The reinforced objective of cartel deterrence can be introduced to the enforcing agencies and business guidance issued by the Supreme court or competition authorities.

6.4. Suggestions for policy reforms

In addition to articulating deterrence as a primary objective of the criminal anti-cartel enforcement, the reform covers four dimensions:

- Balancing the relationship between the administrative and criminal anti-cartel enforcement;
- Reform of the cartel prohibition to make it unambiguously *per se* prohibition;
- Introduction of the *per se* criminal offence;
- Leniency reform.

The reform must start from determining the new line between the criminal and administrative regimes and divisions of competence for anti-cartel enforcement, balancing the investigation power of enforcing agencies and granting a special procedural role to competition authorities in criminal investigations. It must also include the introduction of the cartel definition with consistent and unambiguous *per se* prohibition; replacement of the individual administrative wrongdoing and the effects-based criminal offence by the new *per se* cartel offence; one leniency policy embracing individual and corporate responsibility instead of two independent programmes. A consistent, single leniency programme should also provide immunity from both administrative fines and criminal sanctions, establish transparent requirements for evidence and cover corruption crimes connected with bid-rigging.

6.4.1. The interplay of regimes and divisions of competence for anti-cartel enforcement

The identified ‘grey’ areas in anti-cartel criminal enforcement in Russia stem from a lack of coordination between administrative and criminal regimes. The interplay of all regimes is important for anti-cartel criminal enforcement⁹⁰² but has barely been considered yet for Russia’s policy. Presumably, due to the very fast adoption of Western laws during the reforms of the 1990s, the new provisions were borrowed without adjusting them to the national system.⁹⁰³ Lack of adjustment led to inconsistencies and gaps in substantial anti-cartel laws and procedure.⁹⁰⁴ Also, competition authorities had not yet obtained any independent role in the criminal anti-

⁹⁰² See, for example, Chapter 3 about issues of the effects-based approach.

⁹⁰³ Chapter 2.

⁹⁰⁴ See ss 2.3.2, 2.3.3, 2.4, 4.2.3, 4.3

cartel enforcement. In Russia, as in many other continental jurisdictions,⁹⁰⁵ criminal enforcement is confined to local police, prosecutors and courts.

However, unlike Germany or France, no attempt has been undertaken to integrate criminal enforcement with competition law enforcement, except some semi-formal communication between agencies without any backup in law. Neither criminal courts nor public prosecutors are obliged to ask for the FAS's opinion,⁹⁰⁶ and competition authorities have to keep each other informed about their investigations.⁹⁰⁷ Thus, the failures in the interplay of administrative and criminal regime identified for continental jurisdictions also exist in Russia with some national specifics. Like in France and Germany,⁹⁰⁸ there is decentralised enforcement by general prosecutors and criminal courts. Also, competition authorities lack procedural power for cooperation with prosecutors. Finally, due to these deficiencies and the national criminal law doctrine, the attempt to provide automatic immunity to successful leniency applicants failed. All these deficiencies could be addressed in a new policy.

As Backer notices, the drafters of the US anticartel laws 'clearly intended to create a common law system of antitrust enforcement (rather than a code-centred administrative system).'⁹⁰⁹ In Russia, this 'traditional' set of continental jurisdictions' issues is supplemented by very specific national legal tradition. The division of law and procedure into 'branches' plays an important role in Russia. Usually, different branches of law are built upon different principles. Thus, every tool is to be classified and put into the relevant branch. Many important aspects of the effective anti-cartel regime have never been considered independently. For example, the leniency programme has not been introduced as an anti-cartel tool; it was split into the provision of the administrative regime and mistakenly adopted as one option of active repentance in a criminal regime without any coordination between them.

⁹⁰⁵ Florian Wagner-von Papp, Introduction to 'Individual Sanctions for Competition Law Infringements: Pros, Cons and Challenges' (2016) 2 *Concurrences* 14, 19.

⁹⁰⁶ French courts can ask for the Autorité's opinion: David Viros, 'Individual Criminal Sanctions in France' (2016) 2 *Concurrences* 24, para 23-24.

⁹⁰⁷ See about Germany: [German Criminal Code \(StGB\) 1998 para 298](#); Zimmer (n 916).

⁹⁰⁸ Florian Wagner-von Papp (n 100), 19.

⁹⁰⁹ Baker (n 78).

Belonging to one or another branch of law predetermines the power of institutions and the rigidity of regulation. Those performing administrative enforcement are less powerful and have more restrictions regarding the available tools. Criminal enforcement is confided to special agencies like the police, the Investigating Committee, the Prosecution Office. Agencies performing administrative enforcement are usually not involved in the criminal investigation.⁹¹⁰ Also, competition law is not viewed as an independent branch of law.⁹¹¹ Therefore, ‘owners’ of criminal law branch often determine the design and practicalities while competition authorities have powers and expertise within the administrative regime, but not channels to transfer them to a criminal regime. For example, the status of evidence collected for an administrative cartel case is highly uncertain in criminal investigation and depends entirely on an investigator’s discretion. Similarly, any involvement of competition authorities in the investigation of the offence is not regulated yet.

The principle of independence of competition authorities is widely accepted internationally.⁹¹² In the European Union, it is derived from the nature of competition law and practice within the institutional framework of the EU.⁹¹³ However, the institutional independence of competition authorities did not follow the adoption of the EU cartel regimes framework while a crucial part of competition policy is made by institutions through decision making.⁹¹⁴ In practice, this distribution of power between institutions of administrative and criminal regimes and lack of interplay of two anti-cartel regimes severely impact the criminal case against cartel members from the very beginning and often result in rejections to open criminal cases or their termination at very early stages even if cartels have been proved in a hearing of an administrative case.

⁹¹⁰ The only case for Art 172.1 of the Criminal Code can be opened upon the petition of the Central Bank: subpara 1.2 Art 140 of the Criminal Procedural Code.

⁹¹¹ ПИШ Аблямитов, ‘Конкурентное Право: Проблемы Понимания и Юридическая Природа.’ (2014) 8 Актуальные проблемы российского права 1681 (Competition Law: Problems of Understanding and Legal Nature); КА Писенко and others, *Антимонопольное (Конкурентное) Право* (Российский государственный университет правосудия 2017) <<https://rucont.ru/efd/332406>> accessed 8 June 2018 (Antimonopoly (Competition) Law).

⁹¹² Antonio F Bavasso, ‘Independence in Competition Policy and Enforcement’ <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3060262> accessed 8 June 2018.

⁹¹³ *ibid.*

⁹¹⁴ *ibid.*

As it is established in Chapter 2, the uncertainty of leniency programmes, obligation to compensate harm and the complete independence of the administrative and criminal leniency can facilitate neither opening a case nor collecting evidence for prosecuting cartels in Russia. Although the proportion of administrative leniency applications is growing, hardly one-fourth of cartels are discovered due to confessions of cartel members. Also, while administrative immunity does not affect criminal enforcement, there is no single example of leniency granted in the course of the criminal investigation of a cartel.

A cartel agreement can be either an administrative wrongdoing or a crime depending on the amount of the illegal cartel gain,⁹¹⁵ but it is not clear which agency has to prove this threshold: competition authorities treat cartels as *per se* violations, and the police are not engaged in the administrative inquiry of cartels. As a result, the cartel criminal regime does not deter cartels as it is not frequent and highly visible.⁹¹⁶ Backer notes that ‘If the normal prosecutions are so infrequent as to appear more like random highlighting strikes or prosecutorial vendettas,’⁹¹⁷ a criminal law is not effective as a deterrent. Even worse, in some cases, the unregulated interplay of regimes leads to blurring the offence and the wrongdoing and thus reducing the seriousness of the cartel offence.

There is no special regulation of the relationship between competition authorities and police apart from a very vague joint order of the bodies⁹¹⁸ which does not impose any particular obligation on the parties and barely states that both agencies cooperate on the issues of competition law and timely inform each other on the issues. Therefore, there is no guidance for deciding on transferring the case from competition authorities to the police to open a criminal investigation. Moreover, competition authorities

⁹¹⁵ Chapter 4 (3)

⁹¹⁶ Baker (n 78).

⁹¹⁷ *ibid.*

⁹¹⁸ Приказ Об Утверждении Положения О Порядке Взаимодействия Министерства Внутренних Дел Российской Федерации и Федеральной Антимонопольной Службы 2004 (Order on Approving the Regulations on the Procedure for Interaction between the Ministry of Internal Affairs of the Russian Federation and the Federal Antimonopoly Service of the Russian Federation).

within administrative inquiries do not consider any effect of the cartel including the amount of the illegal cartel gain, which is necessary for the criminal investigation.

This decentralisation of anti-cartel enforcement affects criminal enforcement negatively. It turned out to be significant for the success of the US criminal enforcement that ‘the antitrust civil and criminal enforcement functions were combined in the Attorney General’s hands.’⁹¹⁹ Decentralised enforcement by general criminal law institutions often ‘results in a lack of competition-law specific knowledge and experience, as well as in a lack of publicity.’⁹²⁰ Arguably, it also ‘leads to a distortion in the prioritisation of prosecutions’⁹²¹ since the low numbers of criminal competition law cases have been registered in jurisdictions with decentralised enforcement. Florian Wagner-von Papp assumes that general prosecuting offices ‘may understandably prioritise cases with more salient harm, such as a confidence trickster that defrauds a few individuals, over cartel cases where the aggregate harm may be magnitudes greater but the victims are less readily identifiable’.⁹²² Only a specialised authority has an incentive to bring cases, but very little involvement of the competition authorities in the actual prosecution has ever been observed.

Most evidently this decentralisation affects the leniency programmes. The importance of guaranteeing automatic immunity from criminal prosecution, which is still unattainable for Russia’s criminal immunity programme, has been demonstrated by ‘the much greater effectiveness of the 1993 immunity programme in the US compared to the previous programme that had offered discretionary rebates.’⁹²³

Thus, both from theoretical and practical points of view there is a need of harmonisation of the two anti-cartel regimes which promotes ‘clarity in forming public competition policy, increases the understanding of legal commands by affected parties, and disciplines the exercise of discretion by public officials by subjecting their

⁹¹⁹ Baker (n 78).

⁹²⁰ Florian Wagner-von Papp (n 866).

⁹²¹ *ibid.*

⁹²² *ibid.*

⁹²³ *ibid.*

actions to external review and criticism.⁹²⁴ Therefore, the whole anti-cartel policy is to be revised while keeping in mind that the strict division of anti-cartel enforcement following exclusively traditional ‘branches’ of law is not an optimal criterion for dealing with cartels. The key principles for a new policy are recognition of the seriousness of the cartel behaviour and clear purposes of the enforcement against them.

If deterrence of cartels is set as a policy priority, the European model can be considered as the EU anti-cartel law was a prototype of Russia’s anti-cartel regime. Thus, a new borderline for institutions and administrative and criminal regimes is required. To begin with, a cartel is a serious wrongdoing, and individual administrative fines in Russia are not of a punitive nature and useless for purposes of deterrence of cartels due to their insignificant amounts. Prioritising cartel deterrence is a good ground to consider a new focus for competition authorities on undertakings only. Individuals should be exempted from administrative sanctions as cartels in their virtue are a serious threat to the economy and society. Criminal evidence should subsequently serve as evidence to find an administrative infringement and vice versa.

Whelan reminds us that the separation of functions may increase administrative costs as a certain degree of inevitable duplication in the acquisition of knowledge emerges and there is a risk that fewer convictions will be achieved with a given amount of resources.⁹²⁵ However, such a division of the criminal prosecution from the administrative one also prevents some risks, particularly prosecutorial bias,⁹²⁶ because a case handler ‘naturally tends to have a bias in favour of finding a violation once proceedings have been commenced.’⁹²⁷ Thus, a combination of the investigative and prosecutorial function may lead to erroneous decisions.

⁹²⁴ R Shyam Khemani and Mark A Dutz, ‘The Instruments of Competition Policy and Their Relevance for Economic Development’, *Regulatory Policies and Reform: A Comparative Perspective*. 16, 28.

⁹²⁵ PM Whelan, ‘Criminal Cartel Enforcement in the European Union: Avoiding a Human Rights Trade-Off’, *Caron BeatonWells & Ariel Ezrachi (eds) Criminalising Cartels: Critical Studies of an Interdisciplinary Regulatory Movement* (Hart Publishing 2011).

⁹²⁶ Wouter PJ Wils, ‘The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function in EC Antitrust Enforcement: A Legal and Economic Analysis’ (2004) 27 *World Competition* 201.

⁹²⁷ E Fox, CD Ehlermann and LL Laudati, ‘Rober Shumann Centre Annual on European Competition Law 1996’ (Kluwer Law International 1997).

Division of competences in the suggested way may eliminate (1) confirmation bias, (2) hindsight bias and the desire to justify past efforts, and (3) the desire to show a high level of enforcement activity.⁹²⁸ Confirmation bias is a general tendency of human reasoning which means that people tend ‘to search for evidence which confirms rather than challenges one’s beliefs.’⁹²⁹ Police investigating a criminal offence are not interested in confirmation findings of competition authorities. Thus, they can avoid this bias. Similarly, keeping administrative and criminal investigations separated precludes hindsight bias known as ‘the desire to justify past efforts’ to ‘justify that they do not waste their scarce resources, time or energy.’⁹³⁰

Also, and more importantly, such a division seems a good remedy against the desire to show a high level of enforcement activity.⁹³¹ To date, there is a massive discrepancy between hundreds of administrative cases and absence of criminal convictions. Sometimes it is explained by the unwillingness of police to investigate complex economic cases, and competition authorities impose fines on individuals who escaped criminal sanctions.⁹³² The suggested division would be able to reduce the number of weak cases filled ‘to further [...] career and to earn the respect of their colleagues and friends, officials [...] to show the contribution that they or their organisational division is making to fulfilling this task.’⁹³³

⁹²⁸ Wils, ‘The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function in EC Antitrust Enforcement: A Legal and Economic Analysis’ (n 926).

⁹²⁹ Joshua Klayman, ‘Varieties of Confirmation Bias’ in Jerome Busemeyer, Reid Hastie and Douglas L Medin (eds), *Psychology of Learning and Motivation*, vol 32 (Academic Press 1995) <<http://www.sciencedirect.com/science/article/pii/S0079742108603151>> accessed 8 June 2018; KC Klauer, J Musch and B Naumer, ‘On Belief Bias in Syllogistic Reasoning’ (2000) 107 *Psychological Review* 852; Charles G Lord and Lee Ross, ‘Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence’ [1979] *Journal of Personality and Social Psychology* 2098; Matthew Rabin, ‘Psychology and Economics’ (1998) 36 *Journal of Economic Literature* 11.

⁹³⁰ Wils, ‘The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function in EC Antitrust Enforcement: A Legal and Economic Analysis’ (n 926).

⁹³¹ *ibid.*

⁹³² Interview with Aleshin (n 34).

⁹³³ Wils, ‘The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function in EC Antitrust Enforcement: A Legal and Economic Analysis’ (n 926).

Clear borderlines between administrative and criminal enforcement should not exclude a reasonable level of interplay and mutually reinforcing cooperation.⁹³⁴ Thus, at the same time, the official role for the FAS in a criminal investigation is to be introduced to address the misuse of criminal law in anti-trust enforcement and to learn from mistakes already made in other jurisdictions.⁹³⁵ A criminal case against cartel members should be open only upon the FAS initiative or consent if a cartel has been detected in the course of investigating other crimes. The competence of general public prosecutors and investigators would improve if competition authorities are ‘actively involved with the criminal proceedings’⁹³⁶ and provide subject-matter expertise. Such a model is being used for investigating criminal tax avoidance in continental jurisdictions⁹³⁷ and has proved its effectiveness. Florian Von-Papp assumes that ‘[t]he worst that could happen is that enforcement against individuals becomes slightly less efficient.’⁹³⁸ However, this concern may be less relevant for Russian regimes as individual criminal anti-cartels enforcement hardly exists due to the lack of collaboration between agencies and lack of clarity at what point an administrative infringement becomes a criminal offence.

6.4.2. Administrative sanctions should target only the severe infringements

Since the current state of social norms does not always allow people to understand cartel wrongfulness, the administrative regime must specify the threshold for opening an administrative inquiry of cartel. Also, the administrative sanctions are to be applied only to corporations.

Overenforcement challenging anti-cartel enforcement across many jurisdictions has a peculiar manifestation in Russia. There is no lack of evidence for applying anti-cartel

⁹³⁴ Florian Wagner-von Papp (n 866).

⁹³⁵ *ibid*; Luz and Spagnolo (n 86).

⁹³⁶ Florian Wagner-von Papp (n 866).

⁹³⁷ *ibid*.

⁹³⁸ Florian Wagner-von Papp (n 82).

sanctions against arrangements among self-employees or very small businesses.⁹³⁹ Overenforcement deprives resources of competition authorities, works against the perception of cartels as the most serious anti-competitive violations and confuses courts and public. Widening the cartel definition with concerted practices may strengthen risks of overenforcement of cartel laws because, as Stephan and Hviid notice, the wide meaning of ‘concerted practice’ means that a potential breach of the cartel prohibition may arise, for example, even if a bidder refuses to provide a cover bid for the received request.⁹⁴⁰

Thus, it is crucial to distinguish the most serious arrangements between undertakings for application of anti-cartel sanctions. As it is shown in Chapter 4, neither courts nor competition authorities have managed to formulate this criterion of seriousness. To provide more certainty, other jurisdictions consider the value of the line of the commerce affected by the cartel within a 12-month period.⁹⁴¹ Despite some reasonable criticism, this proposal can be employed by Russia’s anti-cartel regime.

There is no doubt that any monetary threshold itself can be seen as ‘simply an objective and recognisable signpost of seriousness and likely public concern rather than a main indicator of suitability.’⁹⁴² Also, the fact that the value of commerce affected by the cartel conduct exceeds a certain amount ‘does not in itself mean that the impact on competition has been serious’⁹⁴³ and thus this criterion bears risk of being ‘both under-inclusive and over-inclusive, depending on the size of the market in which the cartel members operate’.⁹⁴⁴ However, the solution balancing these risks already exists. Para 5 of Article 11.1 provides that restrictions to concerted practices be applied only if the combined share of all violators on the market exceeds 20 per cent. The similar

⁹³⁹ Алексей Ульянов, *Антимонопольное регулирование в России* (Litres 2018).

⁹⁴⁰ Hviid and Stephan (n 52).

⁹⁴¹ Beaton-Wells, ‘The Politics of Cartel Criminalisation’ (n 29).

⁹⁴² Memorandum of Understanding between the Office of Fair Trading and the Serious Fraud Office 2003.

⁹⁴³ Julie Clarke JulieClarke Julie, ‘Criminal Penalties for Contraventions of Part IV of the Trade Practices Act’ (2005) 10 Deakin Law Review 141.

⁹⁴⁴ Brent Fisse, ‘The Cartel Offence: Dishonesty?’ (2007) 35 A.B.L.R. 235, 246.

suggestion has been discussed and unfortunately rejected in Australia based on the US Sentencing Guidelines.⁹⁴⁵

Thus, to underline the seriousness of the cartel prohibition and prevent over-enforcement against small and medium business, Article 14.32 of the Russian Code of Administrative Offences is to be supplemented with the following Note: ‘A case is to be open if the value of the line of the commerce affected by the cartel within a 12-month period exceeds 400,000,000 RUB,⁹⁴⁶ and the cartel represents 20 per cent of the value of sales by all competitors who compete in that specific line of commerce in the relevant geographic market over a relevant period.’ This solution also addresses the question raised about the threshold for insignificance in Article 7.27 of the Code of Administrative Offences.⁹⁴⁷

6.4.3. Reform of the cartel definition: making it clear that cartels are extremely harmful

Chapter 4 discovered deficiencies in an administrative regime that badly affect anti-cartel criminal enforcement. The courts often require competition authorities to prove the effect of horizontal agreements although cartel agreements are claimed to be prohibited *per se*. Then, small fines signal that cartels are viewed as insignificant infringements which do not deserve public outrage. Also, the abnormal number of reported cartels every year⁹⁴⁸ indicates that there is a significant misunderstanding of what a cartel is. Therefore, the consistent definition of a cartel agreement is required to single out cartels from other violations of competition laws.

⁹⁴⁵ Beaton-Wells, ‘The Politics of Cartel Criminalisation’ (n 29).

⁹⁴⁶ Appr. 4,500.000 GBP

⁹⁴⁷ S 2.3.2

⁹⁴⁸ ‘ФАС России | Андрей Тенишев: В 2016 Году ФАС Выявила 30% Больше Картелей, Чем в Прошлом’ <<https://fas.gov.ru/news/2020>> accessed 7 June 2018 (In 2016, FAS detected 30% more cartels, than in 2015); ‘ФАС России | Большинство Выявленных Картелей Действовали в Рамках Аукционов На Закупки - ФАС’ <<http://fas.gov.ru/publications/758>> accessed 7 June 2018 (Most Detected Cartels Acted on Tenders); ‘Число Выявленных ФАС Картельных Сговоров Выросло на Треть’ <<https://lenta.ru/news/2016/12/12/faskartel/>> accessed 7 June 2018 (Number of Cartel Conspiracies Grew to Third).

Clarification of paragraph 1 of Article 11 of FZ-135

The cartel prohibition in Article 11 of FZ 135 uses the words ‘agreements that lead or can lead...’ (‘приводят или могут привести’ [privodyat ili mogu provesti]). In Russian, this verb has numerous meanings.⁹⁴⁹ It can be understood as ‘to cause something’ [‘послужить причиной’, [posluzhit prichinoi]; as ‘to entail something’, ‘to lead somewhere’ etc. This reading creates lots of confusions for courts hearing the cases. As it was established in Chapter 4, many courts ignore the explanation provided by the High Commercial court regarding *per se* prohibition and interpret Article 11 in a way that not only horizontal agreements but also material circumstances are to be proved. Replacement of ‘an agreement that leads or can lead’ with ‘an agreement that aims at’ makes cartel definition consistent with the economic virtue of horizontal agreements and facilitate interpretation of the law.

Concerted practices are to be included in the cartel definition to prevent the effects-based approach to cartels

As it is shown in Section 4.2.2, courts struggle to distinguish cartel agreements prohibited *per se* and concerted practices required to prove the effect of the collusion. The misunderstanding of the *per se* prohibition leads to its inconsistent application, either too narrow or too broad. Since 2011,⁹⁵⁰ the concerted practices have been excluded from the cartel prohibition and treated differently. They are prohibited by Article 11.1 of FZ 135 only if these actions resulted in price-fixing, bid-rigging, market division, restriction of output or refusal to conclude a contract, i.e. it is a purely effects-based infringement. There are some objections to this design.

⁹⁴⁹ С. А. Кузнецов, *Большой Толковый Словарь* (1 edn, СПб: Норинт 1998) <<http://gramota.ru/slovari/dic/?word=%D0%BF%D1%80%D0%B8%D0%B2%D0%B5%D1%81%D1%82%D0%B8&all=x>> (Great Explanatory Dictionary).

⁹⁵⁰ Федеральный Закон О Внесении Изменений в Федеральный Закон О защите Конкуренции и Отдельные Законодательные Акты Российской Федерации 06.12.2011 N 401-ФЗ (Последняя Редакция) <http://www.consultant.ru/document/cons_doc_LAW_122740/> accessed 6 June 2018 (Federal Law On Amendments to the Federal Law on the Protection of Competition and Other Legislative Acts of the Russian Federation 06.12.2011 N 401-ФЗ (Latest Edition)).

A great body of literature⁹⁵¹ provides that the cartel prohibition is designed to capture not only agreements but also concerted practices and include any form of coordination between competitors that knowingly reduces the risks of competition.⁹⁵² This design is justified from a very practical angle as well: sometimes it is not easy to prove the precise moment of entering an agreement and its other circumstances, but the only plausible explanation for the conduct of companies on the market is coordination between undertakings.⁹⁵³ In addition to the unrealistically high bar of proving particular consequences or restriction of competition, a different approach to concerted practices creates a confusion for courts and business: as Stephan notes, ‘[t]here is no bright-line between an agreement and a concerted practice; indeed the European Commission and courts do not generally specify whether an agreement exists, only that there is evidence of cooperation between undertakings’.⁹⁵⁴ For example, the European Commission does not make a distinction between them as Article 101 is deliberately wide to capture forms of coordination between competitors that fall short of an explicit agreement.⁹⁵⁵

As both horizontal agreements are a manifestation of cartels, therefore it is illogical that in one case the horizontal practice is prohibited *per se*, and in another case, the effects are to be proved.

Taking into account confusion between meanings of ‘lead’, there is no wonder that courts expect competition authorities to prove tangible results for both prohibitions. If any coordination between competitors that knowingly reduces the risks of competition amounts to the cartel,⁹⁵⁶ then ‘greater importance is placed on the other key element

⁹⁵¹ Albertina Albors-Llorens, ‘Horizontal Agreements and Concerted Practices in EC Competition Law: Unlawful and Legitimate Contacts between Competitors’ (2006) 51 *The Antitrust Bulletin* 837; Hviid and Stephan (n 52).

⁹⁵² *ICI v Commission* [1972] ECR 619 (Court of Justice).

⁹⁵³ ‘Concerted Practice - Concurrences’ <<http://www.concurrences.com/en/glossary-of-competition-terms/Concerted-Practice>> accessed 7 June 2018.

⁹⁵⁴ Hviid and Stephan (n 52).

⁹⁵⁵ Stephan, ‘An Empirical Evaluation of the Normative Justifications for Cartel Criminalisation’ (n 18).

⁹⁵⁶ *ICI v. Commission* (n 952).

of the prohibition: whether the arrangement has the object or effect of restricting competition.⁹⁵⁷

Therefore, paragraph 1 of Article 11 of the Law on Protection of Competition is to be adopted in the following wording: ‘The following shall be prohibited as cartel: all agreements between undertakings, decisions by associations of undertakings and concerted practices which **aim at:**

- (1) directly or indirectly fixing purchase or selling prices or any other trading conditions including tariffs, discounts, surcharges;
- (2) directly or indirectly fixing prices or any other conditions on tenders (bid-rigging);
- (3) sharing markets or sources of supply by territory, sales or purchases, an assortment of goods or composition of purchasers or buyers
- (4) limiting or controlling the production of goods, markets, technical development, or investment;
- (5) refusing to conclude contracts with the other parties on similar conditions to equivalent transactions with other trading parties.

Any agreements or decisions prohibited in subparas 1-5 under this Article shall be automatically void’.

Defences should be returned to guide courts and prevent shifting of the burden of proof

As we saw in Chapter 4, courts take the arguments of defendants on the positive effect of detected cartels seriously and thus reverse decisions of competition authorities if the negative effect of cartels has not been proved,⁹⁵⁸ despite the law not having any provision on defences for cartels. The general defences for anti-competitive agreements introduced in Article 13⁹⁵⁹ do not cover the collusions under Para 1 of Article 11. Defences under Article 13 provide an exemption if an agreement or other action results in improving production or distribution of goods, promoting of technical or economic progress or increasing of competitiveness of goods and allowing

⁹⁵⁷ Hviid and Stephan (n 52).

⁹⁵⁸ For example, see *Pangasius and Norway Fish Cartel* cases [in s 4.2.3](#)

⁹⁵⁹ On Protection of Competition (n 233).

consumers a fair share of the resulting benefit proportionately to benefits of undertakings. The possible extension of these defences for cartel agreements is not an optimal solution because this reading of defence is too broad; it allows the undertakings to impose restrictions on parties without limitation and may lead to the elimination of competition.

To limit the risks of effects-based interpretation, to set the burden of proof and to provide courts with more comprehensive guidance, Article 11 of FZ-135 should be supplemented in Para 11 with the defence: ‘The provisions of paragraph 1 may be declared inapplicable by the court if defendants proved the following:

- any agreement or category of agreements between undertakings, and
- any decision or category of decisions by associations of undertakings, and
- any concerted practice or category of concerted practices,

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

- (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
- (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question’.

This provision clarifies the frames of *per se* prohibition of cartels and distributes the burden of proof so that competition authorities must prove a prohibited agreement only.

Although the suggested reading of the cartel prohibition cannot stop the courts from being lenient to cartels, the introduction of defences will benefit the anti-cartel enforcement in two ways. First, it will restrict courts’ discretion regarding the scope of requirements to consider possible benefits of the agreements in question. Second, it will distribute the burden of proof so that competition authorities must prove an agreement in accordance with the *per se* prohibition while the responsibility to prove possible benefits of the cartel agreement goes to defendants.

To sum up, the reform of cartel definition includes the clarification that aims of the horizontal agreements are not meant to be results of the cartel; introduction of defences can guide courts and thus protect *per se* prohibition. Also, enforcing agencies should focus only on cartels affecting certain values of sales with a significant market share, and, finally, individuals are to be freed from administrative responsibility to make the criminal offence more consistent with cartel harm and to enhance the procedure.

6.4.4. The cartel offence should be designed as a *per se* offence

The ongoing discussion on how to consider cartel harmfulness and immorality for designing a cartel offence is aggravated for Russia's criminal regime by the social danger of an act as a necessary characteristic of its delinquency. Although economists convincingly demonstrate that cartels are inevitably bad for consumers and economy in many ways,⁹⁶⁰ going far beyond simple damage to consumers or an amount gained by a cartel member, economic harm of cartels cannot justify intervention by the criminal law.⁹⁶¹ Indeed, damage (or gain) as the embodiment of harm incurred by cartel covers very restricted aspects of harm and thus understates the seriousness of the cartel offence.

Also, there are some practical reasons to exclude damage and gain from the cartel offence.⁹⁶² First, there are reasonable concerns regarding the ability of those who are not experts in economics to understand and weigh economic evidence in cartel offence trials.⁹⁶³ Second, it seems incomprehensible to invest resources into producing and

⁹⁶⁰ M Motta, *Competition Policy*, *Competition Policy* (CUP, Cambridge, 2004); Richard Posner, 'The Social Costs of Monopoly and Regulation' (1975) 83 *Journal of Political Economy* 807; Wardhaugh, 'A Normative Approach to the Criminalisation of Cartel Activity' (n 347).

⁹⁶¹ Bruce Wardhaugh, 'A Normative Approach to the Criminalisation of Cartel Activity' 32 *Legal Studies* 369, 386.

⁹⁶² C Harding, 'The Anti-Cartel Enforcement Industry: Criminological Perspectives on Cartel Criminalisation', C Beato-Wells & A Ezrachi (eds) *Criminalising Cartels* (Oxford, Hart 2011).

⁹⁶³ Macculloch (n 51).

presenting tables of very complex data and formulas in a trial while harm stemming from cartels has been already confirmed.⁹⁶⁴

Although Wardhaugh argues that institutional harm inflicted on distributive justice is the most serious consequence of cartels,⁹⁶⁵ in Russia's case, this argument cannot be used for designing a cartel offence. First, it is ill-suited to justify the criminalisation of cartels in principle; second, as we establish in Chapter 2, neither benefits of market nor liberties have accompanied cartel criminalisation in Russia in the 1990s. Meanwhile, Rawls defines two principles justifying the distributive justice of the markets. The first one is that all individuals should have liberty and equal rights. The second one assumes that the least advantaged individuals take the greatest benefits from social and economic liberties. Only when these two requirements are met, the law may intervene to ensure their maintenance.

However, even by the date, there is some evidence that market economy for individuals in Russia is not of the same value as for ordinary members of the public in other jurisdictions criminalising cartels.⁹⁶⁶ For instance, the statistics from Levada Center⁹⁶⁷ demonstrates that over 52 % of Russians prefer state economy to the markets and this proportion has had the tendency to grow since 2012.⁹⁶⁸ Under these circumstances, social harm is a problematic element for the design of the cartel offence as the harm caused cannot be quantified for cartel laws.⁹⁶⁹ Institutional harm argument is also doubtful if cartels are motivated by a crisis in the industry or fear of

⁹⁶⁴ John M Connor and Robert H Lande, 'The Size of Cartel Overcharges: Implications for U.S. and EC Fining Policies' 41; Cento Veljanovski, 'Cartel Fines in Europe: Law, Practice and Deterrence' (2007) 30 *World Competition* 65.

⁹⁶⁵ Wardhaugh, 'A Normative Approach to the Criminalisation of Cartel Activity' (n 961).

⁹⁶⁶ Stephan, 'An Empirical Evaluation of the Normative Justifications for Cartel Criminalisation' (n 18).

⁹⁶⁷ <<https://www.levada.ru/en/>> accessed 7 June 2018.

⁹⁶⁸ 'Более Половины Россиян Предпочли Плановую Экономику' <<http://www.interfax.ru/business/495017>> accessed 7 June 2018.

⁹⁶⁹ Stephan, 'An Empirical Evaluation of the Normative Justifications for Cartel Criminalisation' (n 18).

bankruptcy.⁹⁷⁰ Until the survey on public attitudes toward the market is undertaken, the argument should be used with caution.

Similarly, the immorality of cartels remains a difficult question, and is unlikely to replace harm in Russian cartel offences. Generally, this justification is not workable until ‘members of society expect markets to be competitive and understand that cartel conduct is harmful’.⁹⁷¹ As attitude towards cartels and competition in Russia have not been tested yet, the argument that cartels are inherently immoral may be perceived with great scepticism.

Considering the reliance of Russian criminal law on the degree of social danger⁹⁷² for distinguishing between an administrative wrongdoing and a crime, the idea of adopting a *per se* criminal offence based on some minimum level of affected commerce is less problematic for Russia’s criminal cartel regime than for common law jurisdictions. There is a commonplace concern that ‘criminal courts are ill-equipped to cope with sophisticated economic arguments’⁹⁷³ when it comes to assessing affected commerce. However, it is a way more suited to prosecutors and courts in Russia as they have been coping with social danger and material effect of the offence on commerce or property interests all the time. Moreover, the concern of preparing the courts to deal with sophisticated economic arguments can be addressed by granting competition authorities special rights in a criminal investigation to introduce evidence and provide explanations. Thus, the introduction of a criminal offence based on some minimum level of affected commerce would also ensure that its scope and application are clear for business, which can enhance the legitimacy of the offence and thus improve its enforceability.

⁹⁷⁰ Andreas Stephan, ‘The Bankruptcy Wildcard in Cartel Cases’ [2006] SSRN Electronic Journal <<http://www.ssrn.com/abstract=912169>> accessed 8 September 2018.

⁹⁷¹ Stephan, ‘An Empirical Evaluation of the Normative Justifications for Cartel Criminalisation’ (n 18) 626.

⁹⁷² Chapter 2.

⁹⁷³ Stephan, ‘How Dishonesty Killed the Cartel Offence’ (n 114). 455.

Another concern of regulatory offences is a risk of over-criminalisation.⁹⁷⁴ Well-defined defences may help to reduce the risk of over-enforcement. However, it is not in the tradition of the Russian criminal law to set defences for a particular offence. The general defences for defendants established in Chapter 8 of the Criminal Code can be applied to the new offence in principle, especially the defence of duress. This concern can also be addressed by a threshold setting the minimum cartel turnover for opening an investigation⁹⁷⁵ in conjunction with the defences suggested in section 6.4.3 for the cartel definition.

Other possible risks appear hypothetical because of practical considerations: cartels were criminalised in Russia many years ago, and no risks apart from misuse of the offence have emerged.

A new reading of Article 178 of the Criminal Code

Williams says that a poorly designed cartel offence is damaging to the competition regime, the coherence and reputation of the criminal law.⁹⁷⁶ In our case, the priority is to make the offence as clear for everyone as possible and to introduce the overwhelming sanctions. The suggestion of the competition authorities to treat bid-rigging separately from other forms of cartels is not sufficient for eliminating all deficiencies identified in Chapters 2 and 4. Considering a call for a *per se* offence and sufficiently severe sanctions to eliminate the issues of the limitation period, Article 178 of the Criminal Code of the Russian Federation should be adopted as follows .

‘Article 178

1. A cartel agreement among two or more persons to make or implement, or to cause to be made or implemented, arrangements relating to at least two undertakings and aiming at:
 - Fixing a price of a product or service;
 - Rigging bids;

⁹⁷⁴ Stephan, ‘An Empirical Evaluation of the Normative Justifications for Cartel Criminalisation’ (n 18).

⁹⁷⁵ Section 6.4.2

⁹⁷⁶ R Williams (n 72).

- Limiting or preventing production or supply of a product in Russian Federation,
- Dividing between undertakings the supply of a product (service) to a customer or customers for the supply in Russian Federation

shall be punished with a fine in the amount of the salary or other income of the convicted person for a period of one to three years or with imprisonment for a term not exceeding seven years, or with both.’

Removal of the amount of loss or gain as an element of the offence is essential for a number of reasons. First, this design works well for a more coherent scope of *mens rea* for the cartel offence. As we have found in Section 2.3.2, this element troubles the prosecution. Also, having a certain amount of loss as an element of the offence means that the prosecution must prove that the defendants, at the moment of entering into the agreement, foresaw the harm caused by the act of price fixing which is often remote and widely dispersed. This approach not only unjustifiably ignores broader manifestations of cartel harm discussed in Section 3.1.2 but also imposes unrealistic expectations on the prosecution which must prove that the defendants foresaw that the cartel would result in a certain amount of loss or gain.

According to the suggested reform, the offence is to be transformed into a *per se* offence, and the prosecutor will need to prove that the defendant knowingly entered into the alleged agreement. Meanwhile, there is no call for further reforming of *mens rea* for the cartel offence. Unlike the first reading of the UK offence, which set the bar too high by incorporating dishonesty into *mens rea*, there was no much criticism regarding the mental element for Article 178. The current design of the intent is also consistent with Russian criminal law traditions for white-collar crimes.

Second, removal of an amount of loss or gain resolves the ambiguity created for the leniency programme by the exemptions provided in Article 76.1 of the Criminal Code (s. 2.4.2.3.). As loss and gain do not constitute the element of the offence, the cartel offence is to be removed from Article 76.1 of the Criminal Code providing the defences if the material harm has been compensated by a defendant.

The suggested wording ensures that the general public can understand its scope and application. As Stephan notices: ‘A popular understanding of why cartels are harmful

and should attract criminal penalties, lends legitimacy to the cartel offence and helps to ensure continued political backing for criminal persecutions; reducing lobbying for soft enforcement'.⁹⁷⁷ Whelan points out that it is important to consider the prohibited behaviour wrong by a sufficient proportion of the population.⁹⁷⁸ Finally, Goodin reminds that the law should be perceptible by the public, not only by lawyers and the courts:

For the law to serve its social function – for it to guide people’s action, to point and to push them in direction legally desired – people have to have some good way of finding out what the law actually requires of them.⁹⁷⁹

Identifying the individuals who are responsible for the offence

If we accept that criminal liability for cartels attaches to those who either make or implement a cartel arrangement, it is clear that the offence can be committed only by ‘a cartel ‘enforcer’ who has the role of ensuring that all cartel participants are properly holding to the agreement through a mix of threats and encouragement’,⁹⁸⁰ not by a person receiving routine instructions from their boss and supervising prices because ‘it would be harsh in the extreme to conclude that a retail store manager following normal pricing instructions is acting criminally’.⁹⁸¹

As it is vital to restrict the offence by criminalising only ‘the particular behaviour which deserves the weight of a criminal sanction’,⁹⁸² the offence should be addressed to those making and implementing decisions. Thus the special position of the offender

⁹⁷⁷ A Stephan, ‘The Battle for Hearts and Minds’: The Role of the Media in Treating Cartels as Criminal’, *Caron BeatonWells & Ariel Ezrachi (eds) Criminalising Cartels: Critical Studies of an Interdisciplinary Regulatory Movement* (Oxford, Hart 2011).

⁹⁷⁸ Whelan (n 54) 21.

⁹⁷⁹ Goodin (n 811).

⁹⁸⁰ Macculloch (n 51).

⁹⁸¹ *ibid.*

⁹⁸² *ibid.*

is a necessary prerequisite for committing the offence and should not be considered as an aggravating factor.⁹⁸³ It may be a more difficult offence to prosecute as the prosecution will have to prove a more complex set of acts, but this offence will communicate to the society ‘that an offender has not committed a mere technical breach, but that there has been a serious affront to wider societal values’.⁹⁸⁴ Therefore, if the prosecution succeeds, the punishment ‘will be seen as appropriate and justified. That, in turn, will increase the effectiveness of the offence, not simply through deterrence and punishment, but through people’s desire to comply with the law’.⁹⁸⁵

Substantial sanctions

Weak criminal sanctions undermine the criminal cartel enforcement both from practical and theoretical angles. Chapter 2⁹⁸⁶ demonstrated that due to the short terms set in Article 178 in many cases the investigation is not opened as the limitation period expired. Also, this deprives incentives for whistle-blowers. Weak sanctions may signal the society that this behaviour is not sufficiently blameworthy to deserve punishment.⁹⁸⁷

The suggested jail term of seven years exceeds a term which Beaton-Wells finds ‘no means an overwhelming,’⁹⁸⁸ qualifies the cartel offence as an offence as a grave crime⁹⁸⁹ and extends a limitation period up to ten years⁹⁹⁰ which is more consistent with the duration of cartels and time required for their investigation. The term of seven years is also analogous to other ‘white collar’ crimes, and the argument of similar

⁹⁸³ See Section 2.3.3

⁹⁸⁴ Macculloch (n 51).

⁹⁸⁵ *ibid.*

⁹⁸⁶ S 2.3.4

⁹⁸⁷ G Lamond, ‘What Is a Crime?’ (2007) 27 *Oxford Journal of Legal Studies* <<https://ora.ox.ac.uk/objects/uuid:e5fb5de7-4bd2-41fc-af94-e999fb6eee72>> accessed 7 June 2018.

⁹⁸⁸ Beaton-Wells, ‘The Politics of Cartel Criminalisation’ (n 29).

⁹⁸⁹ Para 4 Art 15 Criminal Code (n 172).

⁹⁹⁰ Subpara b para 1 Art 78 *ibid.*

treatment is often the crucial one for governments and institutions⁹⁹¹ as well as a middle-of-the-range⁹⁹² argument regarding international standards.

To summarise, criminal sanctions should be applied only to those involved in ‘hard-core’ horizontal cartel arrangements, and a cartel offence should not be over-inclusive.⁹⁹³ The cartel offence must be simplified and formulated as a *per se* offence; material harm should be rejected as the prime rationale for the cartel offence. Instead, some arguments from Whelan’s hybrid model⁹⁹⁴ could be considered. Particularly, the deterrent argument is to be supplemented with some retributive justifications, for example, with answering the questions why a individual is charged and what is a proper severity of the punishment.

It is essential to fix inadequate sanctions fixed before the leniency reform because ‘[t]he greater the difference between the leniency prize (immunity) and the level of sanction otherwise faced, the greater the incentive is to reveal an infringement.’⁹⁹⁵ For example, a comparison of the US leniency programme with its EU counterpart shows that the main reason for the greater success of the US leniency programme in enhancing deterrence by uncovering active cartels is the significance of penalties.⁹⁹⁶

6.4.5. Leniency reform

This section provides a rationale for reforming leniency in Russia and outlines the priorities for the reform. The previous sections provide the solutions on how to make the offence more consistent and how to adjust other tools to improve criminal anti-cartel enforcement. However, the mere detecting of cartels is a difficult task which is unlikely to be performed without comprehensive leniency programme.

⁹⁹¹ Beaton-Wells, ‘The Politics of Cartel Criminalisation’ (n 29).

⁹⁹² JulieClarke (n 943).

⁹⁹³ Macculloch (n 51).

⁹⁹⁴ Whelan, ‘A Principled Argument for Personal Criminal Sanctions as Punishment under EC Cartel Law’ (n 978).

⁹⁹⁵ *ibid*, 432.

⁹⁹⁶ *ibid*.

Chapter 2⁹⁹⁷ established that benefits for a cartel member wishing to discover cartel and to apply for immunity would be so uncertain that the criminal leniency programme has never been used and the administrative one does not contribute much to cartel detection. There are two independent programmes operating in Russia, and none of them provides guidance on the relationship between the corporate and individual immunity. Also, the criminal programme contains very impracticable conditions and subjective criteria of granting immunity. For example, an applicant must compensate the damage or otherwise redress the harm caused by a cartel to be exempted from criminal sanctions. Therefore, in a case similar to Marine Hose none of the individuals would have been eligible for immunity from criminal sanctions.

The administrative leniency unfits the conventional purposes of detecting and proving cartels because immunity is often granted without sufficient evidence. Overall, the leniency programmes in Russia lack certainty for applicants and coordination between enforcing agencies, which makes the very idea of whistleblowing unattractive for those considering confessing and obtaining immunity.

6.4.5.1. The rationale for reforms of Russia's leniency

Leniency policy should not be perceived as a panacea in anti-cartel enforcement. Caron Beaton-Well notices that 'both empirical research and practical experience cast increasing doubt on the extent to which leniency policies are achieving cartel deterrence'⁹⁹⁸ and thus states that the realities of applying leniency are less straightforward than expectations across the world.⁹⁹⁹ There are some doubts that the increase in fines and convictions after the introduction of a leniency programme is caused by its effectiveness in deterring cartels *ex-ante*.¹⁰⁰⁰ Luz and Spagnolo find that

⁹⁹⁷ S 2.4

⁹⁹⁸ Caron Beaton-Wells, 'Introduction', *Caron Beaton-Wells, and Christopher Tran (eds), Anti-Cartel Enforcement in a Contemporary Age: Leniency Religion* (Bloomsbury Publishing PLC 2015) 12 <<http://ebookcentral.proquest.com/lib/uea/detail.action?docID=2196933>> accessed 15 July 2018.

⁹⁹⁹ Caron Beaton-Wells and Christopher Tran, *Anti-Cartel Enforcement in a Contemporary Age* (Hart Publishing 2015).

¹⁰⁰⁰ Joseph E Harrington and Myong-Hun Chang, 'When Can We Expect a Corporate Leniency Program to Result in Fewer Cartels?' (2015) 58 *The Journal of Law and Economics* 417.; Marvão and Spagnolo (n 85).; Luz and Spagnolo (n 86).

‘it can actually reflect the opposite, that is, that more cartels are detected and prosecuted because the number of cartels is growing’.¹⁰⁰¹

Over-reliance on leniency as detection tool should be avoided as a discrepancy between theoretical principles of leniency and its operation in practice is evident for many jurisdictions. In some cases, immunity policies may be used by cartelists as an opportunity to stabilise cartels and to punish those who breach cartel agreements.¹⁰⁰² Some researchers point to the decline in the number of leniency applications by 50% as a signal of the crisis of this instrument, the risk of exposure to civil damages claims and the perceived uncertainty in how authorities will proceed with applications because of the discretionary market regime.¹⁰⁰³

Nevertheless, substantial advantages in creating and retaining evidence outweigh the disadvantages of immunity programmes because violators will likely transform their evidence management strategies ‘from destruction to preservation, from the shredder and delete key to the secure archive.’¹⁰⁰⁴

Wrapping up this brief discussion on advantages and disadvantages of leniency, ‘[t]he protection of leniency programmes is paramount for the effectiveness of public competition law enforcement’¹⁰⁰⁵ and a key for the success of criminal anti-cartel regime.¹⁰⁰⁶ Therefore, Russia’s competition authorities should develop alternative tools for detecting cartels, but considering that cartel investigations are very prolonged and expensive, the leniency policy must be reformed, bearing in mind that its effective

¹⁰⁰¹ Note 3 in Luz and Spagnolo (n 86).

¹⁰⁰² Beaton-Wells, ‘Introduction’ (n 998) 12.

¹⁰⁰³ Johan Ysewyn and Siobhan Kahmann, ‘The Decline and Fall of the Leniency Programme in Europe - Concurrences’ (2018) 1 Concurrences Review 44, 45.

¹⁰⁰⁴ Caron Beaton-Wells, Christopher Harding and Jennifer Edwards, ‘Leniency and Criminal Sanctions in Anti-Cartel Enforcement: Happily Married or Uneasy Bedfellows?’, *Caron Beaton-Wells, and Christopher Tran (eds), Anti-Cartel Enforcement in a Contemporary Age: Leniency Religion* (Bloomsbury Publishing PLC 2015) 252
<<http://ebookcentral.proquest.com/lib/uea/detail.action?docID=2196933>> accessed 15 July 2018.

¹⁰⁰⁵ Florian Wagner-von Papp (n 866).

¹⁰⁰⁶ Stephan, ‘Four Key Challenges to the Successful Criminalization of Cartel Laws’ (n 26).

administration requires coherent interdependencies between the leniency policy and other tools.

As we found in Chapter 2, the degree of certainty that applicants have when deciding to apply for leniency is crucial for creating a proper incentive for cartelists to whistle blow. This certainty embraces legal certainty meaning that an application will be qualified for immunity; certainty regarding liability and financial penalties; certainty regarding the moment when the applicant can get on with his business and social life and certainty relating to the ultimate outcome.¹⁰⁰⁷

6.4.5.2. Main provisions of the leniency reform

Setting the correct objective for leniency

Compensation of harm is the most atypical elements of Russia's criminal leniency programme. This condition makes it clear that immunity under Article 178 of the Criminal Code originates from the erroneously employed concept of active repentance, which has nothing in common with the facilitation of collecting evidence about cartels.

Meanwhile, the Organization for Economic Cooperation and Development (OECD) points out that 'the challenge in attacking hard-core cartels is to penetrate their cloak of secrecy.'¹⁰⁰⁸ The European Competition Network (ECN) underlines that the purpose of leniency programmes is to assist competition authorities 'in their efforts to detect and terminate cartels and to punish cartel participants'.¹⁰⁰⁹ This is why the reform should be undertaken bearing in mind that detection of cartels and collection and preservation of evidence should become the principal purpose of leniency; thus, criminal leniency should be detached completely from the other grounds for immunity from criminal sanctions.

¹⁰⁰⁷ Johan Ysewyn and Siobhan Kahmann (n 1003) 45.

¹⁰⁰⁸ 'Fighting Hard-Core Cartels: Harm, Effective Sanctions and Leniency Programmes' (n 240).

¹⁰⁰⁹ ECN Model Leniency Programme Explanatory Notes (n 256).

One stop-shop programme

We saw in Chapter 2 in Russia whistle-blowers should apply separately for administrative and criminal immunity, and the decisions on exemptions will be made by different authorities without any coordination between them. Therefore, in criminal investigation immunity may be granted to an applicant by police or prosecutor without mere notice of competition authorities and thus without assessment of the value of evidence for the cartel inve

stigation. In this case, quality of received evidence may be insufficient for a strong cartel case.

Also, a new challenge for the anti-cartel enforcement on tenders emerges. Luz and Spagnolo point out that as a cartel infringement is frequently connected to other offences, especially to corruption crimes,¹⁰¹⁰ a leniency programme should grant immunity both for a cartel tender and corruption offences. They add that ‘the involvement of multiple authorities in leniency cases makes it difficult to limit disclosures and to preserve privileges, thus reducing the effectiveness of existing leniency provisions in inducing whistleblowing.’¹⁰¹¹

Therefore, the next priority of reform is a single point for applicants. Although both criminal prosecution and a decision upon a leniency application on the sufficiency of the evidence and complying with other conditions should be contingent upon a decision made by the competition authorities, the ‘single point’ should be available preferably for applicants with every law enforcement agency.¹⁰¹² This opportunity is particularly important for cartels on tenders which are often connected with other corruption crimes. In this case, possible conflicts among agencies can be prevented by the provision obliging the authority first contacted by the wrongdoer to inform any other agency that may be competent over the other possible infringements.¹⁰¹³

¹⁰¹⁰ Luz and Spagnolo (n 86).

¹⁰¹¹ *ibid* 747.

¹⁰¹² *ibid*.

¹⁰¹³ Luz and Spagnolo (n 86).

Overall, one application is to be introduced for granting exemptions from penalties. This amendment raises a question how to gather and present accurate information on possibly illegal conduct, especially considering the duration of cartels and complexity of evidence which may be required regarding other parties. To address this issue, at the very first stage of application, limited information may be revealed if a reasonable time period of at least 30 days is granted to the applicant to collect detailed information on the infringements. These considerations mean that a system analogous to the marker system must be included in the reformed leniency programme.

Criminal immunity for individuals whether they applied individually or jointly with their company

Today neither administrative nor criminal immunity for individuals is linked with the corporate application. Thus, in theory, an individual may be convicted even though a company obtains an exemption from financial sanctions. Under the new leniency policy, when a corporation qualifies for leniency, immunity should cover ‘all directors, officers, and employees of the corporation who admit to their involvement in the illegal antitrust activity as a part of the corporate confession.’¹⁰¹⁴ However, the individual leniency policy should apply only to individuals who come forward on their behalf to report an antitrust violation in order to incentivise race to the authorities by creating tensions between an individual and a corporation.

These provisions mirror the US cartel policy which offers strongest incentives for applicants to come forward.¹⁰¹⁵ As soon as individuals are frequently (or at least regularly) prosecuted, these new conditions will ensure ‘that senior individuals within a company deciding to collude or reveal, personally stand to lose financially and (more importantly) regarding their personal freedom. With the availability of immunity to individuals as well as corporations, infringing firms are not only in a race to self-report with their fellow cartel members but potentially with their own employees as well.’¹⁰¹⁶

¹⁰¹⁴ U.S. Dep’t of Justice Corporate Leniency Policy 1993 5.

¹⁰¹⁵ Stephan, ‘An Empirical Assessment of the European Leniency Notice’ (n 89).

¹⁰¹⁶ *ibid.*

Changes of the policy to secure evidence: marker system, elimination of the requirement to end the involvement in the infringement and the expansion of a programme for the cases when an inspection has been carried out.

As the central purpose of the leniency programme is the detection of cartels and facilitation of gathering evidence, the new programme must include a discretionary marker system for applicants and reject the provision of the administrative programme to end involvement in the cartel before applying. The marker system means that the competition authority has discretion, where justified, to accept an application on the basis of only limited information and grant to the applicant time to perfect the information and evidence to qualify for immunity. The marker secures an applicant's place in the queue for this time.

The condition of ending involvement in the infringement immediately 'might jeopardise the integrity of investigations'¹⁰¹⁷ and deprive the authorities of evidence for prosecution. Thus, the decision on whether an applicant must leave a cartel or continue participation for gathering more information should be made by the authorities after application.

Today the administrative leniency policy provides that competition authorities should not have information about cartel by the moment of application for leniency.¹⁰¹⁸ In practice, this provision means that applications for immunity are accepted at the moment when competition authorities announce a decision establishing the fact of infringement, i.e. when an inspection is completed but before a quasi-court hearing and deciding on imposing administrative sanctions. This provision does not incentivise cartel members to apply as soon as possible as they may make this decision after assessing the evidence obtained by competition authorities, weigh risks and still get full immunity.

¹⁰¹⁷ *ibid.*

¹⁰¹⁸ Note 1 to Art. 14.32 The Code of Administrative offences (n 194).

To replace this very generous condition, full immunity should be restricted by the moment when an inspection has not been carried out yet. However, in the case when competition authorities have carried out an inspection concerning an alleged cartel but have no sufficient evidence in their possession, the second type of immunity is to be introduced. In such a situation, an applicant may be qualified for the decrease in fines 50% instead of full immunity. Exemption from criminal punishment also should be provided in this case if an applicant submits information and evidence which will enable the authorities to find evidence of a violation of cartel prohibition. For the second type of immunity, the threshold may be set higher. For example, providing decisive incriminating evidence that originates from the time of the infringement could be included as a condition.¹⁰¹⁹

Development of requirements for evidence

The administrative programme mentions evidence which is sufficient for establishing cartel in administrative inquiry but does not provide any guidance regarding this sufficiency. As a result, cases are lost in courts because sometimes immunity is granted for self-confession only as it seems sufficient for the officials of competition authorities but insufficient for court. The criminal leniency programme does not mention the quality of evidence. Altogether, this state of things undermines certainty for an applicant on the one hand, and on the other hand, prevents authorities from achieving the goal of leniency to detect and prosecute the cartel. While the discretion of authorities to assess evidence and decide on granting or rejecting immunity should be kept, some guidance on what is expected from an applicant must be introduced to cease granting exemption from fines for a simple confession which does little to build a strong case.

To increase certainty and transparency of the procedure, at least minimal requirements to evidence like in Commission Notice on Immunity from fines and reduction of fines in cartel cases (2006/C 298/11) must be set. Particularly, it must be determined explicitly what type of information and evidence the applicants should submit to

¹⁰¹⁹ 'European Commission - Press Release - Competition: Revised Leniency Notice – Frequently Asked Questions' <http://europa.eu/rapid/press-release_MEMO-06-469_en.htm?locale=en> accessed 8 June 2018.

qualify for immunity. As guidance for assessing information, the threshold for immunity is to be linked with information needed by the competition authorities ‘to carry out a ‘targeted’ inspection in connection with the alleged cartel, which will allow for the inspections to be better focused.’¹⁰²⁰ Also, the applicants must disclose their participation in the cartel explicitly with all significant details. Evidence that requires little or no corroboration must be given greater value to strengthen dependence of reduction of fines on the quality of evidence. Also, additional discounts are to be provided if evidence is used to establish any additional facts increasing the gravity or duration of the infringement.

For greater certainty, for applicants and transparency of procedure, the meaning of genuine cooperation is to be clarified; for example, that this term means the obligation to provide ‘accurate, and complete information that is not misleading’¹⁰²¹ and ‘the obligation not to destroy, falsify or conceal information to cover also the period when the applicant was contemplating making an application.’¹⁰²² The threshold for immunity for applicants applying after the inspection is started should be set higher. In this case conclusive stand-alone evidence is to be provided. Therefore, a simple corporate statement ‘uncorroborated by other pieces of evidence which would not be used as evidence against other parties to the cartel if they all contradicted it in similar statements’¹⁰²³ would not be sufficient for obtaining the discount.

Applications for leniency in bid-rigging cases are to be synchronised with leniency for corruption crimes

Finally, immunity for bid-rigging should be extended to sanctions for corruption so that wrongdoers could report all illegal acts simultaneously. Luz and Spagnolo find that in bid-rigging people are less inclined to apply for leniency because many bid-

¹⁰²⁰ U.S. Dep’t of Justice Corporate Leniency Policy 1993, Part C; Scott D Hammond and Belinda A Barnett, ‘Frequently Asked Questions Regarding the Antitrust Division’s Leniency Program and Model Leniency Letters’ (2008) Question 23 <www.justice.gov/atr/public/criminal/239583.pdf> accessed 8 June 2018.

¹⁰²¹ European Commission, ‘Press Release - Competition: Commission Adopts Revised Leniency Notice to Reward Companies That Report Cartels’ (n 267).

¹⁰²² *ibid.*

¹⁰²³ *ibid.*

rigging cases schemes are often accompanied by corruption of public officials: ‘[i]n the absence of coordinated forms of leniency (or rewards) for unveiling corruption, a policy offering immunity from antitrust sanctions may not be sufficient to encourage wrongdoers to blow the whistle, as the leniency recipient will then be exposed to the risk of conviction for corruption’.¹⁰²⁴

As immunity for a cartel agreement does not cover corruption, an applicant is demotivated to confess in entering into an anti-competitive agreement. For example, Leslie says that a significant disincentive ‘for firms to expose their participation in a price-fixing cartel’ in the United States would be the fact that ‘a confession of price-fixing implicates more than just antitrust laws,’ since the firm ‘may simultaneously be admitting to securities laws violations,’ as well as mail fraud.¹⁰²⁵ Luz and Spagnolo agree that ‘the incentive created by the antitrust leniency policy to blow the whistle and collaborate may be neutralised, at least to some extent, by the disincentive of the risk of being sentenced to imprisonment or fined for the related infringements in the same or other jurisdictions’.¹⁰²⁶ In addition, cartels and corruption are subject to different types of jurisdictions, and in a cartel corruption scenario, an individual interested in immunity will have to apply to different authorities, which creates uncertainty and coordination issues.¹⁰²⁷

Meanwhile it is proved that leniency should work in the fight against corruption as well as in the fight against collusion¹⁰²⁸ because both cartels and corruption are multiagent offences which depend on a certain level of trust among wrongdoers, and this trust is what a leniency programme undermines by creating incentives for wrongdoers to whistle-blow on their partners and cooperate with the authorities.¹⁰²⁹

¹⁰²⁴ Luz and Spagnolo (n 86) 729.

¹⁰²⁵ Christopher R Leslie, ‘Antitrust Amnesty, Game Theory, and Cartel Stability’ (Social Science Research Network 2006) SSRN Scholarly Paper ID 924376
<<https://papers.ssrn.com/abstract=924376>> accessed 8 June 2018.

¹⁰²⁶ Luz and Spagnolo (n 86).

¹⁰²⁷ *ibid.*

¹⁰²⁸ Spagnolo, ‘Divide et Impera’ (n 86); Paolo Buccirossi and Giancarlo Spagnolo, ‘Leniency Policies and Illegal Transactions’ (2006) 90 *Journal of Public Economics* 1281.

¹⁰²⁹ Spagnolo, ‘Divide et Impera’ (n 86); Christopher R Leslie, ‘Trust, Distrust, and Antitrust’ (2004) 82 *TEX. L. REV.* 515; Bigoni and others (n 86).

For example, in Brazil, where anti-cartel enforcement is organised in the same way as in Russia, i.e. cartels are both an administrative offence and a crime, and bid rigging, is specifically targeted for criminal sanctions,¹⁰³⁰ the leniency programme provides that ‘the execution of a leniency agreement requires the suspension of the statute of limitations and prevents denunciation of the leniency beneficiary for each of the aforementioned crimes. Once the leniency agreement has been fully complied with by the agent, the punishments for the crimes will automatically cease’.¹⁰³¹ Similarly, exemption from cartel fines must be provided for those applying for leniency in corruption cases.

6.4.6. Benefits of the suggested reforms

Luz and Spagnolo point out that legal harmonisation, coordination and co-operation across jurisdictions become of even greater importance to fight cartels.¹⁰³² The changes suggested for reforming Russia’s leniency policy can become a step towards compliance with the ECN Model Leniency Programme. The focus on the quality of evidence will give a spark to reinforcing criminal sanctions. To do so, the policy should provide immunity for the first applicant submitting sufficient evidence to carry out an inspection if competition authorities have had no information about a cartel and for the first applicant providing compelling evidence when competition authorities already have sufficient evidence to adopt an inspection decision. Also, the discount on fines is to be determined for every particular case based on the value and quality of evidence. This procedure is to be supported by the marker system to secure applicants a place in a queue. Finally, the suggested reform will secure certainty and transparency of procedure as a successful corporate application will provide automatic immunity for individuals.

¹⁰³⁰ Lei No. 8.137, de 27 de Dezembro de 1990 [Economic Crimes Law], art. 4, Lei No. 8.666, de 21 de Junho de 1993 [Public Procurement Law], arts. 90 and 95 in Luz and Spagnolo (n 86) 744.

¹⁰³¹ Lei No. 12.529, de 30 de Novembro de 2011 [Competition Law] article 87 in *ibid.*

¹⁰³² Luz and Spagnolo (n 86).

6.5. Future research

A number of aspects of anti-cartel enforcement in Russia that arose during the execution of the project have been left aside due to the limitation of the research and timeframes of doctoral theses.

There are at least two good reasons to reconsider the scope of an undertaking for anti-cartel enforcement in Russia. First, to cease the misuse of the cartel offence against imitation of competition discovered in Chapter 5. Second, this is an important and yet realistic measure to make fines imposed on cartel members more proportionate to the seriousness of the violation. As it is established in Chapter 4, anti-cartel fines are based on the turnover of the legal entity, and its affiliates are not counted to calculate fines. In this mode, the economic power of the violator is ignored, the amount of the fine is not punitive, and the cartel is even more profitable.

Russian legal tradition applies administrative sanctions to a legal entity even if it is a part of a holding or other economic entity. This approach has a few implications for anti-cartel enforcement. First, even if an entity is a part of a powerful group holding a significant share of the market, the fine for the cartel agreement is being calculated based on sales of the particular entity. Second, the exemption from cartel fines is formulated in a way that if companies have shares in each other of less than 50%, they are considered independent market players regardless of their actual relationships within the group. This is one of the reasons for treating the imitation of competition on tenders as a cartel agreement. Altogether, further research of a concept of the undertaking is necessary to make fines adequate to be a hazard to cartels and then to exclude an abnormal number of infringements which are not cartels so that competition authorities could focus on the most dangerous violations.

Many findings of this thesis highlight the importance of the survey of people's attitude towards markets and cartels and their actions regarding criminal immunity. Whelan notes that 'empirical evidence on the cultural sensitivity of perceptions of (and attitudes towards) cartel activity' would help to come to a firmer conclusion regarding

objectives of cartel criminalisation¹⁰³³ and to assess difficulties of ‘conveying the immoral content of cartel activity.’¹⁰³⁴ Empirical studies in the form of questionnaires and interviews with individuals will indicate the correlation between attitudes to price fixing and the severity of sanctions. This research will help to set objectives of cartel criminalisation more clearly and to find a way to employ the harmful effects of anti-competitive conduct for normative justification.

Further research is required into the relationship between the objectives of competition law and the specifics of national criminal law which may relate to the effectiveness of cartel criminal regime, such as the balance of rights, judicial independence, benefits of introducing the jury for hearing this sort of infringement.

From a more global perspective, further research into the relationship between democracy and cartel enforcement is also important. The impact of a cartel criminal regime should also be assessed for legal provisions against corruption because there is a risk that anti-corruption laws may undermine the effectiveness of leniency programs against bid rigging in public procurement.¹⁰³⁵ This topic also goes beyond the scope of one jurisdiction, given the size of public procurement markets and their propensity for cartelization.¹⁰³⁶

Finally, ‘better performance required greater insight into how the structure and operations of public institutions shaped policy results.’¹⁰³⁷ Meanwhile, there are not many attempts to understand Russia’s implementation mechanism of anti-cartel laws through the study of policy operators. An understanding of bureaucracy will predict the path between the solution and its actual performance. As policy outcomes, good

¹⁰³³ Whelan, *The Criminalization of European Cartel Enforcement* (n 28) 314.

¹⁰³⁴ *ibid.*

¹⁰³⁵ Luz and Spagnolo (n 86).

¹⁰³⁶ *ibid.*

¹⁰³⁷ William E Kovacic, ‘The Institutions of Antitrust Law: How Structure Shapes Substance’ 110 *Michigan Law Review* 1019.

and bad, often reside in the institutional framework,¹⁰³⁸ institutions are the next direction for further research.

6.6. Concluding remarks

The purpose of the concluding chapter was to address the inconsistencies of the Russian criminal anti-cartel regime, as identified in this thesis, by developing a complex reform which could reinforce the criminal cartel offence and help Russia to achieve the purposes of cartel criminalisation. The cartel offence in its current reading is practically unenforceable to the most typical cartel arrangements; also, it contains conflicting and confusing provisions that may mislead enforcers. The errors in the design of the cartel offence have resulted in the misapplication of the cartel offence to crimes that have nothing in common with the violation of competition, while cartelists go unpunished. Decriminalisation of the cartel offence in Russia would result in abandoning punitive enforcement because administrative fines there are insignificant.

The suggested reform achieves this purpose through reinforcing the objective of the criminal anti-cartel enforcement, formulating the *per se* prohibition, justifying the new reading of Russia's cartel offence, balancing the two regimes of anti-cartel sanctions and introducing one consistent, single leniency programme. As a result, enforcing agencies, business and consumers receive a univocal signal that cartels are corrupt, enforcing agencies get clearer guidance for more effective enforcement, elimination of insignificant wrongdoings frees resources of competition authorities for more serious violations. This reform is a clear movement towards global trends in enforcement of cartel laws, because competition authorities always prioritise *per se* cases, which are much easier to investigate and manage, and there is very little effects-based enforcement.

The chapter also goes some way in helping to remedy the presently disconnected rules of the dual regimes, often unjustified, by the policy establishing the new focuses for Russia's fight against cartels. It fills an important gap in the concept of cartels in Russian law by introducing a new scope of the cartel definition. Establishing a

¹⁰³⁸ Daniel A Crane, *The Institutional Structure of Antitrust Enforcement* (Oxford University Press 2011).

threshold for the administrative wrongdoing and removing of individual administrative sanctions makes it possible to formulate the offence without a certain amount of gain or damage as a criterion of social danger and thus maximise clarity in the scope of the prohibited behaviour. As for effective criminal enforcement, it must be clear what is to be prohibited and punished;¹⁰³⁹ the consistent offence provides a better ground for popular condemnation of cartels and helps to convince courts that cartels ‘should attract a criminal conviction that carries with it a possible custodial sentence’.¹⁰⁴⁰

In addition to the practical recommendations strengthening cartel criminalisation, this chapter fills an important gap in the long-awaited justification for why harm should be removed from Article 178 of the Criminal Code and why cartel is a *per se* offence.

The chapter results strengthen the arguments that harm cannot be for the design of the cartel offence because ‘the nature of the harm caused by cartels is ill-suited to response through the criminal law’.¹⁰⁴¹ Indeed, the protection of the ever-shifting consumer surplus is not the type of harm which should be restricted through the criminal law because it is too fleeting.¹⁰⁴² Moreover, the removal of damage and gain from Article 178 also establishes the more transparent relationship between administrative enforcement and the cartel offence, because it would make the utilitarian arguments of optimal deterrence more convincing: the deterrent effect of financial sanctions is to be examined for corporations only, corporate harm is to be addressed through the courts in actions for damages, and the criminal offence addresses the role of individuals in forming cartels.¹⁰⁴³ A judge can assess the size, duration or damage caused by a cartel ‘to address the severity of offending while sentencing.’¹⁰⁴⁴

Design of the offence in Article 178 of the Criminal Code as entering into a prohibited agreement relies on the delinquency of cartels as Joshua and Harding define it: the

¹⁰³⁹ Macculloch (n 51).

¹⁰⁴⁰ Stephan, ‘Four Key Challenges to the Successful Criminalization of Cartel Laws’ (n 26).

¹⁰⁴¹ Macculloch (n 51).

¹⁰⁴² Wardhaugh, ‘A Normative Approach to the Criminalisation of Cartel Activity’ (n 961).

¹⁰⁴³ Macculloch (n 51).

¹⁰⁴⁴ *ibid.*

‘combining of conscious defiance, collusive action, and trickery (in the sense of pretending to be good competitors and duping the system)’.¹⁰⁴⁵ This design is also consistent with MacCulloch’s statement that the delinquency of the cartel comes from the intentional violation of the expected norms of competitive markets.¹⁰⁴⁶ The suggested new wording may perform an educative function and highlight that cartels harm means a strike at competitive markets as an important institution and thus define cartels as an attack on individual freedom¹⁰⁴⁷ rather than on property.

The findings and arguments contained in this thesis have helped to strengthen the arguments for one-stop shop leniency programme which will induce firms and individuals to self-report, instead of attempting to correct the violator as the current criminal leniency does. Most importantly, detection of cartels should be recognised as a principal purpose of leniency. Thus, the introduction of conditions for immunity in the cases when an inspection has been carried out and a comprehensive list of characteristics of evidence are required for granting immunity. The suggested programme accelerates tension between members of the cartel and makes leniency a detecting tool. A single leniency policy should deal not only with secret cartels but also corruption crimes on tenders linked with agreements on tenders.

To sum up, this chapter comes as the first blueprint for reforms of cartel criminal regime which considers both the specifics of Russia’s law system and the objectives of cartel criminalisation internationally acknowledged.

¹⁰⁴⁵ Harding and Joshua (n 11) 277.

¹⁰⁴⁶ MacCulloch (n 51) 82.

¹⁰⁴⁷ Wardhaugh, ‘A Normative Approach to the Criminalisation of Cartel Activity’ (n 347).

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Appendix 1. Leniency conditions

Administrative leniency (corporate and individual)

Full exemption

Note 1 to Article 14.32 of the Code of Administrative Offences

The first individual (or a company) voluntarily reported to the federal antimonopoly service or its territorial body on the participation in a horizontal agreement or concerted practices shall be exempt from administrative sanctions if:

- (a) at the time of reporting the competition authority did not have the relevant information and documents about cartel;
- (b) a violator terminated participation in the agreement and
- (c) information and documents submitted are sufficient to establish the fact of an administrative offence.

Fine Discount

Note 5 to Article 14.32

The minimum (1 per cent or 0.3 per cent) fine shall be imposed on the second and third applicants (corporations only) voluntarily reported to the federal antimonopoly service or its territorial body on the participation in a horizontal agreement, or concerted practices or an agreement with a state body if:

- (a) a company admits the fact of infringement of the law;
- (b) a violator terminated participation in the agreement ;
- (c) information and documents submitted are sufficient to establish the fact of an administrative offence;
- (d) a company is not an organiser of a prohibited agreement

Criminal leniency (individuals)

Specific exemption

Note 3 to Article 178 of the Criminal Code

An individual committed the crime shall be exempt from criminal sanctions if

- (a) an individual is first among the accomplices of the crime who voluntarily report this crime;
- (b) an individual actively contributed to disclosure and (or) investigation of a crime;
- (c) an individual compensated the damage or otherwise redressed the harm caused by this crime;
- (d) there is no other crime in an individual's actions.

General exemption

Article 76.1 of the Criminal Code

A first-time offender shall be exempted from liability for concluding an anticompetitive agreement under para 1 of Article 178 of the Criminal Code (a cartel agreement without aggravating factors) if an offender:

- (a) has compensated the damage caused by the crime to an individual, an organisation or the, and transferred to the federal budget a compensation in the doubled amount of the damage, or
- (b) has transferred to the federal budget the gain obtained as a result of the crime and compensation in the amount of doubled gain obtained as a result of the crime, or
- (c) has transferred to the federal budget an amount of damages done as a result of the crime and compensation in the amount the doubled amount of these damages, or
- (d) has transferred to the federal budget an amount equivalent to the amount of the committed crime, and a double amount of this amount.