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MASTER THESIS

„Comparative Analysis of Cartels under EU and Russian Competition Laws"

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List of Abbreviations

EC	European Commission
ECJ	European Court of Justice
FAS (RF)	Federal Antimonopoly Service (of the Russian Federation)
GC	General Court
LP	Leniency Program
LPC (RU)	Federal Law on Protection of Competition (RU)
MIA (RF)	Ministry of Inner Affairs (of the Russian Federation)
MFC clause	Most-Favored-Customer clause
MFN clause	Most-Favored-Nation clause
NCAs	National Competition Authorities
SC RF	Supreme Court of Russian Federation
RF	Russian Federation

Chapter 1 Introduction

1.1 Cartels and their impact on competition

"People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices."
Adam Smith

Competition between undertakings is essential in the commercial world due to many reasons, such as the enhancement of consumer welfare, innovation and efficient allocation of resources.[1] As a result of these advantages to the economy, competition authorities throughout the world aim to protect competition on the market.[2] In the EU, this objective is observed by Article 101 TFEU,[3] and in the Russian Federation (RF), the protection of competition is set out as an objective in Article 6 of the Law on Protection of Competition (LPC).

Competition is distorted when undertakings cooperate with one another. When the result of such cooperation is price fixing, agreement on output limitation, market/customer sharing, participation in bid-rigging, we speak of a cartel.[4] The problem of a cartel is that it ultimately leads to the distortion of competition, as a result of collusion and consumer harm.[5]
Collusion means that competing undertakings secretly come together to arrange and carry out the unlawful behavior.[6] More collusion is expected in a highly concentrated market, since this type of market facilitates the coordination of the market behavior.[7]
The definition of a consumer harm is a matter of economic assessment, but, it is generally understood as loss of economic efficiency, distortion in investment, and a transfer of wealth from consumers to cartelists.[8]

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[1] Richard Whish and David Bailey, Competition Law (7 edn, Oxford University Press 2012) 19; Elena Kremyanskaya, 'Cartels in Russia: Fight Chronicles: Way to Success ' [2011] 2(1) New J Eur Crim L 426-440
[2] Art. 8 and 34 Constitution of RF (RU); Richard Whish and David Bailey, *Competition Law* (7 edn, Oxford University Press 2012) 19; Elena Kremyanskaya, 'Cartels in Russia: Fight Chronicles: Way to Success ' [2011] 2(1) New J Eur Crim L 426-440
[3] Communication from the Commission – Notice - Guidelines on the Application of Art 81(3) of the Treaty [2004] OJ C 101/97, para 13
[4] Richard Whish and David Bailey, Competition Law (7 edn, Oxford University Press 2012) 513
[5] Angela Korzhevskaya, 'Achieving a competition compliance culture in Russia: Assessing the UK experience in compliance programmes to deter cartels' [2015] 3(2) Russian Law Journal 63
[6] Christopher Harding, 'Hardcore cartel conduct as crime: The jurisdiction for criminalisation in the European Context Cartel Crime' [2012] 3(2) New Journal of European Criminal Law 150
[7] Gyuzel Yusupova, Leniency program and cartel deterrence in Russia: effects assessment (1 edn, National Research University Higher School of Economics 2013) 8
[8] Christopher Harding, 'Hardcore cartel conduct as crime: The jurisdiction for criminalisation in the European Context Cartel Crime' [2012] 3(2) New Journal of European Criminal Law 148

In view of cartel's negative impact on the world economy and public interest, cartels are considered to be the foremost socially harmful anticompetitive practice, subject to severe fines and sanctions in various jurisdictions.[9]

In this thesis, a subject for comparison is the regulation of cartels in EU and Russian jurisdictions. These jurisdictions are chosen because, at first sight, they seem to have different competition laws and competition practices due to different political, social and economic structures. However, after a closer analysis, they show more similarities than differences in a cartel regulation.

1.2 Central research questions

- What are the exact similarities and differences in the EU and Russian jurisdictions in the way they define, enforce and detect cartels?

- Do all agreements between competitors that restrict competition on the EU and Russian markets constitute a cartel agreement?

- Is the introduction of a compliance program in a company an effective instrument to reduce the emergence of cartels?

1.3 Academic hypothesis (and subsidiary aims)

There are similarities and differences in EU and Russian jurisdictions in relation to cartel regulation.

- Similarities are:
  - definition of cartels within the EU and Russian jurisdictions;
  - similar detection mechanisms of cartels;
  - the fact that both jurisdictions offer administrative sanctions to cartelists;
  - method of fine calculation to be imposed on cartelists.

- Differences are:
  - different enforcement authorities;

[9] Angela Korzhevskaya, 'Achieving a competition compliance culture in Russia: Assessing the UK experience in compliance programmes to deter cartels' [2015] 3(2) Russian Law Journal 63

- different regimes on the regulation of anticompetitive agreements;
- the availability of different sanctions to be imposed on cartelists.

- Not all agreements between competitors that restrict competition constitute cartel agreements. Apart from cartel agreements, there are other anticompetitive agreements, which restrict or distort competition on the market. The difference between these types of agreements is that under EU law cartel agreements will usually constitute restrictions by object, and therefore would unlikely be justified under Article 101(3) TFEU, as opposed to other anticompetitive agreements, which are more likely to be justified under Article 101(3) or Block Exemption Regulations.[10]
  In the Russian Federation, there is also a difference between cartel agreements and other types of anticompetitive agreements. Anticompetitive agreements under Russian law can be justified or exempted, unlike cartel agreements, which are prohibited per se.[11]

- Introduction of a compliance program is ineffective mechanism to decrease the emergence of cartels when used solely.

1.4 Structure of the Thesis

Present thesis is divided into seven chapters.
Chapter 1 is the introductory chapter. The differences and similarities of cartel regulation are described in Chapters 2 to 6. The last chapter (Chapter 7) will analyze the effectiveness of compliance programmes in cartel deterrence in comparison to the imposition of fines.

Thus, the overall aim of this thesis is to examine differences between European and Russian jurisdictions in relation to their cartel regulation. Furthermore, present thesis aims at finding out if corporate compliance programmes are an effective mechanism in cartel deterrence and if they can substitute traditional deterrent mechanism, namely, the imposition of fines on cartel members.

[10] Communication from the Commission: Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements [2011] OJ C 11/21
[11] Article 11 of the LPC (RU); I. V. Kiryushina, 'The notions of "agreements", "concerted actions" and "parallel behavior" in the doctrine and legislation of Russia' [2018] Izvestiya of Altai State University 159

Chapter 2 Definition of Cartel Agreements

2.1 Definition of a cartel agreement in the Russian Federation

Russia adopted its first competition legislation in 1991.[12] These initial provisions were based on EU anti-trust laws and EU anti-trust enforcement experience, however both, the anti-trust laws and the powers of the Russian competition authority were further characterized by a much wider scope.[13]

The term 'cartel' was codified only in 2011 by the new Law on Protection of Competition (LPC).[14] Article 11 of the LPC defines cartel agreements as agreements or concerted practices between competitors involved in price-fixing, bid rigging, market sharing, limitation of output, or collective boycotts.[15]

Article 11(1) of the LPC distinguishes further per se forbidden concerted practices and agreements (namely, cartel agreements) from concerted practices and agreements that are forbidden upon a condition of limiting the competition (namely, other anticompetitive agreements).[16]

2.2 Definition of a cartel agreement in the EU

Under EU law, Article 101(1) TFEU prohibits all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between

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[12] Ianis Girgenson and Anna Numerova, 'Reform of Russian Competition Law: it's a long way from Brussels to Moscow ' [2012] 3(3) Journal of European Competition Law 293

[13] D. Aleshin and others, Russian competition legislation (2nd edn, Higher School of Economics 2014) 4; Svetlana Avdasheva and Andrei Shastitko, 'Russian anti-trust policy: power of enforcement versus quality of rules ' [2011] 23(4) Post-Communist Economies 495

[14] Elena Kremyanskaya, 'Cartels in Russia: Fight Chronicles: Way to Success ' [2011] 2(1) New J Eur Crim L 426-440; Robert W. Orttung and Indra Overland, 'Russia and the formation of a gas cartel' [2014] 58(3) Problems of post-communism 53-66; Elena Kremyanskaya, 'Legal aspects of escape from criminal liability for cartelists in Russia' [2012] 3(2) New Journal of European Criminal Law 175

[15] Article 11 of the LPC (RU); Ianis Girgenson and Anna Numerova, 'Reform of Russian Competition Law: it's a long way from Brussels to Moscow ' [2012] 3(3) Journal of European Competition Law 297

[16] I. V. Kiryushina, 'The notions of "agreements", "concerted actions" and "parallel behavior" in the doctrine and legislation of Russia' [2018] Izvestiya of Altai State University 159

Member States and which have as their object or effect the prevention, restriction or distortion of competition.[17]

Although the term ‘cartel’ is not explicitly mentioned in this Article, cartel agreements are nevertheless caught by this Article.

Article 101(1) provides further with examples of different types of cartels, such as price-fixing, market allocation, output limitation etc.

2.2.1 The similarities in definitions of cartel agreements

Based on the definition of cartels in Article 11 of the LPC (RU) and description of anticompetitive agreements (including cartel agreements) in article 101 TFEU, it can be concluded that both jurisdictions consider cartels as agreements or concerted practices between competing undertakings, aimed at coordinating their competitive behavior on the market through various practices, such as price fixing, market sharing or customer allocation, the limitation of supply or production through bid rigging or otherwise.[18]

Furthermore, both jurisdictions provide that anticompetitive agreements can be concluded in written as well as oral forms.[19]

Additionally, under Russian LPC as well as under EC’s Guidelines, Regulations and EU case law, the distinction is drawn between vertical and horizontal anticompetitive agreements.[20] Horizontal agreements are defined as agreements between direct competitors, who are sellers or buyers in the same product market; vertical agreements are defined as agreements between

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[17] Article 101 of the Consolidated version of the Treaty on the functioning of the European Union (TFEU) [2012] OJ C326/47

[18] Art 11 of the LPC (RU); Art 101 of the Consolidated version of the Treaty on the functioning of the European Union (TFEU) [2012] OJ C326/47; Angela Korzhevskaya, 'Achieving a competition compliance culture in Russia: Assessing the UK experience in compliance programmes to deter cartels' [2015] 3(2) Russian Law Journal 63

[19] Article 18 (4) of the LPC (RU); Cristina Cucu, ‘Agreements, decisions and concerted practices: key concepts in the analysis of anticompetitive agreements’ [2013] 10(1) LESIJ 27-28; D. Aleshin and others, Russian competition legislation (2nd edn, Higher School of Economics 2014) 60 (RU)

[20] Art. 11 and 19 (4) LPC (RU); Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements OJ C 11/01, point 12; Commission Regulation (EU) No 330/2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices [2010] OJ L 102/01; Joined cases 56 and 58/64 *Consten and Grundig v. Commission* [1966] ECR 299, para 4

non-competing undertakings, one of which purchases goods or is a potential purchaser, and the second sells goods or is a potential seller. [21]

ECJ stated that an agreement which may affect trade between Member States and which has the object the prevention, restriction or distortion of competition within the internal market constitutes, **by its nature and independently of any concrete effects that it may have**, an appreciable restriction of competition.[22] Thus, in the EU case law, cartel agreements are considered to constitute restrictions by object or hardcore restrictions, which has following consequences: cartel agreements can never be exempted or benefit from the application of De Minimis Notice,[23]neither from Block Exemption resolutions,[24] and are further not likely to be justified under Article 101(3) TFEU (see Chapter 2.5.1. below).

In the Russian legislation, no formal distinction is made between restrictions by object and restrictions by effect. However, the fact that cartel agreements are, as according to Article 11 of the LPC, prohibited per se and that their effect on competition do not need to be proven, points out to the fact that they also constitute hardcore restrictions under Russian law.[25]

2.2.2 The differences in definitions of cartel agreements

Although the key terms in the definitions of cartels are identical in both jurisdictions, there are certain differences as well.

First of all, as opposed to Article 101 TFEU, Article 11 of the LPC contains explicitly the term “cartel”.

[21] Roman Mohov Mihailovich, 'Legal regime of anticompetitive agreements' [2018] 3(20) Politics, Economics and Innovations
[22] Case C-226/11 *Expedia Inc. v. Authorite de la concurrence and Others* [2012] OJ C 226-11, paras 36-37
[23] Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice) OJ C291/1, para 2
[24] See for e.g. Commission Regulation (EU) No 330/2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices [2010] OJ L 102/02
[25] Article 11 of the LPC (RU)

Secondly, the Russian law, in contrary to the EU law, expands the scope of prohibited cartel agreements to collective boycotting.[26]

Thirdly, the scope of cartel agreements in Article 11 of LPC is further expended to agreements between competitors that lead to allocation of the market by the selection of buyers or sellers, in other words, exclusive dealing agreements. In the EU, these collective exclusive dealing agreements are also anticompetitive agreements with an object or effect the restriction of competition. [27]

Furthermore, the personal scope of application of Article 11 of the LPC resp. Article 101 TFEU is different. Article 11 of the LPC (RU) equally applies to legal entities (both commercial and non-profit) and individuals (both Russian and foreign), as well as federal, local and municipal authorities, state non-budget funds and the Central Bank of Russia.[28]
Article 101 TFEU applies only to undertakings and does not apply to individual employees or officers of undertakings. The concept of 'undertaking' is defined broadly and can extend to any entity (legal or natural person) engaged in an economic or commercial activity, independently of its legal status, the way in which it is financed, and whether it is profit-making or not.[29]

Finally, in order for a cartel agreement to constitute an infringement of Article 101(1) TFEU, it must affect **trade** between Member States and the free play of competition to an appreciable extent.[30] In contrary thereto, the Russian definition of cartels does not include the condition of cartels affecting trade within a territory of the Russian Federation.[31]

[26] D. Aleshin and others, Russian competition legislation (2nd edn, Higher School of Economics 2014) 124 (RU); Angela Korzhevskaya, 'Achieving a competition compliance culture in Russia: Assessing the UK experience in compliance programmes to deter cartels' [2015] 3(2) Russian Law Journal 84
[27] Olav Kolstad, Object contra effect in Swedish and European competition law (Konkurrensverket 2009) 31
[28] https://gettingthedealthrough.com/area/5/jurisdiction/26/cartel-regulation-russia
[29] Commission Decision of 17.12.2018 relating to proceedings under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the Agreement on the EEA in Case AT.40428- Guess OJ L8455/24 para 94
[30] Case 22/71 *Béguelin Import v G.L. Import Export* [1971] ECR 950; Commission Notice on agreements of minor importance which do not appreciably restrict competition under art 81(3) [2001] OJ C368/13; Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice) [2014] OJ C291/01 para 4
[31] Article 11 of the LPC (RU)

2.3 Definition of an 'anticompetitive agreement' in EU and Russian jurisdictions

As set out above, **anticompetitive agreements** (including cartel agreements) in Russian and EU jurisdictions can manifest in a form of written or oral agreements.[32] Therefore, it is necessary to assess if the term 'anticompetitive agreement' is similarly defined in those two jurisdictions.

The Russian definition of the 'anticompetitive agreement' corresponds to the EU interpretation in EC's decisions and EU case law: anticompetitive agreements could be any agreements between undertakings, independently of whether they are regarded as agreements in a country where they were concluded or whether parties to this 'agreement' had an intention to make them legally binding. [33] Furthermore, anticompetitive agreements in both jurisdictions can include gentlemen agreements, rules of professional associations, and standard sale conditions. [34]These agreements also exist where they expresses joint intention of parties to behave on the market in a specific way, independently of the form of these agreements.[35]

Thus, cartel agreements do not have to fulfill any formal requirements as regards to the form or content in order to constitute a valid cartel agreement in EU and Russian jurisdictions.

[32] Article 18 (4) of the LPC (RU); Cristina Cucu, Agreements, decisions and concerted practices: key concepts in the analysis of anticompetitive agreements' [2013] 10(1) LESIJ 27-28; D. Aleshin and others, Russian competition legislation (2nd edn, Higher School of Economics 2014) 60

[33] Art 4 (18) and 8 of the LPC (RU); Case A40-97512/2013 (RU) and Case A40-143256/2013 (RU); D. Aleshin and others, Russian competition legislation (2nd edn, Higher School of Economics 2014) 119; Commission Decision of 17.12.2018 relating to proceedings under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the Agreement on the EEA in Case AT.40428 - Guess OJ L8455/24 para 96; Case 277/87 *Sandoz Prodotti Farmaceutici v Commission* [1990] ECR I-47, para 13; Case T-41/96 *Bayer v Commission* [2000] ECR II-3387, paras 67 and 173

[34] Art 4 (18) and 8 of the LPC (RU); Case A40-97512/2013 (RU) and Case A40-143256/2013 (RU); D. Aleshin and others, Russian competition legislation (2nd edn, Higher School of Economics 2014) 119; Commission Decision of 17.12.2018 relating to proceedings under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the Agreement on the EEA in Case AT.40428 - Guess OJ L8455/24 para 96; Case 277/87 *Sandoz Prodotti Farmaceutici v Commission* [1990] ECR I-47, para 13; Case T-41/96 *Bayer v Commission* [2000] ECR II-3387, paras 67 and 173

[35] Art 4 (18) and 8 of the LPC (RU); Case A40-97512/2013 (RU) and Case A40-143256/2013 (RU); D. Aleshin and others, Russian competition legislation (2nd edn, Higher School of Economics 2014) 119; Commission Decision of 17.12.2018 relating to proceedings under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the Agreement on the EEA in Case AT.40428 - Guess OJ L8455/24 para 96; Case 277/87 *Sandoz Prodotti Farmaceutici v Commission* [1990] ECR I-47, para 13; Case T-41/96 *Bayer v Commission* [2000] ECR II-3387, paras 67 and 173

2.4 Definition of a 'concerted practice' in EU and Russian jurisdictions

Cartels can also manifest in a form of a concerted practice.

"Concerted practices" in Russian legislation are defined in Article 8 of the LPC: "concerted practices are deemed to take place when several undertakings acted in such a way that (i) the result of their actions is in the interest of each involved undertaking, (ii) undertakings had prior knowledge of each other's actions due to the **public announcement** by one of these undertakings on the commission of such actions and (iii) the actions of each of these undertakings are caused by the actions of other undertakings participating in concerted actions, and are not the result of circumstances that equally affect all undertakings in the relevant market."[36]

Concerted practices in Russian jurisdiction, unlike anti-competitive agreements, do not suggest any prior arrangements between competitors: the mere characteristics of these actions (e. g. unjustified increase of prices, discrimination of some suppliers and etc) suggests already the provision of this information to the competitors.[37] Concerted practices are exempted under Russian law if the participants hold a combined market share of maximum 20% or less **and** if each participant holds a share of 8% or less.[38]

In the EU, the notion of 'concerted practices' is not defined by law. ECJ defines them as covering "a form of coordination between undertakings, which, without having reached the stage where an agreement properly so called has been concluded, knowingly substitutes practical co-operation between them for the risks of competition".[39] As opposed to the requirement in Article 8 LPC (RU) stating that the result of the actions of undertakings must be in the interest of each involved undertaking, it is not required in the EU case-law that coordination is in the interest of all the undertakings concerned in order to constitute a concerted practice.[40]

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[36] D. Aleshin and others, Russian competition legislation (2nd edn, Higher School of Economics 2014) 60

[37] D. Aleshin and others, Russian competition legislation (2nd edn, Higher School of Economics 2014) 60

[38] Article 11.1 (5) LPC (RU); Ianis Girgenson and Anna Numerova, 'Reform of Russian Competition Law: it's a long way from Brussels to Moscow ' [2012] 3(3) Journal of European Competition Law 297

[39] Case 48/69 *Imperial Chemical Industries Ltd. v Commission of the European Communities* [1972] ECR I-62; Case 57/69 *ACNA v Commission* [1972] ECR-935; Joined Cases C- 40/73 and 41/73 and others *Suiker Unie and Others v Commission* [1975] ECR I-1668

[40] Communication from the Commission – Notice - Guidelines on the Application of Art 81(3) of the Treaty [2004] OJ C 101/97, para 15; Case C-453/99, Courage v Crehan, [2001] ECR I-6297; Case T-25/95 Cimenteries CBR v Commission [2000] ECR II-508, para 3444

ECJ states further that the economic concept of 'tacit collusion' lies in the basis of a decision on a concerted practice; 'tacit collusion' is defined by the ECJ as a market situation, in which market participants do not make any explicit arrangements with one another, but by orienting at each other's market behavior, make decisions in a way that the market price becomes higher than what it would be in a competitive environment.[41]

In the European jurisdiction, tacit collusion is distinguished from a concerted practice.[42] Tacit collusion can only lead to a concerted practice when the price fixing is a result of the information exchange between competitors (case Dyestuffs)[43] and cannot be justified by any other objective reasons (Woodpulp case)[44] (see Figure 1 below).

Tacit collusion in the EU jurisdiction mainly refers to the concept of "collective dominance", as for example, in the context of merger control: undertakings engaged in a tacitly collusive conduct prior to a merger can hold a position of pre-existing collective dominance.[45]

Collective dominance is also caught by Article 102 TFEU, which states that "any abuse by one or **more undertakings** of a dominant position" is unlawful. Thus, collective dominance refers to the situation when several undertakings are jointly dominant.[46]

It has been stated that the concept of "collective dominance" fills an important gap in European anti-trust policy, since threats to competition can arise even in the absence of single dominant undertaking on the market: this is the case when undertakings engage in a tacit collusion, since their behavior may then approach that of a single dominant undertaking.[47]

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[41] Case 48/69 *Imperial Chemical Industries Ltd. v Commission of the European Communities* [1972] ECR I-62, paras 101-104, 111-113, 119; Case 49/92 *Commission v Anic Partecipazioni* [1999] ECR I-4162, para 118; D. Aleshin and others, Russian competition legislation (2nd edn, Higher School of Economics 2014) 60;
[42] Richard Whish and David Bailey, Competition Law (7 edn, Oxford University Press 2012) 559
[43] Case 48/69 *Imperial Chemical Industries Ltd. v Commission of the European Communities* [1972] ECR I-62, paras 101-104, 111-113, 119
[44] Joined cases C- 89, 104, 114, 116, 117 and 125 to 129/85 *A. Ahlström Osakeyhtiö and others v Commission* [1988] ECR I-5233, para 71
[45] Felix Mezzanotte, 'Using abuse of collective dominance in Article 102 TFEU to fight tacit collusion: the problem of proof and inferential error' [2010] 33(1) World Competition 77; Case C-413/06 P *Bertelsmann and Sony Corporation v. Impala* [2008] ECR I-04951, paras 122-123
[46] Liyang Hou, 'Collective Dominance within the context of EU Electronic Communication Regulations' [2009] 10(3) Competition and Regulation in Network Industries 280
[47] Patrick Rey, 'Collective dominance and the Telecommunications Industry' in PA Buigues and P Rey (eds), The Economics of Antitrust and Regulation in Telecommunications (Cheltenham, Edward Elgar 2004), 91; Patrick Massey & Moore Mcdowell, 'Joint dominance and tacit collusion: some implications for competition and regulatory policy' [2010] 6(2) European Competition Journal 431

Tacitly colluding undertakings that are collectively dominant distort the competition on the market, as they may operate in such a way as to result in higher prices and profits for these undertakings, but a social welfare loss to consumers.[48] Furthermore, due to their substantial market power these undertakings can maintain prices above competitive levels for a significant period of time or to maintain output in terms of product quantities, product quality and variety or innovation below competitive levels for a significant period of time. [49] Thus, collective dominance as a result of tacit collusion leads to the restriction of competition on the market.[50]

Tacitly colluding undertakings infringe Article 102 TFEU by engaging in exploitative practices, like exerting exclusionary actions or excessive pricing.[51] In case of abuse of their dominance in order to maintain or increase this position of market power, these firms can be a subject to Article 102 TFEU.[52]

Thus, tacitly colluding undertakings which become jointly dominant can be sanctioned under Article 101 (1) TEFU,[53] , Merger Control regulation and Article 102 TFEU.[54]

In Russian case law, tacit collusion is described as a coordinated outcome that can be reached without any communication between the undertakings concerned.[55] The difference with the EU approach is that tacit collusion in the RF equals to the concerted practice. [56] Therefore, Russian provisions defining tacit collusion lead to the increase of false positives (meaning that tacit collusion will be regarded in the RF as a concerted practice) and thus generate costs for unjustly accused suppliers.[57]

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[48] Jason Gudofsky and others, Abuse of joint dominance Is the cure worse than the disease? (1 edn, Blake, Cassels & Graydon LLP 2010) 1

[49] Communication from the Commission – Notice - Guidelines on the Application of Art 81(3) of the Treaty [2004] OJ C 101/97, para 25

[50] Jason Gudofsky and others, Abuse of joint dominance Is the cure worse than the disease? (Blake, Cassels & Graydon LLP 2010) 2

[51] Felix Mezzanotte, 'Can the Commission use Article 82 EC to combat tacit collusion' [2009] 4

[52] Felix Mezzanotte, 'Can the Commission use Article 82 EC to combat tacit collusion' [2009] 10

[53] Joined Cases C- 40/73 and 41/73 and others *Suiker Unie and Others v Commission* [1975] ECR I-1668, para 174

[54] Nicolas Petit, 'The oligopoly problem in EU competition law' in Ioannis Lianos and Damien Geradin (eds), *Handbook on European Competition Law* (Edward Elgar Publishing 2013) 305

[55] Cecile Aubert and others, "The impact of leniency and whistleblowing programs on cartels" [2006] 24(6) International Journal of Industrial Organisation 1247

[56] Art. 8 of the LPC (RU)

[57] Svetlana Avdasheva and Andrei Shastitko, 'Russian anti-trust policy: power of enforcement versus quality of rules ' [2011] 23(4) Post-Communist Economies 500

Russian anti-trust laws prohibit tacit collusion, not only because it equals to the concerted practice, but also due to the characteristics of the Russian market, namely: high concentration on the market, entry barriers and tradition of cooperation between suppliers, which increase the probability of coordination instead of competition.[58]

Undertakings simultaneously increasing prices, without having prior arrangements with each other can indicate the existence of a parallel behavior. ECJ has underlined in a number of cases that mere identical parallel behavior of undertakings does not constitute forbidden concerted practices, but in contradiction thereto, information exchange between competitors (as in the case Dyestuffs)[59] or/and the absence of other reasons for the explanation of these parallel actions (as in Wood Pulp case) [60] are evidences of a concerted practice. EU competition authorities consider that spontaneous parallel pricing is not illegal and that antitrust enforcement should focus on secret cartel agreements.[61]

Under Russian law, the conditions laid down in Article 8 of the LPC allow drawing a distinction between lawful parallel behavior from unlawful concerted practices: prior arrangements between competitors and absence of objective reasons that could explain their parallel behavior are indications of an unlawful concerted practice.[62]

Following characteristics of concerted practices are shaped by the EC and ECJ today:[63]

- autonomously, intelligently and reasonably adapting to a competitor's current and anticipated behavior on the market with no information exchange is not a concerted practice;[64]

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[58] Svetlana Avdasheva and Andrei Shastitko, 'Russian anti-trust policy: power of enforcement versus quality of rules ' [2011] 23(4) Post-Communist Economies 499
[59] Case 48/69 *Imperial Chemical Industries Ltd. v Commission of the European Communities* [1972] ECR I-62, paras 101-104, 111-113, 119
[60] Joined cases C- 89, 104, 114, 116, 117 and 125 to 129/85 *A. Ahlström Osakeyhtiö and others v Commission* [1988] ECR I-5233, para 71; D. Aleshin and others, Russian competition legislation (2nd edn, Higher School of Economics 2014) 61; Richard Whish and David Bailey, Competition Law (7 edn, Oxford University Press 2012) 569
[61] Case 48/69 *Imperial Chemical Industries Ltd. v Commission of the European Communities* [1972] ECR I-62, paras 66-67; Steffen Brenner, 'An empirical study of the European corporate leniency program' [2009] 27(6) International Journal of Industrial Organisation 639
[62] I. V. Kiryushina, 'The notions of "agreements", "concerted actions" and "parallel behavior" in the doctrine and legislation of Russia' [2018] Izvestiya of Altai State University 159
[63] D. Aleshin and others, Russian competition legislation (2nd edn, Higher School of Economics 2014) 135
[64] Joined Cases C- 40/73 and 41/73 and others *Suiker Unie and Others v Commission* [1975] ECR I-1668; Case 172/80 *Züchner v Bayerische Vereinsbank AG* [1981] ECR 2023

- one-sided transfer of individualized commercial sensitive information (on e.g. prices) or mutual exchange of this type of information can indicate a concerted practice;[65]
- alignment of pricing behavior on the product market due to announcement of pricing principles by some undertakings is an indication of a concerted practice.

See below Figure 1 for understanding how these concepts relate to each other in the EU:[66]

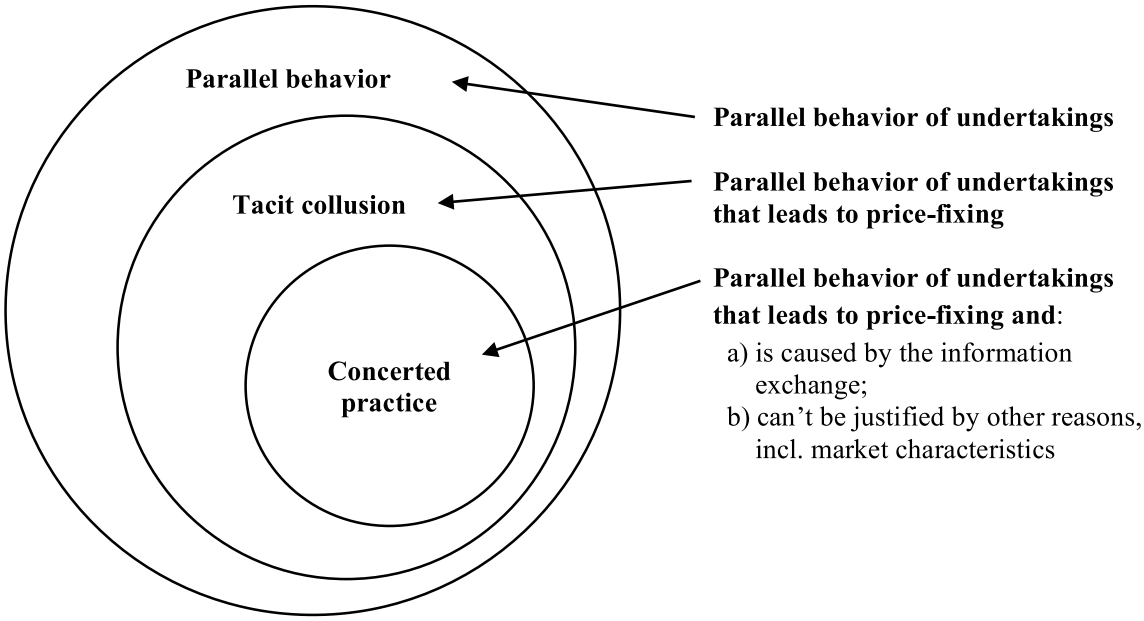

Figure 1: Parallel Behavior vs. Tacit Collusion vs. Concerted practice

According to Figure 1, parallel behavior of undertakings can comprise tacit collusion, if it leads to price-fixing. Furthermore, parallel price-fixing, which is caused by the information exchange, and cannot be justified by any other reasons (such as market characteristics) constitutes a concerted practice. The last condition is similar to the Russian one, defined in Article 8 of the LPC: "parallel actions which are not the result of circumstances that equally affect all undertakings in the relevant market are a concerted practice".

HAC RF (Highest Arbitral Court of the Russian Federation) stated the same in this regard: "actions taken by several undertakings uniformly and synchronically could be an indication of a concerted practice, if other objective reasons for this behavior are absent".[67] Thus, the

[65] Case 49/92 *Commission v Anic Partecipazioni* [1999] ECR I-4162
[66] Ianis Girgenson and Anna Numerova, 'Reform of Russian Competition Law: it's a long way from Brussels to Moscow ' [2012] 3(3) Journal of European Competition Law
[67] Resolution of the Plenum of the Highest Arbitral Court of the Russian Federation of 30.06.2008 N 30, para 2 (RU)

difference between lawful and unlawful parallel behavior in the Russian jurisdiction lies in the presence or absence of objective factors, which cause parallel actions of competitors on the same product market.[68]

In the Woodpulp case, ECJ stated that price announcements and other public statements by market participants do not necessary reveal the existence of an anticompetitive agreement or concerted practice; they may constitute rational and legitimate behavior in oligopolistic market, since market players have the right to adapt to the existing and anticipated conduct of their competitors and parallel conduct can't be viewed as evidence of a cartel.[69]

From the other side, some public price announcements can constitute an anticompetitive agreement or a concerted practice, namely when they lead to the diminishing of uncertainty about the competitors' market behavior. Case AT.39850 (container liner shipping case) is relevant in this regard.[70] In this case, several container liner shipping companies published their intended price increases for identified routes on their websites, which allowed their competitors to coordinate own pricing behavior following this publication.[71]

In its preliminary findings, the EC indicated that these price announcements could constitute signaling which, by reducing the companies' level of uncertainty regarding competitors' pricing behavior or market strategy, diminished incentives to compete.[72] The EC considered this conduct as a concerted practice in violation of Article 101 (1) TFEU, since these pricing announcements can be seen as an invitation to collude and lead further to the adaptation of competitors' pricing behavior. In Article 8 of the LPC, public announcements are also one of the necessary conditions of a concerted practice.[73]

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[68] I. V. Kiryushina, 'The notions of "agreements", "concerted actions" and "parallel behavior" in the doctrine and legislation of Russia' [2018] Izvestiya of Altai State University 158
[69] Joined cases 89, 104, 114, 116, 117 and 125 to 129/85 *A. Ahlström Osakeyhtiö and others v Commission of the European Communities* 1988 ECR I-5233
[70] Commission Decision of 7.07.2016 relating to proceedings under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the Agreement on the EEA in Case AT.39850 OJ C32/7
[71] Commission Decision of 7.07.2016 relating to proceedings under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the Agreement on the EEA in Case AT.39850 OJ C32/7, para 6
[72] Commission Decision of 7.07.2016 relating to proceedings under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the Agreement on the EEA in Case AT.39850 OJ C32/7, para 9
[73] Article 8 of the LPC (RU); I. V. Kiryushina, 'The notions of "agreements", "concerted actions" and "parallel behavior" in the doctrine and legislation of Russia' [2018] Izvestiya of Altai State University 160

This is also the general principle underlying Article 101(1) TFEU, which states that each economic operator must determine independently the policy, that he intends to adopt on the market.[74] The type of coordination of behavior or collusion between undertakings is that where at least one undertaking vis-à-vis another undertaking adopts a certain conduct on the market or that as a result of contacts between them uncertainty as to their conduct on the market is eliminated or at least substantially reduced.[75]

2.5 Other anticompetitive agreements that do not constitute a cartel

2.5.1 Legal regime of anticompetitive agreements in the EU

Although all anti-competitive agreements (including cartel agreements) are prohibited by Article 101(2) TFEU, Article 101 (1) TFEU distinguishes between anticompetitive agreements that restrict competition by object and anticompetitive agreements that restrict competition by effect. [76] If an agreement is not restrictive of competition by object, it must be examined whether it has (actual or potential) restrictive effects on competition, i.e. whether it has anti-competitive effects.[77] Moreover, such negative effects must be appreciable, as Article 101(1) TFEU does not apply when these anti-competitive effects are insignificant.[78]

If an agreement has as its object the restriction of competition – what is always the case for cartels - there is no need to take account of its concrete anti-competitive effects.[79]

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[74] Case 49/92 *Commission v Anic Partecipazioni* [1999] ECR I-4162; Joined Cases C- 40/73 and 41/73 and others *Suiker Unie and Others v Commission* [1975] ECR I-1668, para 173

[75] Communication from the Commission – Notice - Guidelines on the Application of Art 81(3) of the Treaty [2004] OJ C 101/97, para 15

[76] Communication from the Commission – Notice - Guidelines on the Application of Art 81(3) of the Treaty [2004] OJ C 101/97, para 19

[77] Communication from the Commission – Notice - Guidelines on the Application of Art 81(3) of the Treaty [2004] OJ C 101/97, para 24; Case T-374/94 *European Night Services and Others v Commission* [1998] ECR II-3141

[78] Communication from the Commission – Notice - Guidelines on the Application of Art 81(3) of the Treaty [2004] OJ C 101/97, para 24; Case 5/69 *Völk v Commission* [1969] ECR 295, para 7; Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81 (1) of the Treaty on the Functioning of the European Union [2001] OJ C368/01, para 13

[79] Communication from the Commission – Notice - Guidelines on the Application of Art 81(3) of the Treaty [2004] OJ C 101/97, para 20

Under EU competition law, cartels are typically equated with horizontal naked restrictions, even though in the broad sense of the word, cartels cover both horizontal and vertical agreements (Article 101 TFEU covers both types of agreements). [80] 'Naked restraints' indicate that cartels seek to restrict competition without producing any objective countervailing benefits, which makes them unlikely to be justified under Article 101(3) TFEU.[81] That is why European competition authorities widely accept that only horizontal conduct should be included within the category of hardcore cartel agreements.[82] Horizontal restrictions (e.g. price fixing, market sharing, bid rigging and output limitation), in contrast to the vertical restrictions, are harming competition the most, because horizontal restrictions almost always increase the degree of monopolization of the product market.[83] In addition thereto, competition authorities have become more familiar with the pro-competitive objectives of vertical restrictions, which can also justify this trend towards a more permissive treatment of vertical restrictions.[84]

There are several types of anticompetitive agreements under the EU competition law:[85]
<u>(i) hard core cartel agreements:</u> the most harmful anticompetitive agreements with the object of restricting competition;[86]
<u>(ii) other anticompetitive agreements:</u> agreements between competitors, which do not have a purpose or object of limiting the competition, but have as a result restriction of competition;
<u>(iii) agreements of minor importance,</u> which do not appreciably restrict competition and do not have as object the restriction of competition, whereas each party to it and all parties together have an insignificant market share and market power;[87]
<u>(iv) agreements which do not have any impact on competition or agreements,</u> of which positive socio-economic effect overweighs significantly public's loss due to insignificant limitation of competition. The EU considers following agreements belonging to this last category:

[80] OECD, 'Recommendation on Effective Action against hardcore cartels', C (98)35 available at http://www.oecd.org/dataoecd/39/4/2350130.pdf
[81] OECD, 'Recommendation on Effective Action against hardcore cartels', C (98)35 available at http://www.oecd.org/dataoecd/39/4/2350130.pdf
[82] Ingeborg Simonsson, Legitimacy in EU Cartel Control (1st edn, Oxford: Hart Publishing 2010) 73-75
[83] Communication from the Commission on the application of the Community competition rules to vertical restraints [1998] OJ C 365/03
[84] Sandra Marco Colino, Vertical agreements and competition law: a comparative study of the EU and US regimes (1st edn, Oxford: Hart Publishing 2010) 100-102
[85] D. Aleshin and others, Russian competition legislation (2nd edn, Higher School of Economics 2014) 119
[86] Article 101(2) of the Consolidated version of the Treaty on the functioning of the European Union (TFEU) [2012] OJ C326/47; See Commission's approach to these agreements in Communication from the Commission – Notice - Guidelines on the Application of Art 81(3) of the Treaty [2004] OJ C 101/97
[87] See the EU approach to these agreements in the Commission Notice on Agreements of minor importance which do not appreciable restrict competition under art 81(3) [2001] OJ C 368/13

R&D agreements, specialization agreements etc., since they have a legitimate commercial purpose; they are restrictive by effect, not by object (not a hard-core restriction) and they create efficiencies, which are further passed-on to consumers. In this case, they are justifiable under Article 101 (3) TFEU.

2.5.2 Legal regime of anticompetitive agreements in Russia

In Russian law, following anticompetitive agreements are prohibited:[88]
(i) hard core cartel agreements between competitors, which are prohibited *per se;*
(ii) vertical agreements are prohibited when they lead to resale price maintenance or when dealers are prohibited by the seller to distribute products of the seller's competitors;
(iii) other agreements between undertakings are prohibited when they lead or may lead to the limitation or distortion of competition. For example, following agreements belong to this group: 1) an agreement imposing contractual terms on the counterparty, unfavorable to him or not related to the subject of the contract; 2) establishment of different prices for one and the same product, which cannot be economically, technologically or otherwise justified; 3) an agreement, whereby an undertaking creates an entry barrier to the market etc.

Thus, under the Russian Federal Law on protection of competition (LPC) cartels are prohibited per se and are not admissible; other anticompetitive agreements are prohibited only when they distort competition on the market. [89] Therefore, in order to trigger administrative liability of cartel participants, the fact of concluding a cartel within the meaning of 11 (1) of the LPC is sufficient.

In general, Russian legislation on anticompetitive agreements is inspired by Article 101 TFEU and by EU Block Exemptions:[90]

- Article 13 of the LPC provides a general exemption for some anticompetitive agreements and concerted practices, which is similar to one in article 101 (3) TFEU;

[88] Article 11 of the LPC (RU)
[89] Roman Mohov Mihailovich, 'Legal regime of anticompetitive agreements' [2018] 3(20) Politics, Economics and Innovations
[90] Ianis Girgenson and Anna Numerova, 'Reform of Russian Competition Law: it's a long way from Brussels to Moscow ' [2012] 3(3) Journal of European Competition Law 296

- there is a safe harbor for vertical and horizontal agreements;[91]
- the parties have a right to submit their draft agreements to FAS for preliminary review. This procedure is similar to the one which existed in the EU until 2004.

As a conclusion, both EU and Russian legislations offer a general exemption for some anticompetitive agreements and concerted practices. Furthermore, they both distinguish cartel agreements from other anticompetitive agreements in the sense that cartel agreements will usually constitute object restrictions while other anticompetitive agreements will in most cases constitute restrictions by effect.
As cartels will usually constitute object restrictions in both jurisdictions, there is no need for competition authorities to assess their anticompetitive effects. Finally, there exist safe harbors for anticompetitive agreements in both legislations, which makes it possible to exempt some of them in case a certain market share threshold is not exceeded.

2.5.3 Best price clauses

Best price clauses are another example of anticompetitive clauses/agreements, which constitute either object or effect restrictions depending on the jurisdiction in question.

Best price clauses ('best price guarantees across sellers') or sometimes referred to as MFN (Most Favored Nation) clauses are clauses included in vertical agreements (e.g. commercial agreements, distribution agreements) between a supplier and a customer, whereby the supplier promises the customer to always offer its best terms or rates (best price) for a product or a service or at least equally favorable prices (terms), as granted to any other customer.[92]

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[91] D. Aleshin and others, Russian competition legislation (2nd edn, Higher School of Economics 2014) 127. We find in the EU a similar de minimis rule (see Commission Notice on agreements of minor importance which do not appreciably restrict competition under art 81(3) [2001] OJ C 368/13).
[92] German Zaharov and Valentina Raker, "Regulation of vertical agreements in Russia and USA" (RU) [2013] 2 (18) Legal Insight 56; Gönenç Gürkaynak and others, 'Most-favored-nation clauses in commercial contracts: legal and economic analysis and proposal for a guideline [2016] 42(1) European Journal of Law and Economics 130

Regulation of best price clauses in the EU

The current EU competition law position is that MFN clauses will infringe Article 101(1) TFEU when in the individual circumstances of the case they result in an appreciable adversely effect on competition in the European Union.[93] This is likely to happen when parties to the agreement have a substantial market power.[94] Thus, best price clauses in the EU constitute restrictions by effect.

The EC regards best price clauses as restrictions by effect and not restrictions by object, which means that the EC has to make an assessment in which degree these clauses effect/limit/distort competition on the market.[95] Moreover, MFN clauses are presumed to have a lot of pro-competitive benefits which outweigh anticompetitive effects and, thus, are likely to be exempted under Article 101(3) TFEU.[96]

The fact that MFN clauses are regarded as effect restrictions by the EC is confirmed in the Case COMP/39847/E-BOOKS.[97]
EC opened proceedings against Apple and five international publishers, because it had concerns that these companies limited retail price competition for e-books in the EEA. Apple and these publishers switched from a wholesale model (where retailors determine the retail price) to agency agreements (where the publisher determines retail prices), which contained a retail price MFN clause.[98] This MFN clause provided that in the event retailors offered a lower price for e-books to consumers, each publisher would have to also lower the retail price of that e-book in the iBookstore.[99]

[93]Gönenç Gürkaynak and others, 'Most-favored-nation clauses in commercial contracts: legal and economic analysis and proposal for a guideline [2016] 42(1) European Journal of Law and Economics 145
[94]Gönenç Gürkaynak and others, 'Most-favored-nation clauses in commercial contracts: legal and economic analysis and proposal for a guideline [2016] 42(1) European Journal of Law and Economics 145
[95] https://eu-competitionlaw.com/lowest-price-guaranteed-best-price-clauses-come-under-fire/
[96] Gönenç Gürkaynak and others, 'Most-favored-nation clauses in commercial contracts: legal and economic analysis and proposal for a guideline [2016] 42(1) European Journal of Law and Economics 147
[97] Commission Decision of 12.12.2012 relating to proceedings under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement in Case COMP/39.847 OJ C73/17
[98] Commission Decision of 12.12.2012 relating to proceedings under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement in Case COMP/39.847 OJ C73/17 7
[99] Commission Decision of 12.12.2012 relating to proceedings under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement in Case COMP/39.847 OJ C73/17 7, para 20

The EC stated that wholesale price MFN clause is generally pro-competitive in nature as it allows retailers to offer lower retail prices, and to innovate, because they protect against discrimination and/or retaliation by publishers.[100] This shows EC's approach to these clauses: it considers them as restrictions by effect, since restrictions by object do not produce any pro-competitive benefits.

Another case that was decided by EC in relation MFN clauses is the Amazon e-book case (Case AT.40153- E-Book MFNS and related matters).[101]

In June 2015, EC opened an investigation against Amazon because EC had concerns about Amazon's practices regarding certain MFN clauses in its e-books distribution agreements.[102] These clauses required publishers to inform Amazon when offering more favorable terms elsewhere and to make them also available to Amazon.[103]

EC's preliminary assessment showed that these clauses were likely to make it impossible for Amazon's rivals to stand out and come up with innovative distribution models in order to challenge Amazon.[104] The contested clauses were preliminarily considered as hindering e-book suppliers and competing e-book retailers' ability and incentives to support and invest in alternative and differentiated business models and also e-book offerings[105]. Further, they appeared to be reducing the competitiveness of e-book retailers by limiting their ability and incentives to develop and differentiate their e-book offerings, thereby creating barriers to entry and expansion in the relevant markets.[106]

In summary, Amazon's practices regarding EC had made an assessment of its potential anti-competitive effects in this individual case (the contested clauses may have led to less choice,

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[100] Commission Decision of 12.12.2012 relating to proceedings under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement in Case COMP/39.847 OJ C73/17 7, para 26
[101] Commission Decision of 4.5.2017 relating to a proceeding under Article 102 of the TFEU and Article 54 of the EEA Agreement in Case AT.40153 - E-Book MFNS and related matters OJ C26/2, paras 7-10
[102] Commission Decision of 12.12.2012 relating to proceedings under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement in Case COMP/39.847 OJ C73/17 7, paras 2-5
[103] Commission Decision of 4.5.2017 relating to a proceeding under Article 102 of the TFEU and Article 54 of the EEA Agreement in Case AT.40153 - E-Book MFNS and related matters OJ C26/2, para 8
[104] Commission Decision of 4.5.2017 relating to a proceeding under Article 102 of the TFEU and Article 54 of the EEA Agreement in Case AT.40153 - E-Book MFNS and related matters OJ C26/2, paras 9-16
[105] Commission Decision of 4.5.2017 relating to a proceeding under Article 102 of the TFEU and Article 54 of the EEA Agreement in Case AT.40153 - E-Book MFNS and related matters OJ C26/2, paras 9-16
[106] Commission Decision of 4.5.2017 relating to a proceeding under Article 102 of the TFEU and Article 54 of the EEA Agreement in Case AT.40153 - E-Book MFNS and related matters OJ C26/2, paras 9-16

less innovation and higher prices for consumers) and has come to a conclusion that this clause is restrictive by effect.[107]

In contrary to the EC, it is not clear whether individual Member States consider MFN clauses as restrictive by effect or by object. See for example the following case “German competition authorities (Bundeskartellamt) versus Hotel Reservation Service (HRS)”. A ruling was delivered by the *Bundeskartellamt* in December 2013 stating that HRS had violated the German competition act by including a clause concerning "best price guarantee" in its agreements with hotel partners. [108]

According to this "most favored customer" clause, the hotels are to guarantee that HRS always gets the lowest price for rooms and that this price is at least as low as the price at which rooms are being offered through other booking portals.[109]

Bundeskartellamt found that the clause constituted an anti-competitive vertical restraint as the clause revokes price competition and lays down unfair entry barriers for companies entering the market.[110] As HRS has a market share of more than 30 %, Vertical Block Exemption Regulation did not apply in this case as HRS did not fall within the safe harbor.[111]

The German national competition authority assessed that the purpose of the clause is to limit competition and ordered HRS to remove the clause from the company's terms and to pay a penalty.[112] It decided further that this clause could not be justified under 101(3) TFEU, because the pro-competitive effects of these MFN clauses do not outweigh the anti-competitive effects.[113] It remained however an open question whether this MFC clause constitutes hard-core object restrictions or effect restrictions.[114]

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[107] Commission Decision of 4.5.2017 relating to a proceeding under Article 102 of the TFEU and Article 54 of the EEA Agreement in Case AT.40153 - E-Book MFNS and related matters OJ C26/2, para 17

[108] B 9-66/10 Decree in accordance with Section 32(1) of the Act against restraints of competition

[109] B 9-66/10 Decree in accordance with Section 32(1) of the Act against restraints of competition, page 2, para 1

[110] B 9-66/10 Decree in accordance with Section 32(1) of the Act against restraints of competition, page 6, para 1

[111] B 9-66/10 Decree in accordance with Section 32(1) of the Act against restraints of competition, page 6, para 2

[112] B 9-66/10 Decree in accordance with Section 32(1) of the Act against restraints of competition, page 3, para 2

[113] B 9-66/10 Decree in accordance with Section 32(1) of the Act against restraints of competition, page 6, para11

[114] B 9-66/10 Decree in accordance with Section 32(1) of the Act against restraints of competition, page 3, para 1; page 5, para 2; page 6, para 10

Regulation of best price clauses in the Russian Federation

Unlike the EU antitrust policy, in Russian competition legislation and enforcement practice, it is not specified to which degree the competition should be limited, which means that formally any restriction of intra-brand competition (i.e. restrictions of the actions of distributor/reseller in a vertical distribution agreement) can be considered illegal.[115]

Russian antitrust authority, when evaluating any vertical restraint, such as the best price clause, detects anticompetitive behavior based on limitations formally defined in law instead of making an analysis of the state of competition on the market and the impact of such clause on competition.[116] Thus, any vertical restraint, upon the sole condition that an undertaking has a market share of more than 20 %, can be considered illegal, regardless of its actual impact on competition.[117]

Thus, best price clauses are assessed more strictly in the RF than in the EU, since Russian competition authorities do not make an economic assessment on the actual impact of the best price clause on competition and consider this clause as illegal per se. Therefore, it is suggested that the Russian legislator finds a more realistic approach in relation to assessment of best price clauses.

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[115] German Zaharov and Valentina Raker, "Regulation of vertical agreements in Russia and USA" (RU) [2013] 2 (18) Legal Insight 57

[116] German Zaharov and Valentina Raker, "Regulation of vertical agreements in Russia and USA" (RU) [2013] 2 (18) Legal Insight 57

[117]German Zaharov and Valentina Raker, "Regulation of vertical agreements in Russia and USA" (RU) [2013] 2 (18) Legal Insight 57

Chapter 3 Detection Methods of Cartels

3.1 General detection methods of cartels in the EU and Russian Federation

The previous chapters described what cartel agreements are. This chapter analyses which detection methods of cartels are available for competition authorities.

In general, there are several ways to detect cartels. The following instruments are available for the European Commission under Reg. 1/2003:[118]

1) The power to conduct sector inquiries, which is linked to its role as the main enforcer of the European competition policy,
2) The possibility to lodge complaints about suspected infringement of the EU competition rules, for e.g. complaints on suspected cartels,
3) The power to carry out inspections in business premises and non-business premises,
4) Competence to request information for e.g. on existence of a cartel,
5) Possibility to conduct voluntary interviews,
6) The use of the Leniency Program.

For the Russian competition authority, traditional and innovative detection mechanisms are available.

Traditional methods of cartel detection, which already proved themselves and are used throughout the whole world, including the EU, are: [119]

1) The power to conduct planned or unplanned inspections on-site and off-site (dawn raids are on-site unplanned inspections);
2) The use of Leniency Program;
3) The possibility to lodge complaints by citizens, organizations/legal entities (customers, competitors included), law enforcement and other agencies on suspected existence of cartels;

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[118] Articles 19, 20, 21 of the Consolidated version of the Treaty on the functioning of the European Union [2012] OJ C326/47; Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1; Wouter P.J. Wils, 'The use of leniency in EU cartel enforcement: an assessment after 20 years' [2016] 39(3) World Competition 338
[119] RCC OECD-GVH, Informational bulletin No 8, January 2017, 21; https://gettingthedealthrough.com/area/5/jurisdiction/26/cartel-regulation-russia/

4) Own FAS' initiative, if it identifies signs of potential infringements through any other sources, for e.g. through publicly available sources (mass media, internet);
5) Instruction or query from another state authority;
6) Competence to request documents and information.

Innovative detection methods are based on electronization of all procedures: one single portal for publishing information on placement of state- and municipal orders (www.zakupki.gov.ru); one single portal for publishing information on the provision of tenders (www.torgi.gov.ru).[120] Thus, these innovative methods are based on the operational analysis and screening of the results from these competitive procedures.[121]

Thus, both competition authorities (European Commission and FAS) have several detection mechanisms in common, such as the power to carry out on-site and off-site inspections; the power to lodge complaints from various parties, the application for LPs and requests for information.

3.2 Leniency Programs

It shall be noted that both Russian and EU competition authorities consider leniency programs as the most prominent detection mechanism of cartels. [122] Therefore, it is important to understand what these programs are and if they are equally effective in the EU and Russian anti-trust policies.

The general purpose of offering a leniency program is to reduce the costs and efforts for competition authorities to detect cartels.[123] Another purpose is to incentivize individuals not to

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[120] RCC OECD-GVH, Informational bulletin No 8, January 2017, 21

[121] RCC OECD-GVH, Informational bulletin No 8, January 2017, 21

[122] Elena Kremyanskaya, 'Cartels in Russia: Fight Chronicles: Way to Success ' [2011] 2(1) New J Eur Crim L 426-440; Angela Korzhevskaya, 'Achieving a competition compliance culture in Russia: Assessing the UK experience in compliance programmes to deter cartels' [2015] 3(2) Russian Law Journal 64

[123] Gyuzel Yusupova, *Leniency program and cartel deterrence in Russia: effects assessment* (1 edn, National Research University Higher School of Economics 2013) 4; Wouter P.J. Wils, 'The use of leniency in EU cartel enforcement: an assessment after 20 years' [2016] 39(3) World Competition 339; Steffen Brenner, 'An empirical study of the European corporate leniency program' [2009] 27(6) International Journal of Industrial Organisation 644

participate further in cartels by offering them immunity from fines or fine reduction or not to become involved ab initio in a cartel.[124]

Leniency programs have been recently introduced in various jurisdictions and are a relatively new phenomenon. In the United States of America, LP was introduced in 1978; in Russia – in 2007; in Europe, the first LP was introduced in 1996, but then modified in 2002 so as to grant full immunity to the first reporting firm, with the effect that fewer cartels have emerged.[125]

3.2.1 The legal regime of LP in the European Union

The LP is defined under EU law as "a program, on the basis of which a participant in a secret cartel, independently of the other undertakings involved in the cartel, cooperates with an investigation of the competition authority, by voluntarily providing presentations regarding that participant's knowledge of, and a role in, the cartel in return for which that participant receives immunity from, or a reduction in fines for its involvement in the cartel."[126]

As set out above, the initial 1996 LP in the EU was subsequently modified in 2002.
In 2006, the Leniency Notice was once again amended, mainly to clarify the threshold for immunity in terms of provided information and the duty of cooperation: [127]

- immunity from fines will be granted by EC to the undertaking if is the first to submit information and evidence to the Commission, and if, at the time of application for immunity, the EC did not yet have sufficient evidence to adopt a decision to carry out an inspection and hadn't yet carried out such an inspection;[128]
- in order to qualify for immunity, the undertakings must cooperate genuinely, fully, on a continuous basis and the undertaking must have ended its involvement in the cartel

[124] Cecile Aubert and others, "The impact of leniency and whistleblowing programs on cartels" [2006] 24(6) International Journal of Industrial Organisation 1242
[125] Gyuzel Yusupova, Leniency program and cartel deterrence in Russia: effects assessment (1 edn, National Research University Higher School of Economics 2013) 3
[126] Council Directive 2014/104/EU of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union [2014] OJ L349/11
[127] Wouter P.J. Wils, 'The use of leniency in EU cartel enforcement: an assessment after 20 years' [2016] 39(3) World Competition 331
[128] Commission Notice on immunity from fines and reduction of fines in cartel cases [2006] OJ C298/17, points 8(a) and 10

immediately following its application.[129] Moreover, an undertaking which took steps to coerce other undertakings to join the cartel or to remain in it is not eligible for immunity.[130]

- undertakings that do not meet the conditions for immunity may still be eligible for a fine reduction, if they provide the EC with evidence that represents significant added value.[131]
- the first undertaking to provide such significant added value will receive a reduction of 30 to 50% of the fine that would otherwise have been imposed. The second undertaking a reduction of 20 to 30%, and the subsequent undertaking a reduction of up to 20%.[132]

Nowadays, Leniency Programs play a prominent role in the EU cartel enforcement and is the cartel detection mechanism number one, as shown in Table 1.[133]

Table 1. EC cartel decisions imposing fines

Period	Total number of EC cartel decisions imposing fines on cartelists	Number of decisions in which immunity from fines was granted by EC to the first reporting cartelist under the LP
1986-1990	9	-
1991-1995	8	-
1996-2000 (first LP regime)	10	1
2001-2005 (first modification)	33	20
2006-2010 (second modification)	31	25
2011-2015	23	21

[129] Commission Notice on immunity from fines and reduction of fines in cartel cases [2006] OJ C298/17, points 12 and 22
[130] Commission Notice on immunity from fines and reduction of fines in cartel cases [2006] OJ C298/17, point 13
[131] Commission Notice on immunity from fines and reduction of fines in cartel cases [2006] OJ C298/17, points 23 and 24
[132] Commission Notice on immunity from fines and reduction of fines in cartel cases [2006] OJ C298/17, point 26
[133] Wouter P.J. Wils, 'The use of leniency in EU cartel enforcement: an assessment after 20 years' [2016] 39(3) World Competition 337

As shown in Table 1, since the first modification of the LP regime in 2002, in the majority of cartels cases, whereby the Commission imposed fines on cartelists, application was made to the LP and immunity was granted to the first reporting cartelist. This proves the fact that cartelists were becoming with time more and more incentivized to apply for the LP as a first cartel participant, in order to receive the immunity from fines. This statistic confirms also at the same time that the introduction of the LP has increased the number of cartels detected and punished.

Another recent statistical study of 52 European Commission's cartel decisions between 1 May 2004 and 1 May 2014 has shown that of 333 undertakings involved in these 52 cases, 56% applied for leniency and 46% were granted leniency, including 11% immunity from fines, and the fines of 186 undertakings were reduced by 37.8%; out of 333 undertakings, the average fine reduction amounted to 21.1%.[134] This points out once more the successful functioning of the LP in the EU.

3.2.2 The legal regime of LP in the Russian Federation

As mentioned above, the LP was introduced in the Code of Administrative Offences of the Russian Federation in 2007. This Code contains an escape clause from **administrative liability** as a result of applying to the LP: a participant in a cartel can use its leniency right, when (i) he is the first cartelist to cooperate, (ii) where competition authorities possessed no information or documents about the violation in question, (iii) where the first applicant avoids any further cooperation with the cartel in question, and, finally, (iv) where sufficient information to fix the administrative case is provided.[135]

What is missing in the Russian LP is the system of markers, which defines the sequence of information disclosure, the assessment of the provided information and witness protection.[136]

[134] Wouter P.J. Wils, 'The use of leniency in EU cartel enforcement: an assessment after 20 years' [2016] 39(3) World Competition 337

[135] Art. 14.32 of the Administrative Offences Code of the Russian Federation (RU); Elena Kremyanskaya, 'Legal aspects of escape from criminal liability for cartelists in Russia' [2012] 3(2) New Journal of European Criminal Law 177

[136] Andrey Shastitko and Svetlana Avdasheva, 'Leniency program for cartel participants: The Russian case' [2011]8(2) CPI Competition Policy International 200-235

This administrative LP is available to both, companies and individuals, subject to administrative liability, and is governed by Article 14.32 of the Code of Administrative Offences.[137] The potential problem in this regard is that a company is exempted from an administrative liability due to application to the administrative LP, but the respective officers of the company could still be subject to criminal liability under the Criminal Code. [138] It is also possible that a company is granted administrative leniency, but the respective company's officers are not.[139]

Therefore, the fact that there are both an administrative and criminal liability for the company's officers under Russian legislation makes it a more complicated liability regime. Exemption from an administrative liability doesn't automatically lead to an exemption from a criminal liability. This creates legal uncertainty, but from the other side, should incentivize individuals not to become involved in a cartel.

Recently, a new criminal leniency programme was introduced in Russia. This criminal LP is available to individuals only, as there is no concept of corporate criminal liability in the Russian Federation.[140] The criminal LP is governed by Article 178 of the Russian Criminal Code, which stipulates that cartel members shall be relieved from the criminal responsibility if they have facilitated the clearance of the crime, have compensated for the damage caused or in some other way have made up losses caused as a result of organizing a cartel.[141]

The main practical problem with administrative and criminal LPs is that they are not legally linked to each other: administrative leniency granted to a company does not automatically make criminal leniency available for the individuals of that company, and vice versa.[142] This problem is thus a part of a larger inconsistency between the criminal and administrative laws, allowing competition and criminal law enforcement authorities to proceed separately against companies and their employees.[143] To date, there is no official published guidance on either programme.[144]

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[137] Anton Subbot, 'Cartel leniency in the Russian Federation: overview' [2016] Country Q&A 1
[138] https://gettingthedealthrough.com/area/5/jurisdiction/26/cartel-regulation-russia
[139] Anton Subbot, 'Cartel leniency in the Russian Federation: overview' [2016] Country Q&A 5
[140] Anton Subbot, 'Cartel leniency in the Russian Federation: overview' [2016] Country Q&A 1
[141] Article 178 of the Russian Criminal Code (RU)
[142] Anton Subbot, 'Cartel leniency in the Russian Federation: overview' [2016] Country Q&A 2
[143] Anton Subbot, 'Cartel leniency in the Russian Federation: overview' [2016] Country Q&A 2
[144] Anton Subbot, 'Cartel leniency in the Russian Federation: overview' [2016] Country Q&A 2

The main question is whether the LPs in Russia has been as highly effective as LPs in the European Union. In order to give an answer to this question, it has to be taken into account that Russian Federation is a country without an effective law enforcement, with a recent establishment of competition authorities, and with a culture, in which national undertakings are not used to commit themselves to be in compliance with competition rules.[145]

In general, for the LPs to be effective in any legal system, it has to meet certain cumulative conditions: the legislation should provide for high penalties for violating competition law in case cartelists do not apply for LP **and** the ability of competition authority to disclose some cartels independently of supplementary sources of information. [146] The latter condition depends on the resource endowment of the competition authority and its scope of authority, which still constrains the effectiveness of both prevention of cartels and application of LPs in Russia.[147] This is because Russian national competition authority (FAS) has limited powers to collect evidence, since it has no authority to implement the operative-search activity; it can only use methods of covert investigation in cooperation with MIA.[148] Both conditions for the effectiveness of the LP are fulfilled in the EU: there are high penalties under EU law, and additionally, the EC has more resources and powers to collect evidence than FAS. This fact suggests that LP regime is more effective in the EU than in RF.

However, LPs have also been effective in RF, having as a result the decrease of the number of existing cartels and the decrease of incentives for organizing new cartels.[149] Furthermore, after the adoption of the LP in RF, the average duration of an investigation by the national competition authorities decreased by about 1,5 years.[150]

In conclusion, it has to be recalled that LP plays a prominent role in both jurisdictions in deterring cartels. LP has proven its efficiency in diminishing a number of existing cartels and

[145] Andrey Shastitko and Svetlana Avdasheva, 'Leniency program for cartel participants: The Russian case' [2011]8(2) CPI Competition Policy International 200-235
[146] Wouter P.J. Wils, 'The use of leniency in EU cartel enforcement: an assessment after 20 years' [2016] 39(3) World Competition 352
[147] Andrey Shastitko and Svetlana Avdasheva, 'Leniency program for cartel participants: The Russian case' [2011]8(2) CPI Competition Policy International 200-235
[148] Andrey Shastitko and Svetlana Avdasheva, 'Leniency program for cartel participants: The Russian case' [2011]8(2) CPI Competition Policy International 200-235
[149] Gyuzel Yusupova, Leniency program and cartel deterrence in Russia: effects assessment (1 edn, National Research University Higher School of Economics 2013) 18
[150] Steffen Brenner, 'An empirical study of the European corporate leniency program' [2009] 27(6) International Journal of Industrial Organisation 644

the prevention of the emergence of new cartels in both, EU and RF. The fact that EC has more resources and powers than FAS to disclose cartels, independently of supplementary sources of information implicates indicates, however, that LPs have been more effective in the EU.

As regards to the LP system in Russia, further guidance is necessary on how to proceed when there are parallel criminal and administrative proceedings against company and company's officers. The interaction between administrative and criminal liability and administrative and criminal leniency programmes in Russia have to become more concrete, coherent and consistent for the sake of legal certainty and predictability of law.

Chapter 4 Enforcement of Competition Law on the EU and Russian markets

4.1 Brief overview of the EU anti-trust policy

The EU has always had a strong anti-trust policy, which was only improved and modernized over the years.

For over 40 years, Regulation 17 (with its notification system) formed the legal basis for the EC to investigate and sanction infringements of the EU antitrust laws.
Regulation 17 was subsequently replaced by Regulation 1/2003, which has led to the modernization of the enforcement policy in the EU by involving also NCAs and national courts in the application an enforcement of the EU anti-trust legislation and by broadening and reinforcing the investigation powers of the EC.[151]

Thus, Regulation 1/2003 replaced EC-centered anti-trust enforcement by the system of full parallel competences between the EC and NCAs (and national courts) for the purpose of the effective enforcement of the EU competition rules. Based on this new regulation, whenever an agreement affects trade among Member States, **all** European competition authorities have the power to apply the EU antitrust provisions.[152]

Another set of new enforcement methods adopted by the EC are: the revision of the fining system (revised 2006 Fining Guidelines), the improvement of the Leniency Program in 2002 and 2006 and the introduction of the Settlement Procedure for cartel cases in 2004 (cartel settlement procedure).[153]

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[151] Lucio Tome Feteira, The interplay between European and national competition law after regulation 1/2003: United we stand? (1st edn, Wolters Kluwer 2016) 35
[152] Rainer Kulms, 'Competition law enforcement under informational asymmetry' [2017] 5(3-4) China-EU Law Journal 231
[153] Commission Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation 1/2003 [2006] OJ C 210/02; Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases [2003] OJ C 167/01

4.2 Brief overview of the Russian anti-trust policy

During the years 2004-2011, the Russian market was characterized by a high level of the market dominance and among the lowest levels of local competition in the world. [154]

The global economic crisis with its peak in 2008 and 2009 contributed further to the weakening of the local competition. During this crisis, national competition authority (FAS) was criticized by the government of the RF for failing to investigate pricing policies of large Russian companies. FAS reacted by initiating hundreds of new antitrust investigations and imposing fines on large companies such as Gazprom, Rosneft, Mechel, Severstak and Evraz (see Figure 2) [155], thereby applying **new** concepts such as collective dominance and excessive pricing.[156]

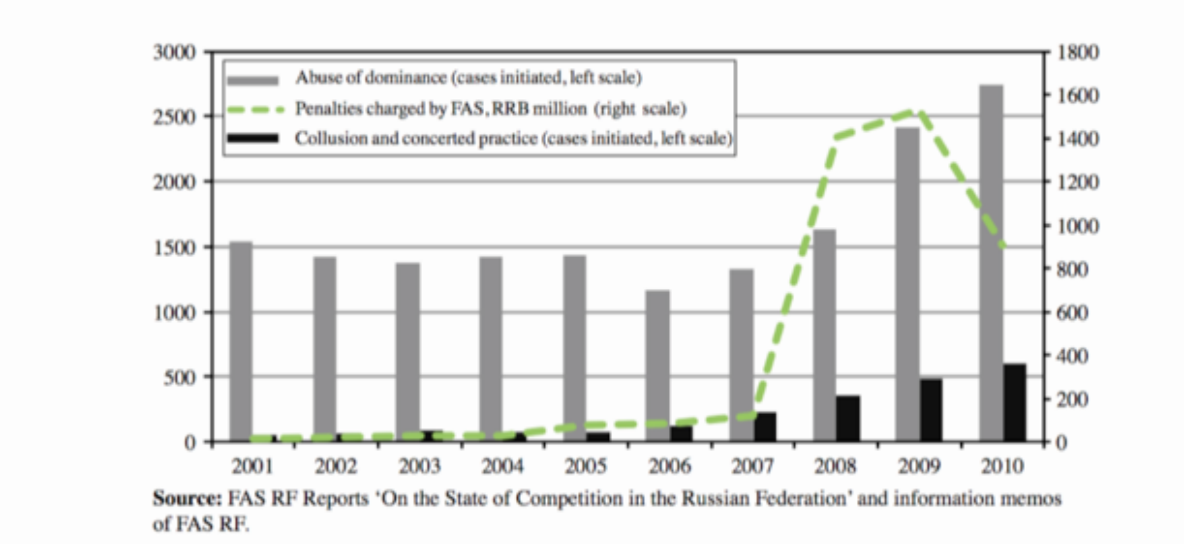

Figure2: Antitrust Enforcement by FAS RF

Figure 2 shows that throughout the period of 2001-2010 a lot of cases were initiated by FAS against companies that abused their dominance on the market. Furthermore, a number of cases against collusion and concerted practices started increasing since economic crisis in 2008, when FAS launched new investigations against large Russian companies. Penalties imposed by FAS achieved their highest peak also during the economic crisis in 2008.

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[154] Ianis Girgenson and Anna Numerova, 'Reform of Russian Competition Law: it's a long way from Brussels to Moscow ' [2012] 3(3) Journal of European Competition Law 293

[155] Svetlana Avdasheva and Andrei Shastitko, 'Russian anti-trust policy: power of enforcement versus quality of rules ' [2011] 23(4) Post-Communist Economies 497

[156] Ianis Girgenson and Anna Numerova, 'Reform of Russian Competition Law: it's a long way from Brussels to Moscow ' [2012] 3(3) Journal of European Competition Law 293

Following the weakening of Russian competition policy, government of the RF tried to increase competition on the market and modernize the economy by implementing new competition laws (which were based on the EU anti-trust laws) and by increasing the enforcement power of antitrust authorities.
This has, however, led to the emergence of adverse trends in Russian competition policy, such as the increase in the number of false positives, meaning that FAS established the existence of cartels when in fact there was no cartel.[157] This, in turn, has led to degeneration of the norms borrowed from European competition legislation.[158] It was moreover proven that the probability of false positives is higher in a country that has weak judiciary institutions and economy in transition, as it was the case in the RF.[159]

The implementation of Western competition rules into Russian jurisdiction has thus failed due to the increase of false positives and the characteristics of the Russian economy and judiciary system. The problem described here is recognized in the literature as ‘decentralized globalization’. This concept implicates the difficulty of spreading norms of anti-trust legislation among countries with different development levels and legal systems, since this implementation contains following risks: uncoordinated decisions based on these new laws increase business costs; the risk of arbitrary decisions in a situation of undeveloped traditions of competition cases and the risk of turning anti-monopoly legislation into a quasi-regulation. [160]

Thus, in order to enhance the overall effectiveness of cartel detection (and anti-trust enforcement in general) in the RF, it is advised to make a reform or to adopt new anti-trust laws that are specifically tailored to the economic and legal situation of the RF.[161]

[157] Svetlana Avdasheva and Andrei Shastitko, 'Russian anti-trust policy: power of enforcement versus quality of rules ' [2011] 23(4) Post-Communist Economies 493
[158] Svetlana Avdasheva and Andrei Shastitko, 'Russian anti-trust policy: power of enforcement versus quality of rules ' [2011] 23(4) Post-Communist Economies 493-494
[159] Svetlana Avdasheva and Andrei Shastitko, 'Russian anti-trust policy: power of enforcement versus quality of rules ' [2011] 23(4) Post-Communist Economies 495
[160] Svetlana Avdasheva and Andrei Shastitko, 'Russian anti-trust policy: power of enforcement versus quality of rules ' [2011] 23(4) Post-Communist Economies 495
[161] Svetlana Avdasheva and Andrei Shastitko, 'Russian anti-trust policy: power of enforcement versus quality of rules ' [2011] 23(4) Post-Communist Economies 495

4.3 Competition authorities

There are different competition enforcement authorities in the EU and RF.

4.3.1 Competition authority in the EU

The main competent authority for the enforcement of the competition law and detection of cartels in the EU is the European Commission (EC).

Under the current competition enforcement system, the EC is entrusted with three main functions: (i) main and active enforcer of the antitrust legislation; this EC's power is based on Article 105 TFEU, which forms a shared competence with NCAs, (ii) traditional role as regards to the development of the European competition policy, and (iii) special responsibility for the general working of the network.[162]

In relation to the function (i), the cartel prohibition is contained in Article 101 TFEU, which is enforced not only by the EC, but also by national competition authorities of the EU Member States, whenever they apply their national competition laws to cartels that may affect the trade between Member States (see above).[163] However, the EC has proved to be and remain one of the most dynamic enforcers of EU competition rules, as it is also laid down in Article 105 TFEU.[164] Thus, EC's enforcement power is based on the Treaty itself.

This first enforcement function of the Commission was also emphasized in *Masterfoods* case in 2000: the ECJ stated that in order to perform its role, it is important that the EC is not prevented at any time from adopting individual decisions under Articles 101 and 102 TFEU.[165]

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[162] U. Böge, 'Das Wettbewerbsprinzip: der Feind Wirtschaftlicher Macht' [2007] 87(7) Wirtschaftsdienst 430
[163] Wouter P.J. Wils, 'The use of leniency in EU cartel enforcement: an assessment after 20 years' [2016] 39(3) World Competition 334; Article 35(1) and 3(1) of the Council Regulation 1/2003/EC of 16 December on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1
[164] Wouter Wils, 'Ten years of Regulation 1/2003' [2013] Journal of European Competition Law and Practice 12-18
[165] Case C-344/98 *Masterfoods Ltd v HB Ice Cream Ltd* [2000] ECR I-11369

4.3.2 Competition authorities in the Russian Federation

In RF, there are several public actors that are involved in detection of cartels: FAS (Federal Antimonopoly Service with its special Anti-cartel department) as a national competition authority; MIA (Ministry for Internal Affairs) and the Public Prosecutor's office of the RF.[166]

Federal Antimonopoly Service of the Russian Federation (FAS RF)

FAS is active on a federal level, but it is further divided into territorial departments of FAS, active in a specific territory; their powers are largely identical to the federal FAS, except for FAS' exclusive powers.[167]

FAS RF was established in 2004 and has following competences:[168]

- initiation and realization of programs for supporting competition in different economic sectors;
- ex ante and ex post control over the compliance with anti-trust legislation by public authorities, undertakings and natural persons (this includes detection and suppression of monopoly; control over economic concentration, suppression of unfair competition); [169]
- establishment of the breach of competition legislation, taking measures for terminating these breaches (by issuing prescriptions, see below in more details) and making infringers responsible for these breaches (by imposing administrative sanctions). Please note that public authorities can also be an infringer and not only undertakings. The FAS is absolutely independent in starting cartel prosecutions and applying sanctions;[170]
- filing a lawsuit at an arbitral court if it establishes an infringement of competition law and thus, initiate the judicial procedure.

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[166] Elena Kremyanskaya, 'Cartels in Russia: Fight Chronicles: Way to Success ' [2011] 2(1) New J Eur Crim L 426-440

[167] D. Aleshin and others, Russian competition legislation (2nd edn, Higher School of Economics 2014) 194

[168] D. Aleshin and others, Russian competition legislation (2nd edn, Higher School of Economics 2014) 187; Article 22 of the LPC (RU)

[169] Svetlana Avdasheva and Andrei Shastitko, 'Russian anti-trust policy: power of enforcement versus quality of rules ' [2011] 23(4) Post-Communist Economies 496

[170] Elena Kremyanskaya, 'Legal aspects of escape from criminal liability for cartelists in Russia' [2012] 3(2) New Journal of European Criminal Law 176

It is interesting to note that EC possesses similar competences in relation to the enforcement of competition on the EU market: EC establishes a breach of competition legislation, takes measures for terminating these breaches (see below), makes infringers responsible for these breaches by imposing administrative fines (see below), ex ante merger control, traditional role for the development of the European competition policy (see above) and finally, the fact that decisions of EC can be appealed at the ECJ (see below).

As stated above, when FAS initiates proceedings and establishes the infringement, it takes measures for terminating these breaches by issuing to an infringer one of the four prescriptions, described in Article 22 of the LPC, for e.g. take actions to terminate the infringements (namely, terminate cartel agreement) or to omit from committing actions which form an obstacle for emergence of competition[171] Non-fulfillment of these prescriptions leads to the establishment of administrative liability of the infringer.[172]

FAS' power to issue prescriptions is similar to the EC's power to require the parties to terminate the infringement and to undertake any action necessary to ensure that their conduct in future is lawful.[173] For this purpose, FAS has in some circumstances the power to impose structural remedies and to accept binding commitments.[174]

It shall be noted that the Russian government has assigned FAS to use its enforcement power in anti-trust cases not only for purposes of preventing and punishing restrictions to competition, but also to tackle current problems of economic policy (in a specific economic sector).[175] Around five hundred "anti-monopoly" cases were initiated during 2008-2011 against oil companies due to the economic explanation: the price of oil products is one of the indicators of social policy in Russia and price reductions were regarded as support to the population

[171] Article 22, 50 and 51 of the LPC (RU); D. Aleshin and others, Russian competition legislation (2nd edn, Higher School of Economics 2014) 190
[172] Article 22 of the LPC (RU); D. Aleshin and others, Russian competition legislation (2nd edn, Higher School of Economics 2014) 189
[173] Anna Lyle-Smythe, 'Cartel Regulation ' (*Getting the Deal Through*, January 2019) <http://gettingthedealthrough.com > accessed 27 February 2019
[174] Anna Lyle-Smythe, 'Cartel Regulation ' (*Getting the Deal Through*, January 2019) <http://gettingthedealthrough.com > accessed 27 February 2019
[175] Svetlana Avdasheva and Andrei Shastitko, 'Russian anti-trust policy: power of enforcement versus quality of rules ' [2011] 23(4) Post-Communist Economies 497

and sectors using oil products. Another example is the initiation of more than 70 cases in relation to the increase of domestic prices of food products.[176] Thus, the enlarged number of anti-trust cases are not 100% an indication of purely combatting with cartels – FAS uses its competence also for economic objectives.

Ministry of Inner Affairs (MIA) of the Russian Federation (RF)

The MIA (RF) is responsible for initiating criminal investigations and for criminal liability.[177] The result hereof is that criminal sanctions are applied to the **individuals by the MIA** and not by FAS.

In case of a cartel, the violation of competition law is serious enough that it should be punished by criminal sanctions. Thus, both FAS and MIA have to be involved in that case: FAS collects initial information and ascertains if antimonopoly law was breached and the MIA will start criminal investigations, based on the information provided by FAS. [178]

Public Prosecutor

The competence of the Public Prosecutor's Office lies in the following: when a cartel participant is not able to satisfy all the requirements in order to escape criminal liability, he can enter into pre-court agreement with Procurator's Office, but only after MIA had initiated a criminal case under Chapter 40.1 of the Criminal Process Code RF.[179] The agreement has to be accepted by both parties. If this pre-trial agreement is accompanied by active cooperation of a cartel member with the Public Prosecutor's Office, the penalty for this cartelist may be reduced.[180]

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[176] Svetlana Avdasheva and Andrei Shastitko, 'Russian anti-trust policy: power of enforcement versus quality of rules ' [2011] 23(4) Post-Communist Economies 497

[177] Elena Kremyanskaya, 'Legal aspects of escape from criminal liability for cartelists in Russia' [2012] 3(2) New Journal of European Criminal Law 176

[178] Andrey Shastitko and Svetlana Avdasheva, 'Leniency program for cartel participants: The Russian case' [2011]8(2) CPI Competition Policy International 200-235; Elena Kremyanskaya, 'Legal aspects of escape from criminal liability for cartelists in Russia' [2012] 3(2) New Journal of European Criminal Law 176

[179] Elena Kremyanskaya, 'Legal aspects of escape from criminal liability for cartelists in Russia' [2012] 3(2) New Journal of European Criminal Law 178-179

[180] Elena Kremyanskaya, 'Legal aspects of escape from criminal liability for cartelists in Russia' [2012] 3(2) New Journal of European Criminal Law 178-179

This pre-court agreement is similar to the cartel settlement agreement in the EU: both agreements aim at settling the cartel case quickly and without adhering to the court, in order to avoid a procedural backlog.[181]In return for an active cooperation with EC resp. Procurator, cartel participants receive a fine reduction (10 % in the EU and a maximum of 50% of the penalty depending on the type of infringement in question in the RF).[182]

The difference with the EU procedure is that in the RF, this agreement can only be entered into after MIA had already initiated a criminal procedure. Another difference is that in order to conclude a cartel settlement agreement in the EU, undertakings must admit their involvement in a cartel and their liability, and waive certain procedural rights (right to full access of the file and to an oral hearing).[183]

The common point is then again that this procedure can only be initiated if the existence of a cartel has already been established by the relevant authorities (EC resp. FAS), since these cartel settlements for the EC are based on Articles 7 and 23 of Regulation 1/2003, which constitute the legal basis for EC's decisions fining a cartel: thus, cartel has to be established and fined.

The settlement procedure has rapidly become a valuable enforcement instrument for both, undertakings and the EC. The EC is using this procedure with increasing frequency: four out of seven cartel decisions reached in 2017 were full settlement cases.[184]

In conclusion, FAS and EC have similar competences in relation to cartel enforcement: establishment of a breach of competition legislation; adoption of measures for terminating these breaches; make infringers responsible for these breaches by imposing administrative fines; ex ante merger control; active role for the development of the competition policy.
Moreover, the pre-trial agreement with Procurator's office in RF is similar to the cartel settlement procedure in the EU.

[181] J. JOSHUA, That Uncertain Feeling: The Commission's 2002 Leniency Notice. in C.D. Ehlermann and I. Atanasiu (eds), European Competition Law Annual 2006: Enforcement of Prohibition of Cartels (Oxford: Hart Publishing 2007) 526, 533
[182]Case T-456/10 *Timab Industries and CFPR v Commission* [2015] ECR II-296; Elena Kremyanskaya, 'Legal aspects of escape from criminal liability for cartelists in Russia' [2012] 3(2) New Journal of European Criminal Law 178-179
[183]Case T-456/10 *Timab Industries and CFPR v Commission* [2015] ECR II-296
[184] Anna Lyle-Smythe, 'Cartel Regulation ' (*Getting the Deal Through*, January 2019) <http://gettingthedealthrough.com > accessed 27 February 2019

The difference is that FAS, unlike the EC, focuses also on the solution of economic problems in cartel cases. This, has led to the fact that anti-trust provisions, which were borrowed from the EU standards and implemented into a domestic jurisdiction, not only fail to contribute to the attainment of competition policy objectives, but may even result in the restriction of competition.[185]

There are further fundamental weaknesses in Russian competition policy, which Russian legislation didn't address so far: overenforcement (too many investigations launched by FAS every year in comparison to the EU statistics) and lack of economic analysis in competition law enforcement (relevant concepts such as dominance and concerted practices are defined based on statutory presumptions and depart from standard microeconomics).[186]

4.4 Judicial enforcement of competition law in the EU and Russian Federation

Judicial enforcement authorities of competition law in the EU is the European Court of Justice, consisting of two courts: General Court and Court of Justice. Judicial enforcement authorities in RF are arbitral courts of the first instance, appellation arbitral courts and cassation arbitral courts and finally, the Supreme Court of the RF.

EC's decisions in cartel cases can be appealed at the General Court, and the judgments of the GC can be appealed at the Court of Justice. [187] According to the Article 263 TFEU, the GC has a power to annul, reduce or increase the fines imposed by the EC and also review the entire Commission's decision.[188] The ECJ has a power to annul, reduce or increase fines imposed by the GC, but limits itself to questions of law and cannot review facts of the case or analyze the evidence.[189] Thus, the ECJ is the highest enforcer of competition legislation in

[185] Svetlana Avdasheva and Andrei Shastitko, 'Russian anti-trust policy: power of enforcement versus quality of rules ' [2011] 23(4) Post-Communist Economies 497
[186] Ianis Girgenson and Anna Numerova, 'Reform of Russian Competition Law: it's a long way from Brussels to Moscow ' [2012] 3(3) Journal of European Competition Law 299
[187] Art 263 of the Consolidated version of the Treaty on the functioning of the European Union (TFEU) [2012] OJ C326/47
[188] Article 263 of the Consolidated version of the Treaty on the functioning of the European Union (TFEU) [2012] OJ C326/47
[189] Michael Hellwig and Kai Hüschelrath, 'Cartel cases and the cartel enforcement process in the EU 2001-2015: a quantitative assessment ' [2017] 62(2) The Antitrust Bulletin 405

cartel cases. Both ECJ and EC have the power to establish the infringement and set an administrative fine, which leads to the disappearance of the clear distinction between judicial and executive competences on the EU level in cartel cases.

In the RF, if the FAS decision is inconsistent with its practice, appeal can be sought in a prejudicial procedure in the appellate body within the FAS structure (the FAS Appellate Body). The FAS Appellate Body is required to issue its decision within two months and has the ability to cancel or change the substance of the previous decision.[190]

The appellant can also challenge in court the original FAS decision and challenge the decision of the FAS Appellate Body.[191] The courts may change the substance or overturn the FAS decisions. The FAS can then appeal court decisions.

In the RF, both FAS (federal executive body – executive branch) and SC RF (before Higher Arbitral Court of the Russian Federation – judicial branch) have similar powers. The powers of the HAC RF (Higher Arbitral Court of the Russian Federation) were transferred to the **Supreme Court of the Russian Federation** in 2014.[192] These powers include the power to establish the infringement of competition legislation, take measures of coercion and impose sanctions on cartelists. Decisions or prescriptions taken by FAS in cartel cases can also be appealed before SC RF.[193]

The fact that Russian judicial and executive branch possess identical competences leads to the detraction from the concept of 'separation of powers'. On the EU level, same tendency is observed, as powers of the EC and the ECJ are similar in competition cases.

[190] https://gettingthedealthrough.com/area/5/jurisdiction/26/cartel-regulation-russia/
[191] https://gettingthedealthrough.com/area/5/jurisdiction/26/cartel-regulation-russia/
[192] According to the Law of the Russian Federation on the amendment to the Constitution of the Russian Federation of February 5, 2014 No. 2-FCL and the amendments to the Constitution of the Russian Federation introduced by it
[193] D. Aleshin and others, Russian competition legislation (2nd edn, Higher School of Economics 2014) 233

Chapter 5 Sanctions for Cartelists under the EU and Russian Competition Rules

5.1 Administrative sanctions

5.1.1 Regulation of administrative sanctions in the EU

Under the EU competition law, the EC has the main competence in public enforcement of EU competition law, which it finds in the Treaty itself (see above).

The EC possess the competence to impose fines on the undertakings or associations of the undertakings concerned. As briefly mentioned above, the EC has a wide discretion in setting the level of fines within the limits of Regulation No. 1/2003.[194]

The EC determines fines according to its Fining Guidelines: it has adopted its first Fining Guidelines in 1998, which were subsequently revised in 2006 ('2006 Fining Guidelines"). According to 2006 Fining Guidelines, the EC has to determine first the basic amount of the fine by taking "the value of the undertaking's sales of goods/services to which the infringement directly or indirectly relates in the relevant geographic area within the EEA". [195]
In a second step, this basic amount may be adjusted taking account aggravating or mitigating circumstances and will be multiplied by the number of years of the infringement. [196]

The fines imposed on cartelists have a cap of 10 per cent of worldwide group turnover in the preceding business year where an undertaking or association of undertakings has infringed Article 101 TFEU.[197]

It should be noted that since the introduction of the LP in the EU, the level of fines imposed on cartelists in the absence of cooperation under the LP has been sustainably increased: from

[194] Anna Lyle-Smythe, 'Cartel Regulation ' (*Getting the Deal Through*, January 2019) <http://gettingthedealthrough.com > accessed 27 February 2019
[195] Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation 1/2003 [2006] OJ C 210/02
[196] Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation 1/2003 [2006] OJ C 210/02
[197] Anna Lyle-Smythe, 'Cartel Regulation ' (*Getting the Deal Through*, January 2019) <http://gettingthedealthrough.com > accessed 27 February 2019

2-4 % of the company's turnover in the relevant market before the 1998 Fining Guidelines up to 15-25 % under the 2006 Fining Guidelines.[198]
This shows that EC did not weaken cartel deterrence by lowering the overall fine level with the introduction of the LP. There is a certain *rationale* behind it: by imposing high fines, the EC pursues two goals: punish cartelists for the breach of competition law and deter future infringements.[199] As will be discussed below, Russian legislator has also come to the conclusion that only high fines have a deterrent effect on cartels.

The concept of imposing high fines for infringements of competition law is based on the theory of deterrence, which puts forward the idea that companies are not willing to commit an infringement if there is a credible threat of detection and/or a high sanction following the infringement.[200]

Thus, in order to increase the deterrent effect of cartel enforcement, either the detection rate must be improved, or the fines should be increased.[201] In the EU and the RF, both factors are present, which leads to the conclusion that undertakings in both jurisdictions are less incentivized to be involved in a cartel. However, it shall be noted that high detection rate of cartels in the RF can also include false positives (see Chapter 4.2.) and thus does not reveal a detection rate of cartels only.

Furthermore, apart from the imposition of higher sanctions, criminal and civil liability can increase the perceived costs of infringements of competition law, as it leads to the conviction of cartelists and civil claims.[202] In the RF, as will be shown in Chapters 5.2.2. and 5.3.2, there is also a criminal and civil liability for cartelists, which contributes again to the increased deterrent effect.

[198] Wouter P.J. Wils, 'The use of leniency in EU cartel enforcement: an assessment after 20 years' [2016] 39(3) World Competition 343
[199] Michael Hellwig and Kai Hüschelrath, 'Cartel cases and the cartel enforcement process in the EU 2001-2015: a quantitative assessment ' [2017] 62(2) The Antitrust Bulletin 405
[200] Eva Lachnit, 'Compliance programmes in competition law: improving the approach of competition authorities' [2014] 10 (5) Utrecht Law Review 33
[201] Emilie van Hasselt & Hans Urius, 'The deterrent effect of EU competition law: higher fines and extended targets' [2014] National Law Review 10; Eva Lachnit, 'Compliance programmes in competition law: improving the approach of competition authorities' [2014] 10 (5) Utrecht Law Review 33
[202] Eva Lachnit, 'Compliance programmes in competition law: improving the approach of competition authorities' [2014] 10 (5) Utrecht Law Review 33

5.1.2 Regulation of administrative sanctions in the Russian Federation

In the RF, there are the following types of sanctions that can be imposed on cartelists: administrative (in the form of fines) and criminal sanctions (in the form of imprisonment).[203] The prevailing administrative sanctions are the most effective sanctions in Russia, while criminal law norms are rarely used in practice.[204]

In addition to these sanctions, the FAS may, as an alternative to the administrative fine, require the infringing entity to transfer all income received from illegal cartel activity to the Russian federal budget.[205] This form of liability replaces the administrative liability and cannot be used in combination therewith.[206]

Administrative sanctions for cartelists under Russian law constitute turnover fines, which are calculated as a particular percentage of the offender's annual turnover in the relevant market with a cap of 15 % of the turnover.[207] As already mentioned above, higher turnover fines were introduced in 2007 in order to have a deterrent effect on cartels. [208]

Administrative liability of cartel members and administrative sanctions are set out in article 14.32 of the Russian Code on Administrative Offences. The provisions of this Article differentiate the liability of undertakings (legal entities), its managers and other employees (parts 1 and 2 of Article 14.32) from the liability of organs of public authority (part 3 of Article 14.32). The latter ones can, in addition to a fine, be disqualified from their job position for a maximum of 3 years.[209]

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[203] Elena Kremyanskaya, 'Cartels in Russia: Fight Chronicles: Way to Success ' [2011] 2(1) New J Eur Crim L 426-440; Angela Korzhevskaya, 'Achieving a competition compliance culture in Russia: Assessing the UK experience in compliance programmes to deter cartels' [2015] 3(2) Russian Law Journal 82

[204] Art. 14.9, 14.31-14.33, 19.5, 19.8 of the Administrative Code (RU)

[205] Article 51 of the LPC (RU)

[206] D. Aleshin and others, Russian competition legislation (2nd edn, Higher School of Economics 2014) 40; https://gettingthedealthrough.com/area/5/jurisdiction/26/cartel-regulation-russia/

[207] Angela Korzhevskaya, 'Achieving a competition compliance culture in Russia: Assessing the UK experience in compliance programmes to deter cartels' [2015] 3(2) Russian Law Journal 64

[208] Andrey Shastitko and Svetlana Avdasheva, 'Leniency program for cartel participants: The Russian case' [2011]8(2) CPI Competition Policy International 200-235

[209] Art 14.32 of the Russian Code on Administrative Offences (RU)

In this regard, it shall be noted that it is specific characteristics of Russian anti-trust legislation to contain provisions, which are addressed to public entities that exercise public powers (unlike most of foreign legislations, including the EU one).[210]

While the Administrative and the Criminal Code provide for a range of fines, the actual fine imposed on the infringing party is ultimately in the discretion of FAS and, subsequently, the courts.[211] The EC possess the same discretion in determining the exact amount of fine to be imposed on cartelist (see above).

The Russian Administrative and the Criminal Code provide also for aggravating and extenuating circumstances that affect the amount of the basic fine to be imposed on the infringing entity.[212] The same tendency can be seen under the EU 2006 Fining Guidelines: the amount of the basic fine to be imposed on a cartel member is also affected by the existence of mitigating or aggravating circumstances (see above). Thus, the method of fine calculation is similar to the one under EU law: first, the basic amount has to be defined, which can subsequently be increased resp. decreased depending on the existence of mitigating resp. aggravating circumstances.

Last but not least, the administrative liability of legal entities doesn't exclude further criminal or administrative liability of its managers/employees and vice versa.[213]

In conclusion, both competition authorities, FAS and EC, have the competence to impose administrative sanctions on cartelists; they both possess the discretion of setting the amount of fine; the method of fine calculation is similar in both jurisdictions. Moreover, both jurisdictions have integrated the theory of deterrence into their anti-trust policy.

[210] Art 1 of the LPC (RU); D. Aleshin and others, Russian competition legislation (2nd edn, Higher School of Economics 2014) 142
[211] https://gettingthedealthrough.com/area/5/jurisdiction/26/cartel-regulation-russia/
[212] Article 14.32 of the Russian Code on Administrative Offences and Article 178 of the Criminal Code (RU)
[213] Art 2.1 of the Russian Code on Administrative Offences (RU)

5.2 Criminal sanctions

5.2.1 Regulation of criminal sanctions in the EU

The EC can only impose fines and does not have any competences in criminal law.

National legislation within some member states may, however, provide for criminal sanctions, administrative fines or other personal sanctions (see, e.g. directors' disqualification orders), where individuals have infringed Article 101 TFEU.[214]

It is worth observing that there is a growing EU interest in the use of national criminal law: partly because the EU has been a leading jurisdiction in the regulation of cartels; partly because of the principle of ensuring the "effective, proportionate and dissuasive" role of sanctions used at the national level when implementing EU rules and policies; partly because of the general increasing interest of the EU in the use of criminal law by its Member States, as evidenced in the Commission's Communication "Towards an EU Criminal Policy" in 2011.[215]

In its Communication, the EC emphasized the *ultima ratio* principle, i.e. States have to consider carefully the arguments in favor of criminalization and the need to conduct impact studies in relation to such proposals. The individual Member States can choose a method of legal control, but they have to follow the EU guidelines (in the EC's Communication and other EU documents).[216]

Individual Member States shall pass, however, the subsidiarity test: they should be best placed to provide criminal sanctions for cartelists in so far as these may be deemed necessary in particular areas. The EC retains its competence under article 101 TFEU to deal with signif-

[214] Anna Lyle-Smythe, 'Cartel Regulation ' (*Getting the Deal Through*, January 2019) <http://gettingthedealthrough.com > accessed 27 February 2019

[215] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee of the regions, 'Towards an EU Criminal Policy: ensuring the effective implementation of EU policies through criminal law' [2011] 573; Christopher Harding, „Hardcore cartel conduct as crime: The jurisdiction for criminalisation in the European Context Cartel Crime" [2012] 3(2) New Journal of European Criminal Law 144

[216] Christopher Harding, „Hardcore cartel conduct as crime: The jurisdiction for criminalisation in the European Context Cartel Crime" [2012] 3(2) New Journal of European Criminal Law 145

icant European-wide and international cartels, alongside the competence of the national authorities to deal with other cartels (thus, complementary powers).[217] That means that bigger cartels have to be treated at the EU level and sanctioned with administrative fines, while smaller cartels are to be treated at the national level and sanctioned with criminal penalties. This seems to be against the Communication from EC that there has to be a “coherent and consistent criminal policy”.

5.2.2 Regulation of criminal sanctions in the Russian Federation

In 1996, a new Article was introduced in the Criminal Code of RF that punished the coordinated activity. [218] It was however a “sleeping clause” for almost 10 years because of the Russian planned economy, where the State was a sole coordinator of the activities of manufacturing, fixing unified terms and conditions, as well as product pricing.[219] Therefore, this article was not applied in practice.

Criminal liability of cartelists is now implemented by Article 178 of the Russian Criminal Code: depending on the seriousness of the crime, there are criminal sanctions starting from a fine, community service, disqualification (deprivation of the right to hold certain offices or engage in certain activities) to imprisonment, or a combination thereof.[220]

As mentioned above, it belongs to the MIA’s competence to handle criminal prosecutions in cartel cases on the basis of information provided by FAS.

It is very important to point out that only cartels can be subject to criminal penalties in Russian competition law and no other anticompetitive agreements or concerted practices. [221]

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[217] Christopher Harding, „Hardcore cartel conduct as crime: The jurisdiction for criminalisation in the European Context Cartel Crime” [2012] 3(2) New Journal of European Criminal Law 145

[218] Elena Kremyanskaya, 'Legal aspects of escape from criminal liability for cartelists in Russia' [2012] 3(2) New Journal of European Criminal Law 176

[219] Elena Kremyanskaya, 'Legal aspects of escape from criminal liability for cartelists in Russia' [2012] 3(2) New Journal of European Criminal Law 176

[220] Andrey Shastitko and Svetlana Avdasheva, 'Leniency program for cartel participants: The Russian case' [2011]8(2) CPI Competition Policy International 200-235; Elena Kremyanskaya, 'Legal aspects of escape from criminal liability for cartelists in Russia' [2012] 3(2) New Journal of European Criminal Law 176; https://gettingthedealthrough.com/area/5/jurisdiction/26/cartel-regulation-russia/

[221] Ianis Girgenson and Anna Numerova, 'Reform of Russian Competition Law: it's a long way from Brussels to Moscow ' [2012] 3(3) Journal of European Competition Law 297

Moreover, criminal sanctions can only be applied to individuals and not to legal entities, as there is no such concept as corporate criminal liability in Russia.[222]

As briefly mentioned already, administrative and criminal sanctions can exist in parallel: if a party escapes administrative liability through for e.g. applying to the leniency program, it does not mean that he/she can automatically escape criminal liability.[223]
This co-existence of several norms in relation to the exemption from a (criminal and administrative) liability leads to legal uncertainty of Russian citizens.

A cartel member can escape criminal liability if following conditions are cumulatively fulfilled: if a cartel participant was the first to voluntarily report to authorities that he was engaged in a cartel; if he actively assisted in the cartel investigation or disclosure; if he has compensated third parties for damages sustained, or transferred the income gained from illegal conduct to the federal budget and if there are no other criminal offences in which he is involved.[224] Thus, grounds for exempting from criminal and administrative liability are different.

Following conclusion can be made with regards to the regulation of administrative and criminal liability clauses in the RF: the aim is to grant the cartel member exemption from a liability only if he is willing to cooperate with authorities. This saves time and effort to investigate the case and forms, therefore, a highly effective measure for both, authorities and cartelists.

In conclusion, although EC cannot impose criminal sanctions on cartelists, it still exercises a control: when Member States want to impose criminal sanctions, they have to be consistent with the EU guidelines and pass subsidiarity test. This creates an incoherent and inconsistent criminal policy in the EU and leads to legal uncertainty.

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[222] Article 178 of the Russian Criminal Code; https://gettingthedealthrough.com/area/5/jurisdiction/26/cartel-regulation-russia/
[223] Andrey Shastitko and Svetlana Avdasheva, 'Leniency program for cartel participants: The Russian case' [2011]8(2) CPI Competition Policy International 200-235; Elena Kremyanskaya, 'Legal aspects of escape from criminal liability for cartelists in Russia' [2012] 3(2) New Journal of European Criminal Law 177
[224] Art 178 of the Russian Criminal Code (RU); Andrey Shastitko and Svetlana Avdasheva, 'Leniency program for cartel participants: The Russian case' [2011] 8(2) CPI Competition Policy International 200-235

In the RF, the criminal policy is also not coherent: parallel existence of criminal and administrative liabilities, whereby the escape from one liability doesn't guarantee the exemption from the other leads to legal uncertainty.

5.3 Civil liability

Civil liability concerns the liability of cartel members for suppressing the rights and interests of natural persons due to their breach of anti-trust legislation.[225] Civil liability implies thus the enforcement of competition law by private parties or in other words, private enforcement of competition law.[226]

5.3.1 Regulation of civil liability at the EU level

EU competition policy enforcement has become a multi-player game between the European Union and Member State officials, private businesses, consumers and national courts.[227]

Third parties (and in certain circumstances, even parties involved in the infringement), who have suffered loss as a result of cartel behavior can sue for damages before the national courts of the Member States.[228] It must be emphasized that the notion of 'private enforcement' implicates the competence of Member states' national courts (primarily civil/commercial courts) to apply the antitrust Treaty provisions in their entirety.[229]
National courts were granted this competence since the decentralization of competition law with the enactment of Regulation 1/2003 (see Recital 7 of the Reg).[230]

[225] Andreas Stephan, 'Does the EU's drive for private enforcement of competition law have a coherent purpose?' [2018] 37(1) University of Queensland Law Journal 154
[226] Andreas Stephan, 'Does the EU's drive for private enforcement of competition law have a coherent purpose?' [2018] 37(1) University of Queensland Law Journal 155
[227] Rainer Kulms, 'Competition law enforcement under informational asymmetry' [2017] 5(3-4) China-EU Law Journal 231
[228] Anna Lyle-Smythe, 'Cartel Regulation ' (*Getting the Deal Through*, January 2019) <http://gettingthedealthrough.com > accessed 27 February 2019; Vejko Mlutinovic, The right to damages under EU competition law: from Courage v Crehan to the White Paper and Beyond (1st edn, Wolters Kluwer International 2010) 14
[229] Vejko Mlutinovic, The right to damages under EU competition law: from Courage v Crehan to the White Paper and Beyond (1st edn, Wolters Kluwer International 2010) 14
[230] Christopher Bovis and Charles Clarke, 'Private Enforcement of EU Competition Law' [2015] 36(1) Liverpool Law Review 50

Thus, at the EU level, individuals cannot go to ECJ for claiming damages, but only to their national courts. The question is on which basis private individuals or undertakings can enforce competition law and trigger the civil liability of cartel members before these courts. The basis is Article 101 TFEU, that has a direct effect in the Member States and can be invoked by individuals before national courts of the Member States.[231]

A party may base a claim for restitution on alleged nullity of the cartel agreement.[232] A party may want to seek an injunction under Article 101 TFEU in order to bring anti-competitive conduct to an end or to enforce a contract. Finally, damage actions can be brought against the infringer in order to seek a monetary award to compensate the victim for the harm it has suffered.[233] Compensation is not restricted solely to actual losses, but extended to lost profits and interest.[234]

The precise rules of standing, procedure and quantification of damages may, however, vary between Member States.[235]Directive 2014/104/EU sets out provisions that would ensure effective private enforcement of EU antitrust law by national courts of the Member States.[236]

Thus, there is currently no identical procedure in the private enforcement of competition law across all Member States. So far, the EC did not regulate the judicial cooperation.[237] This lack of uniformity creates legal uncertainty and difficulty for national courts, deterring injured parties from bringing claims before them. At the same time, the existence of a parallel system of public and private enforcement of antitrust rules in the EU leads to the strengthening of the enforcement of competition law.

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[231] Case 26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* [1963] ECR 02

[232] Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1

[233] Commission, 'Green Paper on Damages actions for breach of the EC antitrust rules' COM (2005) 672 final 3; Council Regulation 1/2003 OJ L 1; Commission, 'White Paper on Damages Actions for breach of the EC antitrust rules' COM (2008) 165; Case 453/99 *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others* [2001] ECR I-6314; Joined cases C-295/04 to C298/*04 Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA* [2006] ECR I-6641

[234] Christopher Bovis and Charles Clarke, 'Private Enforcement of EU Competition Law' [2015] 36(1) Liverpool Law Review 49-71, 52; Commission, 'White Paper on Damages Actions for breach of the EC antitrust rules' COM (2008) 165

[235] Anna Lyle-Smythe, 'Cartel Regulation ' (*Getting the Deal Through*, January 2019) <http://gettingthedealthrough.com > accessed 27 February 2019

[236] Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union Text with EEA relevance [2014] OJ L349/01

[237] Commission, 'White Paper on Damages Actions for breach of the EC antitrust rules' COM (2008) 165

5.3.2 Regulation of civil liability in the Russian Federation

In the RF, individuals and legal entities whose rights have been affected by anticompetitive behavior of the cartel participants are entitled under Article 37 of the LPC to seek protection through court procedures at Arbitral courts, in particular, by seeking redress of infringed rights, recovery of damages and losses, including loss of profit, compensation of damage inflicted on property. [238] Compensation is also provided as a remedy for damages caused by governmental bodies.[239]

Russian rules on calculation of third party loss and reimbursement are not clearly defined and practically difficult.[240] This requires again further Guidelines on precise and coherent rules on civil liability of cartelists.

In conclusion, in Russian jurisdiction there are no clearly defined rules on the civil liability of cartelists. Different situation is to be observed in the EU, where there exist parallel rules/procedures on the civil liability of cartelists. This lack of coherence and uniformity in both jurisdictions create difficulties for national courts and also for individuals, harmed by cartel behavior. The best remedy for the individuals in the respective Member States is to directly invoke Article 101 TFEU before their national courts.

[238] D. Aleshin and others, Russian competition legislation (2nd edn, Higher School of Economics 2014) 41
[239] Art. 16 of the Civil Code (RU)
[240] Elena Kremyanskaya, 'Legal aspects of escape from criminal liability for cartelists in Russia' [2012] 3(2) New Journal of European Criminal Law 177

Chapter 6 Comparative Analysis of High Courts' Decisions in the EU and Russian Federation

6.1 High Court's decisions in the EU

As described in Chapter 4.4, the highest court in the European Union which makes rulings in cartel cases is the European Court of Justice (ECJ).

This chapter emphasizes on how EU and Russian case-law define, describe and analyze the concept of a "concerted practice".

The most prominent case in this regard in the EU case-law is ECJ's Judgment of 4 June 2009: the case T-Mobile/Dutch Competition Authority.[241]

The facts of this case are following: representatives of 5 Dutch undertakings which provide mobile telecommunication services in the Netherlands held one meeting on 13 June 2001, where they discussed, inter alia, the reduction of standard dealer remunerations for postpaid subscriptions; confidential information also came up in discussions, as was eventually evident from the order for reference.[242]

The national Dutch competition authority (NMA) upheld that practices of these undertakings constitute an infringement of article 101(1) TFEU. These undertakings went on appeal at Administrative Court for Trade and Industry (NL), which then submitted several questions for a preliminary ruling to ECJ.

ECJ held in relation to a definition of a 'concerted practice':

- "concerted practice is a form of coordination between undertakings by which, without it having been taken to the stage where an agreement properly so-called has been concluded, practical cooperation between them is knowingly substituted for the risks of competition;[243]

[241] Case 8/08 *T-Mobile Netherlands and Others* [2009] ECR I-04529
[242] Case 8/08 *T-Mobile Netherlands and Others* [2009] ECR I-04529, para 12
[243] Case 8/08 *T-Mobile Netherlands and Others* [2009] ECR I-04529, para 26

- agreements, decisions and concerted practices, mentioned in Article 101 TFEU, are all form of collusion having the same nature, and distinguishable from each other only by their intensity and the forms in which they manifest themselves;[244]
- in order to assess whether concerted practice is anti-competitive, close regard must be paid in particular to the objectives which it is intended to attain and to its economic and legal context.[245]"

First of all, by analyzing this part of the ruling, it can be concluded that the EU case-law draws a distinction between concerted practices, decisions and anticompetitive agreements. In Russian case-law, the same distinction was made by the Arbitral Court in the case **A42-2564/2014 (page 3).**

The ECJ as well as Supreme Court of Russian Federation agree, moreover, on the point that mere practical/factual cooperation between undertakings with the intention to limit the competition can indicate a concerted practice. [246] The difference is that EC analyzes economic context in order to determine the existence of a cartel, and this approach is also confirmed by the ECJ in this part of the judgment,[247] whereas FAS never makes analysis of the economic context in cartel cases, although Supreme Court RF has stated in several rulings that this analysis has to be made (for e.g. in cases **A40-97512/2013** and **A40-143256/2013**).

The ECJ held further in this ruling that the criterion that points out at non-existence of a concerted practice is the requirement of independence. According to this requirement, each economic operator must determine independently the policy which he intends to adopt on the common market, thereby retaining the right to adapt themselves intelligently to the existing or anticipated conduct of their competitors.[248] ECJ held that this requirement of independence does, none the less, **strictly preclude any direct or indirect contact** between such operators by which an undertaking may influence the conduct on the market of its actual or potential

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[244] Case 8/08 *T-Mobile Netherlands and Others* [2009] ECR I-04529, para 23
[245] Case 8/08 *T-Mobile Netherlands and Others* [2009] ECR I-04529, para 27
[246] Case 8/08 *T-Mobile Netherlands and Others* [2009] ECR I-04529, paras 26, 29; Case A42-2564/2014, page 4 (RU)
[247] Case 8/08 *T-Mobile Netherlands and Others* [2009] ECR I-04529, paras 31, 27
[248] Case 8/08 *T-Mobile Netherlands and Others* [2009] ECR I-04529, para 33

competitors **or disclose to them its decisions or intentions** concerning its own conduct on the market.[249]

In Russian case-law, there is a similar conditionality requirement.[250] According to this requirement, if the behavior (or a market strategy) of one undertaking is not influenced by the behavior of the other undertakings, then there is no concerted practice. Additionally, the conduct of one undertaking is not conditional (or not dependent) on the conduct of others undertakings, if such undertaking is merely adapting to the existing or anticipated conduct of their competitors, without having any contact with each other.[251]

Finally, Russian definition of a 'concerted practice' (in Article 8 LPC) includes the criterion that 'undertakings must have a prior knowledge of each other's actions'. This criterion is also present in the EU case-law, as mentioned above, that some kind of prior information exchange has to take place 'and undertaking **discloses to them its decisions or intentions** concerning its own conduct on the market'.[252] In the EU jurisdiction, information exchange is therefore an essential element of a concerted practice. In Russian case-law, information exchange is not an essential element of a concerted practice, as for Russian courts (for e.g. in the **Case A42-2564/2014)**, factual behavior of an undertaking contains already an information for the competitors, which then can base their conduct on the behavior of the first undertaking.

Another common point is that under both jurisdictions, the existence of the cartel agreement can be proven by the combination of evidences (not necessary direct evidence), in particular, an evidence of factual behavior of the undertakings involved.[253]

The last comparison point concerns the existence of causal connection. ECJ held in this ruling that there is a presumption of the causal connection between the concerted practice and the market conduct of undertakings, according to which, where the undertakings concerned remain active on the market, they are presumed to take account of the information exchanged with their competitors.[254] In the Russian case-law, namely, in the Case **A42-2564/2014** (where undertakings were involved in bid-rigging), the Arbitral Court also confirmed the existence of the

[249] Case 8/08 *T-Mobile Netherlands and Others* [2009] ECR I-04529, para 33
[250] Case A42-2564/2014, page 5 (RU)
[251] Case A42-2564/2014, page 5 (RU)
[252] Case 8/08 *T-Mobile Netherlands and Others* [2009] ECR I-04529, para 33
[253] A76-6532/2018 (RU); Case 8/08 *T-Mobile Netherlands and Others* [2009] ECR I-04529
[254] Case 8/08 *T-Mobile Netherlands and Others* [2009] ECR I-04529, paras 5, 51-53

causal link between the actions of the bidders and maintenance of the price/price increase (market behavior) at the auction.[255]

In conclusion, both Russian and EU case-law confirm the presumption of causal connection between the existence of a concerted practice and the market conduct. They agree also on the point that mere factual behavior can indicate the existence of a concerted practice. Russian conditionality requirement is further similar to the EU independence requirement.

They differ on the point that in the EU case-law prior information exchange is a necessary condition for a concerted practice, whereas in Russian case-law, merely parallel behavior can be sanctioned, as it already contains an information on a market strategy of an undertaking. Final difference is that EC makes an economic analysis to establish the existence of a concerted practice, unlike FAS, although the latter is also required to do so according to SC RF.

6.2 High Court's decisions in the Russian Federation

As already described, the highest court in Russia which makes rulings on cartel cases since 2014 is the Supreme Court of Russian Federation.

Two similar cases **- Case A40-97512/2013 and Case A40-143256/2013** will be analyzed below and compared to the EU law.

In the first case, FAS suspected existence of a cartel between several Russian importers of Norwegian fish on the Russian market. They were all members of the 'Association of industrial and trading enterprises of the fish market' (non-commercial organization).
In the second case, FAS suspected existence of another cartel in the fish market between importers of Vietnamese pangasius fish and the same association.

According to FAS, undertakings in both cases distributed the Russian fish market among themselves based on the volume of purchased fish, the composition of sellers, the participation in this agreement (which constitutes a cartel as stated in art 11 (3) of the Federal Law), and the Association was the coordinator of this process (violation of Article 11, 5 LPC).[256] There was a market sharing based on the composition of sellers, because the

[255] Case A42-2564/2014 (RU)
[256] Case A40-97512/2013, paras 10-15 (RU) and Case A40-143256/2013, paras 9-14 (RU)

Association tried to monopolize the supplies from Vietnam and Norway by making a strategic partnership agreement on distribution conditions of the fish: one Norwegian or Vietnamese exporter would have only one Russian importer, that was necessary a member of this Association.[257] In fact, FAS alleged they concluded an exclusive dealing agreement, as these suppliers could not supply this fish to any other distributors for the following 5 years, which has led to an exclusionary effect or created impediments to access this market for other Russian fish importers that were not a member of this cartel. [258]

In both cases, the Judge of the Supreme Court RF rejected FAS in handing over its appeal.

The SC RF held in both cases that there was no indisputable evidence showing that undertakings involved committed violations of competition law: there is no evidence that they participated in a cartel agreement; no evidence that they communicated with each other on market sharing on the composition of sellers and exchanged information on their future strategies.[259] In contrary, their correspondence indicates a tough competition between them. SC stated further that the mere communication between market participants or the discussion of sectoral issues cannot serve as a sufficient proof for the existence of an anti-competitive agreement between them.[260]

SC ruled also that FAS decision lacks economic evidence of the existence of collusion and its impact on economic processes in the commodity market.[261]

By analyzing SC's ruling, the following conclusions can be made: mere communication between competitors without any information exchange on future market strategy does not lead to the establishment of a cartel. The same was stated in the ECJ's case above, where only information exchange on the market behavior indicates the existence of a cartel.

Secondly, both SC RF and ECJ emphasized in their rulings that competition authorities have to make an analysis of the economic context in order to determine whether the cartel exists or not. Thus, the interpretation by FAS of the standard of proof applicable in cartel cases differs

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[257] Case A40-97512/2013, paras 5-7 (RU) and Case A40-143256/2013, paras 4-6 (RU)
[258] Case A40-97512/2013, paras 5-7 (RU) and Case A40-143256/2013, paras 4-6 (RU)
[259] Case A40-97512/2013, paras 20-26 (RU) and Case A40-143256/2013, paras 18-24 (RU)
[260] Case A40-97512/2013, paras 20-26 (RU) and Case A40-143256/2013, paras 18-24 (RU)
[261] Case A40-97512/2013, paras 27 (RU) and Case A40-143256/2013, paras 25 (RU)

from EC's interpretation, as the first one does not make an economic analysis or analysis of the market structure (such as entry costs, information transparency, market allocation among suppliers) nor an analysis proving that prices set by suppliers are above competitive market prices.[262]

[262] Svetlana Avdasheva and Andrei Shastitko, 'Russian anti-trust policy: power of enforcement versus quality of rules ' [2011] 23(4) Post-Communist Economies 500; Ianis Girgenson and Anna Numerova, 'Reform of Russian Competition Law: it's a long way from Brussels to Moscow ' [2012] 3(3) Journal of European Competition Law 296

Chapter 7 Compliance Programs as a Mechanism to Deter Cartels

Cartels are a worldwide problem and various jurisdictions, including the European and Russian ones, aim at drafting efficient antimonopoly laws in order to combat them.
Although these two jurisdictions provide for severe sanctions for cartelists (namely, high fines) and various instruments to fight cartels (e.g. leniency programs), cartels still continue to exist in many sectors of the global economy.[263]

This fact suggests that imposition of high fines alone (traditional instrument in cartel deterrence) is not sufficient to deter cartels and to induce compliance with competition laws.[264] Therefore, it is suggested to substitute the traditional enforcement approach, so that cartels prohibitions could be enforced more effectively.

One alternative is the creation of a pro-compliance culture via implementation of corporate compliance programs.[265] This is not a new realization in the field of EU competition law, as there were already discussions about it in the late 1950s.until early 1960s.[266]

Compliance programs are usually coupled with the company's code of conduct, thereby forming a preventive mechanism of antitrust violations.[267] Most corporate compliance programs refer to two basic rules in competition law: company's officers cannot engage in anticompetitive agreements and cannot abuse their dominant position on the market.[268]

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[263] Cecile Aubert and others, "The impact of leniency and whistleblowing programs on cartels" [2006] 24(6) International Journal of Industrial Organisation 1241; Eva Lachnit, 'Compliance programmes in competition law: improving the approach of competition authorities' [2014] 10 (5) Utrecht Law Review 34
[264] Eva Lachnit, 'Compliance programmes in competition law: improving the approach of competition authorities' [2014] 10 (5) Utrecht Law Review 34
[265] Angela Korzhevskaya, 'Achieving a competition compliance culture in Russia: Assessing the UK experience in compliance programmes to deter cartels' [2015] 3(2) Russian Law Journal 64; Wils Wouter, 'Antitrust compliance programmes and optimal antitrust enforcement' [2013] 1(1) Journal of Antitrust Enforcement 52-81
[266] C.V. Anderson, 'Effective antitrust compliance programs and procedures' [1962-1963] 18 Business Law 739; G. Geis, White collar crime: the heavy electrical equipment antitrust cases of 1961. in M.B. Clinard & R. Quinney (eds), Publishing (Criminal Behavior Systems: a typology 1967) 139-151
[267] Angela Korzhevskaya, 'Achieving a competition compliance culture in Russia: Assessing the UK experience in compliance programmes to deter cartels' [2015] 3(2) Russian Law Journal 64; Wils Wouter, 'Antitrust compliance programmes and optimal antitrust enforcement' [2013] 1(1) Journal of Antitrust Enforcement 88
[268] Eva Lachnit, 'Compliance programmes in competition law: improving the approach of competition authorities' [2014] 10 (5) Utrecht Law Review 32

The question is whether these compliance programs constitute an effective mechanism in cartel deterrence and whether they could be more effective than the imposition of high fines on cartelists.

First of all, these programs can be considered to be effective due to the fact that they have a psychological effect of 'social influence', meaning that compliance with competition law becomes a socially acceptable standard norm and a behavior, which individuals in a company want to adhere to. [269] Company's officers don't want to be perceived as outsiders by not complying with these rules, thus, they will try to conform them. [270] In addition to it, if a compliance programme is well designed, competition law infringements can be detected and halted at an early stage, thereby preventing further damage to the company and to the market.[271]

Another argument for introducing a compliance program is the following psychological effect: when individuals are told that something is forbidden (for e.g. law stipulating that organization of a cartel is illegal and thus shall be prohibited), they tend to circumvent the system; whereas compliance programs do not stipulate any prohibitions, but merely state that compliance is desirable.[272]

However, there are also several reasons why these programs might be ineffective:[273]

- companies have other interests than enforcement authorities, as they initially benefit from their involvement in a cartel;[274]
- antitrust violations are typically committed by people who are primarily motivated by company's interest. If a company explains the importance of compliance, but sets for e.g. impossible sales targets, it sends mixed messages to its employees.[275]

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[269] Neil Warwick, „The psychology of cartels. Cartel crime" [2012] 3(2) New Journal of European Criminal Law 182
[270] Neil Warwick, „The psychology of cartels. Cartel crime" [2012] 3(2) New Journal of European Criminal Law 183
[271] Eva Lachnit, 'Compliance programmes in competition law: improving the approach of competition authorities' [2014] 10 (5) Utrecht Law Review 35
[272] Neil Warwick, „The psychology of cartels. Cartel crime" [2012] 3(2) New Journal of European Criminal Law 183
[273] Eva Lachnit, 'Compliance programmes in competition law: improving the approach of competition authorities' [2014] 10 (5) Utrecht Law Review 42
[274] Wouter P.J. Wils, 'Antitrust compliance programs and optimal antitrust enforcement' [2013] 1(1) Journal of Antitrust Enforcement 9
[275] Eva Lachnit, 'Compliance programmes in competition law: improving the approach of competition authorities' [2014] 10 (5) Utrecht Law Review 44

- compliance programs have a monitoring side-effect: it implicates that those responsible for monitoring the compliance within the company are better placed to hide non-compliance. In other words, those who know the signs of things going wrong, know the best how to hide them.[276]

It shall be also noted that these programs have a weaker effect in the RF than in the EU, as the term ‘antimonopoly compliance’ only recently appeared there, with the arrival of foreign companies, for whom compliance is an integral part of their activities.[277] It was also confirmed that introduction of the compliance program in the Russian companies doesn’t lead to the diminishing of the cartel activity.[278]

From the other side, FAS believes that in certain matters compliance can be more effective than coercive measures of state control as compliance has the following advantages:[279]
– it is voluntary and not mandatory on the part of the state;
– internal procedures, imposed by a company are more effective than prescriptions of antimonopoly authority, since the companies will more clearly adhere to the rules that they have established for themselves. Especially at the time, when capabilities to control implementation of FAS’ prescriptions are rather limited (see above).

Thus, there is no clear answer as to whether the introduction of a compliance program is an effective mechanism in cartel deterrence or not. What is certain is that its’ effectiveness depends on the compliance mentality of companies: whereas for the EU companies, compliance is an integral part of their activities, this is not the case for Russian companies. [280]

The next question is whether these programs are more effective in cartel deterrence than imposition of high fines on cartelists.

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[276] C. Angelucci & M.A. Han, ‘Monitoring managers through corporate compliance programs’, Amsterdam Center for Law & Economics Working Paper No. 2010-14

[277] Angela Korzhevskaya, 'Achieving a competition compliance culture in Russia: Assessing the UK experience in compliance programmes to deter cartels' [2015] 3(2) Russian Law Journal 85

[278] Neil Warwick, „The psychology of cartels. Cartel crime” [2012] 3(2) New Journal of European Criminal Law 182

[279] Angela Korzhevskaya, 'Achieving a competition compliance culture in Russia: Assessing the UK experience in compliance programmes to deter cartels' [2015] 3(2) Russian Law Journal 88

[280] Angela Korzhevskaya, 'Achieving a competition compliance culture in Russia: Assessing the UK experience in compliance programmes to deter cartels' [2015] 3(2) Russian Law Journal 85

In this regard, it shall be noted that conformity with competition law can flow from a fear of detection and subsequent punishment, and from a sense of normative obligation.[281] According to this statement, severe sanctions have a greater deterrent effect than compliance programs stand-alone and thus are more effective in deterring cartels. This statement is also confirmed by a theory of deterrence, which implicates that companies are not willing to commit an infringement if there is a credible threat of detection and a high sanction.[282] Thus, in order for compliance programs to be more effective, they should be designed in a way that they also provide for punishments for misconduct or non-compliance.

In conclusion, imposition of high fines on cartel members is a more effective instrument in cartel deterrence than the compliance program stand-alone. Nonetheless, in order to have the greatest possible deterrent effect, a certain suggestion would be the use of compliance programs with its preventive effect in addition to (and not a replacement for) the traditional enforcement approach, since compliance programs can add a value to the traditional deterrent mechanism.[283] Furthermore, this program is attractive to authorities, as it forms a preventive mechanism against the emergence of cartels.

[281] Eva Lachnit, 'Compliance programmes in competition law: improving the approach of competition authorities' [2014] 10 (5) Utrecht Law Review 33
[282] Eva Lachnit, 'Compliance programmes in competition law: improving the approach of competition authorities' [2014] 10 (5) Utrecht Law Review 33
[283] Eva Lachnit, 'Compliance programmes in competition law: improving the approach of competition authorities' [2014] 10 (5) Utrecht Law Review 31

Conclusion

Under the EU and Russian competition law systems, cartels are generally always prohibited. This strict approach to cartels adopted by the competition authorities and legislators reflects the special seriousness of this misconduct. This is the reason why EU and Russian jurisdictions distinguish cartels from other anticompetitive agreements, that can be prohibited only upon certain conditions, such as significant restriction of competition.

This similar approach to cartels in the EU and Russian law systems is also the reflection of the fact that EU competition law has always been used as the basis for Russian antimonopoly legislation. The Russian legislator always strived to borrow antimonopoly rules from the most prominent jurisdictions, as the EU one. Thus, these two jurisdictions contain similar provisions in the area of cartel law, as for example, the way they define cartels; which mechanisms are used to detect them; the fact that both jurisdictions offer administrative sanctions to cartelists and method of fine calculation to be imposed on cartel participants.

Nonetheless, problems arise in relation to the practical implementation of these EU anti-trust norms into Russian antimonopoly practice. Russia, compared to the EU, is a country with a developing economy and weak judicial institutions, and cannot therefore guarantee the same level of cartel enforcement. This problem is recognized in the literature as ‘decentralized globalization’, which means spreading norms of anti-trust legislation among countries with different development levels and legal systems.

Russian authorities have nonetheless always tried to strengthen their enforcement policies in cartel deterrence. Despite their efforts, cartels are still detected in various industries. It is thus discussed if the traditional approach in cartel deterrence, namely the imposition of fines, should be substituted by the integration of compliance programmes into companies.

Taking into account the theory of deterrence and the differences in compliance mentalities of EU and Russian companies, it is suggested that corporate compliance programmes are not to be used stand-alone. On the opposite, the combination of both instruments (namely, compliance programmes **and** imposition of high fines on cartelists) would guarantee the greatest possible effect in the battle against cartel emergence.

It shall be finally kept in mind that Russian competition legislation is in constant development and it tries thereby to keep pace with European legislation, as well as global trends, which are based on a best judicial and administrative practices of the leading competition authorities.[284] It remains, however, an open question when RF will be able to offer the same level of cartel enforcement as the EU.

[284] Angela Korzhevskaya, 'Achieving a competition compliance culture in Russia: Assessing the UK experience in compliance programmes to deter cartels' [2015] 3(2) Russian Law Journal 63, 82

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Abstract

(English)

The EU anti-trust policy has always been the basis for the Russian anti-trust policy. Therefore, EU and Russian legislations contain a lot of similar provisions in the area of competition law, as for example, in the way they define cartels; which detection mechanism of cartels are used; the fact that both jurisdictions offer administrative sanctions to cartelists and the fact that both jurisdictions distinguish cartel agreements from other anticompetitive agreements.

Certainly, there are also some differences in their competition policies. For instance, there are different enforcement authorities in the EU and RF, different enforcement history, variety of sanctions available for cartelists and, finally, different interpretation of standards of proof in cartel cases by national competition authorities.

Another finding is that not all agreements between competitors which restrict competition automatically constitute a cartel agreement. In the EU and the RF, cartels are always prohibited, as opposed to other anticompetitive agreements, that can be justified upon the condition that they do not significantly distort competition on the market.

The final finding is that introduction of a compliance program alone, without imposition of fines, is an ineffective mechanism to decrease the emergence of cartels.

(Deutsch)

Das EU-Kartellrecht war schon immer die Grundlage für das russische Kartellrecht. Daher enthalten EU- und Russischen Gesetze auf dem Gebiet des Wettbewerbsrechts eine Vielzahl ähnlicher Bestimmungen, zum Beispiel bei der Art und Weise, wie sie Kartelle definieren; welcher Erkennungsmechanismus der Kartelle verwenden werden; die Tatsache, dass beide Gerichtsbarkeiten administrative Sanktionen gegen Kartellmitglieder vorsehen und die Tatsache, dass beide Kartellabsprachen von anderen wettbewerbswidrigen Vereinbarungen unterscheiden, wobei letztere unterschiedlich geregelt sind.

Natürlich gibt es auch Unterschiede in der Wettbewerbspolitik. Beispielweise gibt es unterschiedliche Vollstreckungsbehörden, Vollstreckungsgeschichten, Sanktionen für Kartellisten

und schließlich eine unterschiedliche Auslegung von Beweisnormen in Kartellfällen durch die nationalen Wettbewerbsbehörden.

Eine weitere Feststellung ist, dass nicht alle wettbewerbsbeschränkenden Vereinbarungen zwischen Wettbewerbern ein Kartell darstellen. In der EU und in Russland, Kartelle werden von anderen wettbewerbswidrigen Vereinbarungen unterschieden und anders geregelt. Kartelle sind immer verboten, und die anderen wettbewerbswidrigen Vereinbarungen können durch bestimmte Gesetze oder Vorschriften gerechtfertigt werden, sofern sie den Wettbewerb auf dem Markt nicht erheblich verzerren.

Die endgültige Feststellung ist, dass, um das Entstehen von Kartellen zu verringern, die Einführung eines Compliance Programms ein ineffizienter Mechanismus ist, wenn dieser ab einzelner eingesetzt wird.