AN EXAMINATION OF CRIMINALIZATION OF RUSSIA'S ANTI-BID RIGGING POLICY

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The paper investigates enforcement of criminal sanctions in anti-bid rigging policy in Russia. Although cartels were criminalized in 1997, parties of numerous anticompetitive agreements on tenders are punished by corporate or individual fines, or disqualified. Statistics on sentences for bid rigging are highly controversial although legislative conditions for efficient criminalization are presented not only by criminal norms but also by leniency programmes in administrative and criminal proceedings which were designed to contribute to anticartel enforcement.

The aim of this research is to determine factors that have caused the very rare use of criminal sanctions for cartel enforcement with the focus on bid rigging. For the purpose of the research, the paper outlines the regulation of tendering in Russia and the system of sanctions for bid rigging, including leniency. Case analysis of the first custodial sentence for anticompetitive agreement on a public tender highlights specific features resulting in successful prosecution. Since this is one of the first attempts to assess criminalization of bid rigging in Russia, original empirical data including interviews with officials from federal competition authorities and regional representatives constitute the basis of the study.

Findings of the research determine the influence of social norms on the enforcement as the main challenge for criminalization of bid rigging which is weighed down by the insufficient political influence of competition authorities. The paper's findings may be of interest for assessing enforcement in other jurisdictions experiencing the same difficulties.

Keywords: bid rigging; cartels; enforcement; criminalization; leniency; social norms.

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1. Introduction

When it comes to criminal enforcement of competition law in Russia, given how the law is written, what happens in practice is a mystery. Detection of cartels works rather well: from 75 to 187 anticompetitive agreements are detected every year.[1] Criminalization of antitrust offences was legitimized many years ago: cartel as a criminal offence was introduced in 1997, leniency programme in the Criminal Code – in 2009. The jurisdiction of competition authorities corresponds to the regions of other enforcement agencies: competition authorities are represented by 84 regional departments and communicate with investigating agencies at the same level. Nevertheless, the only 'pure' anticartel custodial sentence was reported in 2014: the previous statistics on the use of the anticartel criminal norm are estimated as inaccurate because anticartel norms were applied improperly.[2]

Therefore, criminalization of cartels in Russia is not effective in the area for which it was designed despite a great number of detected cartels and cartelists and intensive use of fines as administrative enforcement.[3]

The issue is of particular significance for anticompetitive agreements on tenders. First, bid rigging constitutes over 70 percent of all cartels and anti-bid rigging enforcement actually determines anticartel enforcement.[4] Second, the vast majority of tenders in Russia concern the use of public funds so anticompetitive agreement on tenders directly affect social welfare, thus really very closely related to fraud or theft,[5] not only from a moral perspective.

Malfunctioning of anticartel criminal norms is recognized as one of the main challenges for Russian anticartel enforcement;[6] however, there is very little academic analysis of the issue in question. The purpose of this paper is to investigate the use of criminal sanctions in anti-bid rigging enforcement and to examine factors causing non-use of criminal enforcement in Russia.

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1 *Кинёв А.Ю.* Картели и другие антиконкурентные соглашения [Kinyov A.Yu. *Karteli i drugie antikonkurentnye soglashenia* [Alexander Yu. Kinyov, *Cartels and Other Anticompetitive Agreements*]], ConsultantPlus (2014).

2 *Id.*; Interview with Deputy Director of the Cartel Department of the Federal Antimonopoly Service of the Russian Federation Konstantin Aleshin (Mar. 10, 2015) [hereinafter Interview with Konstantin Aleshin].

3 1231 fines were imposed in 2013 (*see* Kinyov, *supra* n. 1).

4 *Report on Condition of Competition in the Russian Federation 2013*, at 146, Federal Antimonopoly Service of the Russian Federation (May 30, 2014), <http://fas.gov.ru/about/list-of-reports/list-of-reports_30086.html> (accessed Dec. 4, 2015) [hereinafter FAS Report].

5 Scott D. Hammond, *The Fly on the Wall Has Been Bugged*, U.S. Department of Justice (May 15, 2001), <www.justice.gov/atr/public/speeches/8280.htm> (accessed Dec. 4, 2015); Terry Calvani, *Cartel Penalties and Damages in Ireland: Criminalization and the Case for Custodial Sentences*, in Criminalization of Competition Law Enforcement: Economic and Legal Implications for the EU Member States 270 (Katalin J. Cseres et al., eds.) (Edward Elgar Pub. 2006).

6 FAS Report, *supra* n. 4, at 63.

The research question is how criminal liability for bid rigging in Russia is designed and what prevents criminal enforcement.

The paper is structured in the following way. Chapter 2 of the paper outlines the procurement legislation, the design of sanctions for violation of competition law on tenders, leniency programmes and some proceeding regulations influencing criminal enforcement. Chapter 3 contains an analysis of the 'Road case,' which is the first 'pure' criminal case against violators on tenders, aimed at discovering the factors distinguishing the case from other attempts to prosecute bid rigging. Chapter 4 is based on the use of original empirical data from Russian competition authorities. The findings are assembled into two main groups: the first one is about expression of social norms affecting criminal enforcement; the second group contains some observations which can show the deficiency of political power of competition authorities in the law enforcement system. In the conclusion, some policy recommendations are presented.

Empirical data consist of: interviews with the Deputy Director of the Cartel Department of the Federal Antimonopoly Service of the Russian Federation Konstantin Aleshin and the Deputy Director of the Sverdlovsk Region Department of the Federal Antimonopoly Service of the Russian Federation Sergey Volkov; an official website of the Federal Antimonopoly Service of the Russian Federation and courts database. The paper compares some elements of the Russian system with the German system because of the similarity of the structures of sanctions for individuals for anticompetitive agreements. Moreover, the two systems belong to the same legal tradition, which may affect enforcement.

The paper argues that social norms are the main obstacle to effective anti-bid rigging enforcement in Russia. This is expressed by several symptoms: dividing cartels into administrative offences or crimes of medium gravity instead of gravest crimes; 'spare' use of administrative fines where prosecution is doubted; a long period of time when nearly all antitrust violations had been criminalized without a special focus on cartels; a very short limitation period for cartels and an inconsistent regime of collecting evidence; the small importance given to this category of crimes by investigation agencies and removal of competition authorities from investigation. Finally, courts do not consider damage to competition as a serious problem. No wonder that bid rigging is not assessed as a serious crime and a threat of punishment is insignificant, a leniency programme exempting from criminal sanctions for cartels does not meet expectations: actually, there is not any significant effect on the number of convictions. Underestimation of danger of this crime directly affected the entire anticartel enforcement.

Consequently, treating cartel as a crime of medium gravity shows a tolerant public attitude and use of available procedural tricks to neutralize criminal sanctions; ignorance of these crimes by investigators due to weak public interest in cartels: competition authorities lacking formal power in criminal proceedings. This results in fragmentary and inefficient interaction by the public authorities. Correction of

these defects immediately results in a custodial sentence for bid rigging which is proved by case analysis.

The paper may be of interest for research regarding international enforcement since 'the boundaries of markets are increasingly not coinciding with the borders of legal jurisdictions,'[7] and transnational corporations are often involved in sensational investigations of anticompetitive agreements in Russia.[8] Findings on the relations between administrative sanctions and criminal liability may be relevant for jurisdictions where cartels and bid rigging are dealt with by similar provisions.

2. Legal Framework and Sanctions Applicable to Bid Rigging

This chapter outlines the structure of tender regulation in Russia, sanctions for anticompetitive behavior on tenders for cartel members and relations among enforcement acts in terms of impacts on each other. It focuses on enforcement of competition law in public procurement which constitutes the lion's share of auctions, presents types of violations on tenders, including illegal agreements, and peculiarities of cartel regulation, including thresholds for various types of sanctions. The chapter also refers to basic procedures for decision-making and appeals, as well as to the interactions among competition authorities and other law enforcement agencies, including the judiciary, to indicate the non-integration of competition law enforcement in the overall system.

Commercial tendering[9] of non-state companies is not restricted by law in determining the subject of auction or its procedure, except for an obligation to inform participants about tenders and meet deadlines for signing a tender protocol and a contract;[10] undertakings can organize tenders in any form including open and closed auctions and tenders. However, private auctions are rarely the subject of competition law enforcement, and anticompetitive agreements in public procurement constitute the majority of detected cartels in recent years,[11] so the paper focuses on the enforcement of competition law to anticompetitive agreements in public tendering. Tendering is regulated by special legislation for two groups of public purchasers.

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[7] Andreas Stephan, *Four Key Challenges to the Successful Criminalisation of Cartel Laws*, 2(2) J. Antitrust Enforcement 333 (2014). doi:10.1093/jaenfo/jnu004

[8] Resolution of the FAS of December 19, 2014, to impose a fine on the case concerning an administrative offense No. 4-14.32-23/00-22-14; *see also* materials of the FAS investigation of bid rigging on tender which involved the Ministry of Health of the Republic of Sakha (Yakutia), Diatech S.A. (Switzerland) Ltd. and its subsidiaries and affiliates of Siemens AG (Germany) and Siemens: <http://fas.gov.ru/fas-in-press/fas-in-press_36816.html> (accessed Dec. 4, 2015).

[9] Civil Code of the Russian Federation [hereinafter Civil Code], Arts. 447–49.

[10] Civil Code, Art. 448.

[11] FAS Report, *supra* n. 4, at 146.

2.1. Regulation of Tenders for State and Municipal Institutions

Public procurement process, including planning, forming, placing and executing an order of procurement for state and municipal customers, is regulated by the Federal Law No. 44-FZ.[12] This Federal Law covers tenders organized by government bodies, including public authorities; the State Atomic Energy Corporation *Rosatom*; a governing body of the state non-budgetary fund or state public institution acting on behalf of the Russian Federation or the constituent entities of the Russian Federation, authorized to accept budget commitments; municipal authorities or municipal public institutions acting on behalf of the municipality, authorized to accept budget commitments and carrying out procurements.[13] The main ways for placing orders are tenders (an open tender, a tender with limited participation, a two-stage tender, a closed tender, a closed tender with limited participation, a closed two-stage tender), auctions (an auction in electronic form, a closed auction), a request for quotations, a request for proposals.[14] A number of antidumping measures are provided by this Federal Law, including collateral to secure contract performance in case when a participant with whom a contract is signed proposes a price which is lower than the starting (maximum) price of the contract by 25 percent or more.[15] Antidumping rules are designed to stop unfair practices, such as when extremely low prices were set without any justification and correlation with suppliers' resources and expertise, which resulted in the embezzlement of budget funds because of the suppliers' failure to comply with deadlines and degradation of quality of goods, works and services. The amount of such a contract performance security exceeds by 1.5 times the amount of a contract performance security, specified in the documentation on tender or auction, but not less than advance payment. If during a tender or an auction the initial (maximum) contract price is RUB15 million or less, an alternative way to secure performance is to provide information from the register of contracts confirming that such a participant has been acting in good faith if the price of any of the previous contracts is at least 20 percent of the price proposed by the participant.

A unified information system supports the system of public procurement contracts. This system contains information about the terms, prohibitions and limitations on access for products originating from a foreign state or a group of foreign states, as well as the work (services) performed (provided) by foreigners; a list

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[12] Федеральный закон от 5 апреля 2013 г. № 44-ФЗ «О контрактной системе в сфере закупок товаров, работ, услуг для обеспечения государственных и муниципальных нужд» [*Federal'nyi zakon ot 5 aprelya 2013 g. No. 44-FZ 'O kontraktnoi sisteme v sfere zakupok tovarov, rabot, uslug dlya obespecheniya gosudarstvennykh i munitsipal'nykh nuzhd'* [Federal Law No. 44-FZ of April 5, 2013, 'On the System of Public Procurement Contracts for Products, Work or Services for State and Municipal Needs']] [hereinafter Federal Law No. 44-FZ].

[13] *Id*. Arts. 3(5), (6).

[14] *Id*. Art. 24(2).

[15] *Id*. Art. 37.

of foreign states that have signed international treaties with the Russian Federation mutually to apply the national regime for purchases, as well as the terms under which the national regime is applied.

2.2. Regulation of Tenders for Specific Types of Companies

The Federal Law No. 223-FZ[16] sets the basic principles and requirements for procurement of goods, works and services for the specific types of legal entities: state-owned corporations, public (state-owned) companies; natural monopolies, entities involved in regulated operations (electricity, gas, heat and water supply, *etc.*); state and municipal unitary enterprises; autonomous institutions; business entities in which the Russian Federation, a constituent entity of the Russian Federation or a municipality holds an aggregate of over 50 percent; subsidiaries in which the above types of legal entity hold a cumulative share of over 50 percent; subsidiaries in which the above types of subsidiary hold a cumulative share of over 50 percent.[17] Before the Federal Law No. 223-FZ the Federal Law No. 135-FZ[18] regulated the purchase of certain financial services only (*e.g.,* obtaining a loan) for natural monopolies on open tenders.

Each of the above legal entities must select suppliers of goods, works and services on the basis of a tender, auction or other selection procedure provided for in a procurement regulation, adopted internally by each procuring entity, and posted on the official website *www.zakupki.gov.ru*. The procurement contains the requirements on purchases, including the procedure for preparing and carrying out the purchase (in particular, purchasing methods: by tender, auction or otherwise), for conclusion and performance of contracts, *etc.*[19] Procurements should rely on the principles of equal eligibility criteria and the absence of arbitrary requirements or discriminatory restrictions for potential suppliers, absence of ungrounded restrictions or unmeasurable requirements on transaction participants. Information about the purchase should be accessible free of charge. While certain principles are developed further in the provisions of Federal Law No. 223-FZ by specifying certain action and obligations for a procuring entity, some of them are general in nature and lacking specific details. In particular, it is unclear whether restricted tendering is in compliance with Federal Law No. 223-FZ and under what circumstances the use of direct contracting may be justified in the case of purchases of goods from a single

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[16] Федеральный закон от 18 июля 2011 г. № 223-ФЗ «О закупках товаров, работ, услуг отдельными видами юридических лиц» [*Federal'nyi zakon ot 18 iyulya 2011 g. No. 223-FZ 'O zakupkakh tovarov, rabot, uslug otdel'nymi vidami yuridicheskikh lits'* [Federal Law No. 223-FZ of July 18, 2011, 'On Procurement of Goods, Works and Services by Certain Legal Entities']] [hereinafter Federal Law No. 223-FZ].

[17] *Id*. Art. 1.

[18] Федеральный закон от 26 июля 2006 г. № 135-ФЗ «О защите конкуренции» [*Federal'nyi zakon ot 26 iyulya 2006 g. No. 135-FZ 'O zashchite konkurentsii'* [Federal Law No. 135-FZ of July 26, 2006, 'On Protection of Competition']] [hereinafter Federal Law No. 135-FZ].

[19] Federal Law No. 223-FZ, *supra* n. 16, Art. 3(2).

supplier.[20] Also some procuring entities envisage an approach where certain types of contracts or contracts under a certain value (less than RUB100,000 or for procuring entities with annual revenues of over 5 billion roubles – less than RUB500,000), are excluded from the formal tendering procedures.[21]

Federal Law No. 223-FZ covers procurement of any goods, works and services except (i) sale and purchase of securities and foreign currency, (ii) purchase of commodities on a commodity exchange, (iii) purchase of military products, and (iv) purchase of goods, works or services in accordance with an international treaty which provides for a different method of procurement.

2.3. Anticompetitive Agreements on Tenders

The Russian anticartel legislation evolved under the strong influence of the European tradition,[22] and some authors note that the current wording of Art. 11 of Federal Law No. 135-FZ is nearly 'blueprints of Article 101' TFEU.[23] The first attempt to define anticompetitive agreements was undertaken in 1991;[24] however, because of the novelty and foreignness of the institutions, there were a lot of inconsistencies. For example, only agreements between competitors holding collectively a dominant position were prohibited. Reforms of the beginning of the 1990[5] and a special programme of demonopolization of the economy in 1994[25] resulted in changes to competition legislation;[26] however, again, only agreements between competitors with an aggregated share of 35 percent of the market were illegal. Later, there were several

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[20] Federal Law No. 223-FZ, *supra* n. 16, Art. 4(19)(2).

[21] *Id*. Art. 4(15).

[22] *Алешин Д.А., Артемьев И.Ю., Борзило Е.Ю. и др.* Конкурентное право России: Учебник [Aleshin D.A., Artem'ev I.Yu., Borzilo E.Yu. i dr. *Konkurentnoe pravo Rossii: Uchebnik* [Dmitry A. Aleshin et al. Competition Law of Russia: Textbook]] 33 (Igor Yu. Artemiev & Alexey G. Sushkevich, eds.) (Publishing House of the Higher School of Economics 2012).

[23] Svetlana Avdasheva et al., *Discovering the Miracle of Large Numbers of Antitrust Investigations in Russia: The Role of Competition Authority Incentives* 8 (Higher School of Economics Research Paper No. WP BRP 26/PA/2015), <http://papers.ssrn.com/abstract_id=2588989> (accessed Dec. 4, 2015).

[24] Закон РСФСР от 22 марта 1991 г. № 948-I «О конкуренции и ограничении монополистической деятельности на товарных рынках» [*Zakon RSFSR ot 22 marta 1991 g. No. 948-I 'O konkurentsii i ogranichenii monopolisticheskoi deyatel'nosti na tovarnykh rynkakh'* [RSFSR Law No. 948-I of March 22, 1991, 'On Competition and Restriction of Monopolistic Activity on Markets']] [hereinafter RSFSR Law No. 948-I].

[25] Государственная программа демонополизации экономики и развития конкуренции на рынках Российской Федерации (основные направления и первоочередные меры) [*Gosudarstvennaya programma demonopolizatsii ekonomiki i razvitiya konkurentsii na rynkakh Rossiiskoi Federatsii (osnovnye napravleniya i pervoocherednye mery)* [State Programme on Demonopolization of Economy and Development of Competition on Russian Market (Main Key Areas and Priority Measures)]] (approved by Decree of the Government of the Russian Federation No. 191 of March 9, 1994).

[26] Federal Law No. 83-FZ of May 25, 1995 (amending and supplementing the RSFSR Law No. 948-I, *supra* n. 24).

attempts to improve the wording of the prohibition on anticompetitive agreements;[27] however, only in 2009[28] was a comprehensive definition of cartels given.[29]

Today, Federal Law No. 135-FZ determines cartel agreements as agreements between competing economic entities that sell goods on the same market if such agreements lead or can lead to: 1) fixing or maintaining prices (tariffs), discounts, markups (surcharges) and (or) additions to prices; 2) increasing, reducing or maintaining prices in the course of competitive bidding; 3) dividing the goods market according to a geographic principle, the quantity of sales or purchases of the goods, the mix of goods or a composition of buyers or sellers (customers); 4) reducing or terminating production of the goods; 5) refusing to conclude contracts with particular sellers or buyers (customers). So, cartels in a form of bid rigging as raising, lowering, or maintaining of prices at tenders by economic entities are prohibited.[30] It is noteworthy that the impact on the market is not a necessary element of the violation; actually, any anticompetitive agreement is illegal *per se*, and constitutes an object of enforcement; this approach explains a huge number of annually detected cartels and devalues their danger.

The legislature has introduced a few more types of anticompetitive agreements on tenders. Special norms prohibit anticompetitive agreements involving a purchaser (a state agency) and a participant or participants of a tender: Art. 16 prohibits acts, actions (omissions), agreements, concerted practices of federal executive authorities, public authorities of the constituent entities of the Russian Federation, bodies of local self-government, other bodies or organizations exercising the functions of the above-mentioned bodies and public extra-budgetary funds that restrict competition. Particularly, agreements which lead or can lead to increase, decrease or maintaining in prices (tariffs) are forbidden except the cases when such agreements are provided for by federal laws or statutory legal acts of the President or the Government of the Russian Federation.[31] There is another type of prohibited agreements on tenders: agreements between economic entities which lead or can lead to a restriction of competition,[32] including imposing contract conditions upon a counteragent which are disadvantageous or irrelevant to the contract subject (*e.g.,* unreasonable requirements

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[27] Federal Law No. 122-FZ of October 9, 2002 (amending and supplementing the RSFSR Law No. 948-I, *supra* n. 24); Federal Law No. 135-FZ, *supra* n. 18.

[28] Федеральный закон от 17 июля 2009 г. № 164-ФЗ «О внесении изменений в Федеральный закон «О защите конкуренции» и отдельные законодательные акты Российской Федерации» [*Federal'nyi zakon ot 17 iyulya 2009 g. No. 164-FZ 'O vnesenii izmenenii v Federal'nyi zakon "O zashchite konkurentsii" i otdel'nye zakonodatel'nye akty Rossiiskoi Federatsii'* [Federal Law No. 164-FZ of July 17, 2009, 'On Amendments to the Federal Law "On Protection of Competition" and Some Legislative Acts of the Russian Federation']].

[29] Interview with Konstantin Aleshin, *supra* n. 2.

[30] Federal Law No. 135-FZ, *supra* n. 18, Art. 11(1)(2).

[31] *Id*. Art. 16(1).

[32] *Id*. Art. 11(4).

to transfer financial funds, other property, particularly property rights, as well as consent to conclude a contract subject to including provisions in the contract regarding goods, in which the counteragent is not interested, and other requirements).

Some special prohibitions for public tenders are set in Art. 17 of Federal Law No. 135-FZ and include coordination of activities of the tender participants by the tender organizers or customers; creation of preferential conditions for participation in the tender to one or several participants, including illegal access to information; violation of the procedure for determining a winner or winners of a tender; participation of the tender organizers or of the buyers and (or) employees of the tender organizers or employees of the tender buyers in the tender. This special regulation for other agreements depending on participation (or non-participation) of state institutions on the side of the tender organizer causes confusion for enforcement.[33]

Competition authorities (Federal Antimonopoly Service [hereinafter FAS]) represented by 84 regional FAS departments are responsible both for anticartel enforcement and also for monitoring tenders conducted under the law on orders for goods, works or services for the needs of the state.[34] Their competence includes consideration of the appeal of actions or omissions of purchasers during the procurement procedures and assessment of their compliance with the standards of the law. The FAS performs the function of control either on its own initiative or on application of an interested party (tenderers, prosecutors, *etc.*). Therefore, other forms of violations, which cannot be qualified as agreement, are also the subject of the competence of competition authorities that initially opposes competition authorities with other state institutions.

2.4. Sanctions

2.4.1. Overview of Criminalization of Cartels in Russia

Analysis of the legislation and enforcement in XIX – the beginning of XX century in Russia reveals that in pre-revolutionary Russia, dangerous anticompetitive actions of traders and industrialists were criminalized with the intention to protect the interests of consumers and social well-being rather than competition.

The first systematized code of criminal laws of the Russian Empire – Code of Criminal and Correctional Penalties[35] (1845) – set three of the offences relating to the collusion of producers and (or) dealers: in Arts. 1130, 1615, 1619. For example, Art. 1615 included in Ch. XIII 'Violation of Trade Statutes' provided for liability for conspiracy of traders or manufacturers to excessively increase or decrease prices for goods aimed to make barriers for other suppliers. Initiators could be sentenced to

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[33] Interview with Konstantin Aleshin, *supra* n. 2.

[34] Decree of the Government of the Russian Federation No. 94 of February 20, 2006.

[35] Уложение о наказаниях уголовных и исправительных [*Ulozhenie o nakazaniyakh ugolovnykh i ispravitel'nykh*].

imprisonment for a term from six months to one year, other participants – to arrest for a period from three weeks up to three months or a fine of up to RUB250. If the agreement caused a violation of public order (riots), deprivation of certain special rights and imprisonment in 'strait-house' from two to three years were applied. Article 1130 (as amended in 1885 – Art. 913) was not included in the chapter on the violation of trade regulations, and was aimed at preventing crimes against public improvement and well-being. Article 1130 established liability for price fixing on food, and liability for violation of this provision was determined by Art. 1615.

Article 1619 (as amended in 1885 – Art. 1181) criminalizes the conspiracy at the auction and removal from auction:

> An individual who persuades other participants by gifts, promises or otherwise, not to participate in the auction for sale of immovable or movable property at public auction, or in bids for contracts or supplies or bought off is subject to the fine from RUB50 to RUB500.

Similarly, the Criminal Code 1903 established criminal sanctions for agreements among traders to raise food prices and prices for other essentials.[36] Enforcement of these norms, obviously, was completely discontinued in 1917, and in the Soviet planned economy with the total state control over prices the issue of protection of competition did not arise.

At the beginning of the reforms in the 1990[s], several unsuccessful attempts to criminalize anticompetitive acts were undertaken. Article 175.1 'Violation of the Antitrust Laws' was incorporated in 1992 to Criminal Code of the Russian Soviet Federative Socialist Republic (RSFSR) of 1960,[37] Art. 154.3 'Illegal Increasing or Maintaining of Prices' – in 1993. Article 175.1 provided sanctions for officials for failure to comply with the legal requirements of competition authorities if they were exposed to an administrative penalty for the same actions within a year. Illegal increasing or maintaining of prices as a result of monopolistic activity by creating barriers to entry into the market for other economic entities or withdrawal of goods from the market was criminalized by Art. 154.3 of the Criminal Code of RSFSR. Incompleteness and ambiguity of the determination of crimes against competition resulted in the absolute ineffectiveness of these norms.[38]

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[36] *Хутов К.М.* Преступный монополизм: уголовно-политическое и криминологическое исследование [Khutov K.M. *Prestupnyi monopolizm: ugolovno-politicheskoe i kriminologicheskoe issledovanie* [Kazbek M. Khutov, The Criminal Monopoly: Criminal, Political and Criminological Research]] 47 (Wolters Kluwer 2007).

[37] RSFSR Law No. 948-I, *supra* n. 24.

[38] *Максимов С.В.* Уголовная ответственность за нарушение антимонопольного законодательства в России // Российское антимонопольное право и экономика. 2014. № 1. С. 7 [Maximov S.V. *Ugolovnaya otvetstvennost' za narushenie antimonopol'nogo zakonodatel'stva v Rossii // Rossiiskoe antimonopol'noe pravo i ekonomika*. 2014. No. 1. S. 7 [Sergey V. Maksimov, *Criminal Responsibility for Violation of the Antimonopoly Legislation in Russia*, 2014(1) Russian Competition Law and Economics 7]].

Since the adoption of the new Criminal Code of the Russian Federation [hereinafter Criminal Code] in 1996, Art. 178, setting sanctions for anticompetitive agreements, has undergone four major changes. Until 2003 any anticompetitive agreement was criminalized. In 2003, serious damage or illegal income became necessary elements of criminal anticompetitive agreements.[39] Starting with a very broad interpretation of all monopolistic actions as a crime, the legislature gradually narrowed the range of criminalized anticompetitive acts, and to date restriction to competition by means of making an agreement (cartel) restricting competition by competing economic agents, which is prohibited by the antitrust legislation of the Russian Federation, is prosecuted only if such actions have inflicted serious damage to citizens, organizations or the state or have entailed the receipt of a large income.[40]

2.4.2. System of Sanctions

Sanctions for bid rigging are covered by sanctions for hard-core cartels with one exception for bidders avoiding entering into a contract, which is one of the most widespread forms of implementing anticompetitive agreements on tenders. In this case, a bidder is to be included in the register of *mala fide* suppliers[41] which bans a company from any tender for state or municipal needs for up to two years.[42]

Overall, the system of sanctions for bid rigging to some extent is similar to the German system of anti-bid rigging enforcement with two types of sanctions for individuals[43] and 'division of competences' between competition authorities 'as the enforcer of competition law, and the local or regional public prosecutors as the enforcers of criminal law.'[44]

Both the FAS and the *Bundeskartellamt* in Germany are 'competent for investigations relating to infringements of competition law, including the enforcement of administrative offences and the imposition of administrative fines on both individuals and undertakings.'[45] However, unlike administrative fines for individuals in Germany, where 'the statutory maximum for individual fines is €1m or the amount gained by the individual, whichever is the greater,'[46] fines for

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39 Federal Law No. 162-FZ of December 8, 2003 (amending and supplementing the Criminal Code).

40 Criminal Code, Art. 178 (as amended by the Federal Law No. 45-FZ of March 8, 2015).

41 The register of *mala fide* suppliers available at <http://rnp.fas.gov.ru/> (accessed Dec. 5, 2015).

42 Federal Law No. 44-FZ, *supra* n. 12, Art. 104.

43 Florian Wagner-von Papp, *Criminal Antitrust Law Enforcement in Germany: 'The Whole Point Is Lost If You Keep It a Secret! Why Didn't You Tell the World, Eh?,'* <http://ssrn.com/abstract=1584887> (accessed Dec. 5, 2015).

44 *Id*.

45 *Id.*

46 *Id.*

individuals in Russia can hardly be considered significant. Article 14.32(1) of the Code of Administrative Offences of the Russian Federation [hereinafter Code of Administrative Offences] set:

> The conclusion by an economic entity of an agreement which is inadmissible under the antimonopoly legislation of the Russian Federation, and equally, participation therein or the commission by an economic entity of coordinated actions that are deemed inadmissible under the antimonopoly legislation of the Russian Federation –
>
> shall cause the imposition of an administrative fine at the rate of RUB20,000 to RUB50,000 or disqualification for a term of up to three years for officials; and on legal entities from 0.01 to 0.15 of the sum of the offender's proceeds from the sale of the product (work or service) in the market where the administrative offence has been committed, or from 0.1 to 0.5 of the initial value of the subject matter of trading, but in any case not below RUB100,000 or if the sum of the offender's proceeds from the sale of the product (work or service) in the market where the administrative offence has been committed exceed 75 percent of the aggregate sum of the offender's proceeds from the sale of all products (works or services), or the administrative offence has been committed in the market of commodities (works or services) whose sale takes place at the prices (tariffs) regulated in accordance with the legislation of the Russian Federation, at the rate from 0.003 to 0.03 of the sum of the offender's proceeds from the sale of the product (work or service) in the market of which the administrative offence has been committed but in any case not below RUB100,000.

Therefore, fines imposed on a company for anticompetitive agreement on tenders are not turnover fines, are calculated from the initial price of a contract and cannot exceed half of the initial value of the starting auction price.

If a company is responsible for any anticompetitive agreement on tenders *per se*, sanctions for individuals differ depending on damage or illegal income resulting from the agreement. If there is no damage or illegal income, or damage from bid rigging is less than RUB1 million or illegal income is less than RUB50 million, an individual (a manager of a company or a public official) shall pay administrative fine in the amount of RUB50,000 (appr. £560) or be disqualified for the period of time no longer than three years in accordance with the Code of Administrative Offences.[47]

Therefore, unlike in the German criminal enforcement system, the investigating agencies which are responsible for public prosecution of bid rigging are competent to investigate a crime only if an anticompetitive agreement has inflicted serious damage to citizens, organizations or the state or has entailed the receipt of a large

[47] Code of Administrative Offences, Arts. 14.32(1), (3).

income,[48] wherein a large size income is an amount that exceeds RUB50 million, and an income in an especially large size of RUB250 million;[49] large damage shall be deemed to be damage the amount of which exceeds RUB10 million, and especially large damage – exceeds RUB30 million. In this case, an individual can be brought to criminal responsibility in the form of criminal fine, correction works or imprisonment up to three years.[50]

2.4.3. Corpus delicti and the Role of Competition Authorities in Proving

While just concluding an agreement disregarding damages or effect for competition is sufficient for administrative liability both for individuals and undertakings, another concept determines a criminal liability where both restriction of competition and particular amount of income or damages are to be proved.

Pursuant to Art. 8 of the Criminal Code, the commission of an offence which embraces all elements of a crime provided for by the Code shall be the only ground for criminal responsibility. *Corpus delicti* consists of the object, objective element, subject, and subjective element of a crime, where the object of a crime describes social relations that have been affected by a criminal offence; an objective element of a crime is an outer manifestation of a crime that includes the socially harmful conduct (an act or omission), socially harmful consequences, a causal link between the criminal conduct and socially harmful consequences, place, time, setting, manner and means to commit a crime; the subject of a crime is an individual who committed a crime and is subject to criminal liability; the subjective element of a crime is an inner manifestation of a crime – the psychological activity of a person that exposes his / her attitude in the form of the cognition and will towards the socially harmful conduct. The psychological attitude of a person concerning their socially harmful conduct is reflected in various forms of guilt, particularly intention and negligence.[51]

Therefore, for a criminal enforcement place, time, setting, manner and means to commit a crime besides serious damage or illegal income should be proved for a convicted sentence.

It is noteworthy that there is no legal requirement making a decision of the FAS establishing the existence of a cartel agreement a compulsory element of a crime.[52] Moreover, there is no formal status of competition authorities in criminal proceedings

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48 Criminal Code, Art. 178(1).

49 *Id*. Note 1 to Art. 178.

50 *Id*. Art. 178.

51 Mohamed Elewa Badar & Iryna Marchuk, *A Comparative Study of the Principles Governing Criminal Responsibility in the Major Legal Systems of the World (England, United States, Germany, France, Denmark, Russia, China, and Islamic Legal Tradition)*, 24(1) Criminal Law Forum 25 (2013). doi:10.1007/s10609-012-9187-z

52 Code of Criminal Procedure of the Russian Federation [hereinafter Code of Criminal Procedure], Art. 140.

rather than that of 'applicant,' so the investigating agencies, which are a part of the Ministry of Internal Affairs, are authorized to open a criminal case under Art. 178 of the Criminal Code if they find out cartel attributes. If by the end of 2014 the issue of whether a decision of competition authorities should constitute necessary ground for opening a criminal case for violation of competition law had hardly been discussed,[53] after adopting a law excluding a similar approach to opening tax criminal investigations although the effectiveness of the role of the relevant governmental stakeholders like tax authorities for criminal enforcement, '*e.g.,* investigate up to the point of indictment, ask questions and make statements in court'[54] is noted in other jurisdictions with a similar enforcement regime. Before that law was enacted decisions of tax authorities were the only ground for opening criminal cases against tax violations.[55]

2.5. Regulation of Leniency

Although the importance of leniency programmes for anticartel enforcement[56] is recognized both in an administrative proceeding and investigation of criminal cases, it is not a one-stop shop for applicants. The leniency programmes for the first person reporting to the authorities about a cartel are established both for administrative sanctions[57] and criminal responsibility.[58] They are applied to all types of anticompetitive agreements prohibited by Art. 11 of Federal Law No. 135-FZ.

The conditions for exemption from administrative liability defined in accordance with the note to Art. 14.32 of the Code of Administrative Offences for a company or an individual that voluntarily applied to the federal competition authorities or its territorial body to report that he / she / it has concluded an inadmissible agreement are: the lack of relevant information and documents concerning the administrative offence committed at competition authorities by the time of the person's report; the termination of the person's participation in the agreement; the information and documents that have been presented are sufficient for the purpose of establishing the event of the administrative offence. It should be noted that the values of the leniency programme for detecting cartels in administrative proceeding look distorted because competition authorities are regarded as not having relevant information and documents concerning the administrative offence committed till the announcement of the decision of the competition authorities, which established the fact of violation of

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53 Maximov, *supra* n. 38, at 13.

54 Papp, *supra* n. 43.

55 Federal Law No. 308-FZ of October 22, 2014 (amending the Code of Criminal Procedure).

56 Andreas Stephan, *The UK Cartel Offence: Lame Duck or Black Mamba?* (CCP Working Paper 08-19, November 2008), <http://competitionpolicy.ac.uk/documents/8158338/8256111/CCP+Working+Paper+08-19.pdf> (accessed Dec. 5, 2015) [hereinafter Stephan, *The UK Cartel Offence*].

57 Code of Administrative Offences, Note 1 to Art. 14.32.

58 Criminal Code, Note 3 to Art. 178.

the antimonopoly legislation that was grounds for instituting an administrative case.[59] Therefore any participant of bid rigging can apply for relief during the hearing of the case regarding investigating cartel case in the Commission as soon as he / she realizes the vulnerability of his / her position. Nevertheless, the leniency programme providing an exemption from administrative fines is an effective tool of deterrence cartels.[60]

Since 2009, leniency regarding cartels has been introduced in criminal proceeding and a person who has concluded an anticompetitive agreement shall be relieved from criminal responsibility if he / she has contributed to solving the crime, has compensated for the damage caused or in some other way has made up losses caused as a result of cartel, unless there is another *corpus delicti*. Since competition authorities are remote from investigating criminal cases, it seems an individual has to apply on exemption of criminal responsibility to investigating agencies. While certainty of leniency is the main factor of its success,[61] there are no clear criteria for establishing the contribution to solve the crime, or compensation of damage or losses in other way. Considering the detachment of criminal investigation from cartel investigation by competition authorities, no wonder that to date there are no signs of use of the leniency pursuant to the Criminal Code.

Therefore, the order of application leniency programme in criminal cases is uncertain and does not meet expectations of increasing the effectiveness of leniency programmes, 'as the offer of immunity becomes more tempting.'[62]

2.6. Appeal against the FAS Decisions and the Role of Judicial Acts for Criminalization of Cartels

Companies can appeal any decision or order of competition authorities to the commercial courts[63] and individuals to the district courts within three months from the date of the decision.

Commercial courts as a part of the judiciary system have jurisdiction for business and other economic claims.[64] Commercial courts are divided into judicial panels for disputes arising from civil relation (private enforcement of law) and judicial panel

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[59] Постановление Пленума ВАС РФ от 30 июня 2008 г. № 30 «О некоторых вопросах, возникающих в связи с применением арбитражными судами антимонопольного законодательства» [*Postanovlenie Plenuma Vyshchego Arbitrazhnogo Suda Rossiiskoi Federatsii ot 30 iyunya 2008 g. No. 30 'O nekotorykh voprosakh, voznikayushchikh v svyazi s primeneniem arbitrazhnymi sudami antimonopol'nogo zakonodatel'stva'* [Ruling of the Plenum of the Supreme Commercial Court of the Russian Federation No. 30 of June 30, 2008, 'On Some Issues Arising in Connection with the Use of Commercial Courts Antitrust Legislation']] ¶ 10.3 [hereinafter Ruling No. 30].

[60] Interview with Konstantin Aleshin, *supra* n. 2.

[61] Stephan, *The UK Cartel Offence*, *supra* n. 56, at 32.

[62] *Id.* at 22.

[63] Federal Law No. 135-FZ, *supra* n. 18, Art. 52; Code of Arbitration Procedure of the Russian Federation [hereinafter Code of Arbitration Procedure], Art. 198.

[64] Federal Law No. 135-FZ, *supra* n. 18, Art. 52; Code of Arbitration Procedure, Art. 1; Code of Administrative Offences, Art. 23.1.

for disputes arising out of administrative relations (public enforcement).[65] Despite the establishment of specialized court within the judiciary system, such as courts on intellectual property rights,[66] the idea of courts specializing in competition law has not even been discussed yet. Acts of the FAS as elements of public enforcements are considered by panels specialized on administrative cases.

Sometimes appeals to different judicial systems increase uncertainty for enforcement because neither commercial courts nor district courts are bound by fact established by courts from another branch; for example, the Ruling of the Presidium of the Supreme Commercial Court of the Russian Federation No. 13988/06, April 3, 2007, states that the legal assessment of the actions of the organization given by one of district courts cannot be regarded as a prejudicial fact to the commercial court. However, the facts established by a judgment of commercial court are mandatory for law enforcement agencies and do not need proof.[67]

The lack of specialization may explain abnormal percentage of cancelled decisions of competition authorities on cartels: the Head of the FAS Legal Department Sergey Puzyrevsky recognized that up to 18 percent of all decisions establishing cartels were dismissed by commercials courts in 2014. In commercial courts of the lower level, applicants won in 62 percent cases.[68] These cancellations affect criminal investigations because although investigating agencies are not bound by decisions of competition authorities establishing anticompetitive agreements, they have to terminate an investigation related to a cartel if the commercial court dismisses the FAS decision on this matter.

2.7. Concluding Remarks on the Review of Legislation

To sum up, the current design of competition law determining anticompetitive agreements makes illegal any agreement among competitors which leads or can lead to fixing, maintaining prices or other prohibited manipulation with prices; increasing, reducing or maintaining prices in the course of competitive bidding; dividing the goods market; reducing or terminating production of the goods or refusing to conclude contracts with particular sellers or buyers. Both administrative and criminal responsibilities are established for any of such anticompetitive agreements, including bid rigging. There are some rules in competition law regarding agreements between a purchaser and tenderers but this type of agreements is treated separately from cartels. Other types of violations on tenders are subject of control of competition

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[65] *See, e.g.,* <http://www.arbitr.ru/struct/judges/>, <http://ekaterinburg.arbitr.ru/about/structure> (accessed Dec. 5, 2015).

[66] <http://ipc.arbitr.ru/> (accessed Dec. 5, 2015).

[67] Code of Arbitration Procedure, Art. 58.

[68] *Штыкина А., Галактионова А.* Коэффициент судебного действия [Shtykina A., Galaktionova A. *Koeffitsient sudebnogo deistviya* [Alisa Shtykina & Aleksandra Galaktionova, *The Coefficient of Legal Action*]], RBK Daily (Apr. 9, 2015), <http://rbcdaily.ru/economy/562949994699918> (accessed Dec. 5, 2015).

authorities but beyond enforcement of competition laws. Nearly all tenders susceptible of enforcement by competition law are public tenders.

Sanctions for corporations for bid rigging are relatively low and do not exceed half of the initial maximum price of a tender. Sanctions for individuals are set depending on the cost of damage caused by an agreement, which is somewhat inconsistent with provisions of competition law prohibiting cartels *per se*.

Competition authorities are completely detached from criminal investigations apart from a very general right to report a crime. The leniency programme is used rather for facilitating proof of cartels than for detecting cartels in administrative proceeding conducted by competition authorities and is not used in criminal proceedings because of its separation from cartel investigation and high uncertainty of conditions. Decisions of competition authorities are not a compulsory element for opening a criminal case but court dismissal of their decisions deters a criminal prosecution.

The case analysis in the next section presents application of substantive law norms in the first custodial sentence for bid rigging.

3. Assessment of the 'Road Case'

3.1. Why the 'Road Case' is Important for Assessment of Anti-Bid Rigging Policy in Russia

The case in question is of particular importance for assessment of criminalization because the number of cases is very limited (actually, the 'Road case' is reported as the first custodial sentence for bid rigging[69]), and statistics on the criminal enforcement since 1997 is very debatable. Table A demonstrates that the number of opened cases pursuant to Art. 178 of the Criminal Code is much lower than the number of detected cartels, and opened cases are often stopped even during investigation before being sent to courts.

Table A. Criminal v. Administrative Enforcement (2011–13)[70]

	FAS		Ministry of Internal Affairs	
	Detected cartels (violation of Art. 11(1) of Federal Law No. 135-FZ)	Number of fines imposed	Number of opened criminal proceedings	Number of criminal cases transferred to court hearing
2011	187	1394	13	4
2012	75	1537	5	1
2013	148	1237	9	0

[69] Interview with Konstantin Aleshin, *supra* n. 2.

[70] Kinyov, *supra* n. 1.

In the period 1996–2013, 380 criminal cases were opened,[71] 60 defendants were indicted. However, the vast majority of the criminal cases were stopped. Moreover, almost all cases concerned the incidents on commodity and farm markets, local facilities providing services, where some entrepreneurs have injured others 'aiming to limit their business activity.'[72]

Since examination of the first custodial sentence for bid rigging may reveal factors determining its success, necessary tests, as well as other elements of the case in question and the court assessment of seriousness of bid rigging as a crime are analyzed in this chapter. Specific characteristics of the case correlating to obstacles examined in the next chapter are identified, in particular joint investigation of the corruption case and a cartel agreement on the tender. However, adequacy of sanctions for bid rigging is doubted because, first, weight of imprisonment for bid rigging is not significant in the sum of punishment for accompanying crimes, and, second, the imprisonment becomes rather unrealistic for the defendant due to suspended prison sentence.

3.2. Background Facts of the 'Road Case'

The first criminal charge on bid rigging in the Russian Federation was just one episode of a big corruption investigation ('Road case') against a group of at least eight officials including the Deputy Governor of Novgorod region,[73] so no wonder that broad publicity accompanied the investigation from the very early days. Although publicity for the convictions for bid rigging is mentioned as a necessary support for criminal enforcement,[74] public awareness is unlikely to be considered as having significant impact on anti-bid rigging enforcement in Russia since other numerous media reports about detected anticompetitive agreements on tenders including officials usually end up with reports on judgments dismissing the FAS decisions and, consequently, with termination of criminal proceeding.[75]

Engagement of the investigating agency before bidders concluded their agreement determined the success of the criminal investigation, which resulted in

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71 Letters of the Ministry of Internal Affairs No. 1/2069 of March 19, 2012; No. 1/6599 of July 15, 2013; No. 1/3238 of April 10, 2014.

72 *Кунле М.* ФАС повышает порог уголовной ответственности за ценовой сговор [Kunle M. *FAS povyshaet porog ugolovnoi otvetstevennosti za tsenovoi sgovor* [Mariya Kunle, *FAS Raises the Threshold for Criminal Liability for Price Fixing*]], *Izvestia* (Jul. 31, 2013), <http://izvestia.ru/news/554558#ixzz2rF6AakFq> (accessed Dec. 5, 2015); Interview with Konstantin Aleshin, *supra* n. 2.

73 The Russian Legal Information Agency press-release (Mar. 17, 2014), <http://infosud.ru/incident_news/20140317/270950519.html#ixzz3Vr67Ce1u> (accessed Dec. 5, 2015).

74 Papp, *supra* n. 43.

75 One of the most prominent cases about anticompetitive agreement between subsidiaries of Siemens and Diatech S.A. on tender for medical equipment in Yakutia in FAS press-release (Dec. 20, 2013), <http://www.fas.gov.ru/fas-news/fas-news_35113.html> (accessed Dec. 5, 2015); the Russian Legal Information Agency press-release (Nov. 25, 2014), <http://rapsinews.ru/arbitration/20141125/272651945.html> (accessed Dec. 5, 2015).

preliminary investigative measures ensuring the collection of evidence. For example, wiretaps of tenderers and officials have been used to prove all elements of a crime, including date, place, and method, whereas this type of evidence is never available if competition authorities detect cartel on tenders by using information on tenderers' behavior during tender from electronic platforms. The next peculiarity of the 'Road case' is that the signs of antitrust violations were detected first by the investigator who reported them to the competition authorities, which may be a sign of proper qualifications of investigators. Except obtaining direct evidence, the early detection of cartel provided ground for cooperation between competition authorities and the investigating agency so that the criminal investigation was supported by the expertise of competition authorities and the decision of the regional department of the FAS establishing the fact of bid rigging. That cooperation also helped to avoid the usual time lag between the date of a bid rigging agreement, the FAS decision stating the cartel and the beginning of the criminal proceeding by investigating agency when competition authorities are actually excluded from criminal investigating of cartels. Synchronizing of proceeding of competition authorities with criminal proceeding immediately after concluding the cartel agreement on a tender prevented the termination of the cases due to the expiration of the limitation period.[76]

Particular interest in the investigation of corruption cases at a fairly high level of government engaged investigating agencies in the 'Road case.' According to the Investigative Committee of Russia in 2012, the First Deputy Governor of the Novgorod region organized a criminal group which included officials of state agencies and a number of entrepreneurs and aimed at misappropriation of state funds allocated for the repair and maintenance of highways in the Novgorod region. Initially, in the given case, the affiliated regional state unitary enterprise was supposed to win the tender for the state of a RUB395 million contract for the maintenance of roads in most areas of the Novgorod region in order to receive and to share among the parties at least RUB50 million. Acting in concert, members of the group abused their administrative resource by restricting competition on auctions for the repair of roads, and sought to enter into contracts with the controlled entities. Subsequently, the money has been transferred to the bank accounts of affiliated commercial organizations.[77] In the course of collecting data about the corruption scheme, signs of cartel were detected by the investigator and reported to competition authorities by the Investigative Department of the Investigative Committee of Novgorod region on August 20, 2013, with the application materials proving bid rigging.[78]

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[76] More about limitation period and contradictions between criminal and administrative proceedings *see infra* Sec. 4.1.3.

[77] *See supra* n. 73.

[78] Decision of the Novgorod Department of the FAS No. 5906/02 on the results of the proceedings for violation of Federal Law 'On Protection of Competition' by *Novomost 53* LLC, *Construction Company 'Baltic Region'* LLC and *Transbaltstroy* LLC of December 17, 2013 [hereinafter Decision No. 5906/02].

Aside from detecting the cartel at the stage of its formation that allowed the collection of direct evidence and exclude the risks of falling foul of / the limitation period, cartel secrecy, usually guaranteed by very close relationships between participants,[79] was undermined in the 'Road case' because organizers of cartel tried to involve in their agreement individuals who were strangers to each other; direct communications by telephone, without adequate preparation contributed to the disclosure of the cartel and, in the end, to the custodial sentence for some of cartel members. The audio recording proved, for example, that V. Samoylov contacted managers of other bidders – *SK Baltic Region* LLC and *Transbaltstroy* LLC[80] – in order to convince them to refuse to participate in the auction. As he was also an official expert of the bid organizer, he threatened other tenderers of potential problems regarding the acceptance of the executed works for *Novgorodavtodor* and, consequently, failure to obtain payment for the performed works. In addition, for refusing to participate in the auction for the construction of a bridge, V. Samoylov as a representative of *Novomost 53* promised in turn to *SK Baltic Region* to yield them all other construction sites that would be auctioned in Novgorod region. All those facts proved conclusion of a cartel agreement between *Novomost 53* LLC and *Construction Company Baltic Region* LLC.

Due to the wiretapping of one of the participants' of the corruption group, the investigating agency received audio records disclosing facts which are usually inaccessible for this type of crime. For example, every detail of an agreement in oral form that led to the maintenance of prices in an open auction in the electronic form on the construction of a bridge across the river had been recorded and was used as evidence.[81] Particularly, the conversation about providing contact details of other bidders between V. Samoylov, the founder and director of *Novomost 53* LLC, which applied for participation in the public auction in electronic form, and first deputy director of the bid organizer, the regional state public agency *Novgorodavtodor*, G. Vishnyakov demonstrated their intention to persuade potential bidders to refuse to participate in the auction, and Vishnyakov's awareness that Samoylov intended to commit an offense. Therefore, wiretapping as part of another investigation provided such necessary elements of cartel for opening a criminal case as the timing of the cartel agreement, the method and the names of individuals who joined it.

The next necessary element for proving *corpus delicti* in cartel cases is illegal income in large size or large damage;[82] the receipt of a large income[83] was also easily proved by investigative agencies even before the administrative proceeding

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79 Andreas Stephan, *Cartel Laws Undermined: Corruption, Social Norms, and Collectivist Business Cultures*, 37(2) J.L. & Soc'y 360 (2010). doi:10.1111/j.1467-6478.2010.00507.x

80 Decision No. 5906/02, *supra* n. 78.

81 *Id.*

82 Criminal Code, Art. 178(1).

83 *Id*. Note 1 to Art. 178.

confirmed violation of competition law in the form of bid rigging. In spite of refusal of another tenderer, *Transbaltstroy* LLC, to join a cartel agreement and to withdraw its application from auction, it did not participate in the auction because the director feared that in case they win his company would not be to obtain the necessary permission for building the bridge and might have problems with the payment for work performed. The auction was cancelled because only one bidder – *Novomost 53* LLC – remained; this bidder lowered the initial maximum price just by 0.5 percent during its participation, and price of RUB21,065,422 was fixed. Consequently, the purchaser concluded a contract at this price with *Novomost 53* LLC, which was declared the winner. Therefore, the anticompetitive agreement resulted in the receipt of illegitimate income in the sum of RUB21,065,422.[84]

3.3. Sanctions in the First Custodial Sentence: Is It of Proper Severity?

A threat of serious sanctions is essential for efficient cartel enforcement.[85] However, some inconsistencies in severity of sentences for bid rigging as cartels agreement can be identified in this case. First of all, only one company was fined for bid rigging: based on evidence provided, the Novgorod Region Department of FAS Russia ruled that the agreement between *Novomost 53* LLC and *Transbaltstroy* LLC is a cartel agreement but only *Novomost 53* LLC was fined for RUB100,000 (turnover fine).[86] Then, criminal sanctions for cartel are barely distinguishable in the sum of penalties applied to defendants. Since both G. Vishnyakov and V. Samoylov pleaded guilty and entered into a pre-trial agreement on cooperation,[87] later the court took into account their assistance and sentenced G. Vishnyakov to imprisonment for three years and eight months in a penal colony, a fine of RUB1.3 million and disqualification for two years. In Vishnyakov's case, it is cumulative punishment for abuse of official powers,[88] swindling committed by an organized group or on an especially large scale,[89] restriction or elimination of competition by means of entering an agreement (cartel) restricting competition committed by a person in an official position,[90] excess

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84 Decision No. 5906/02, *supra* n. 78.

85 Stephan, *The UK Cartel Offence*, *supra* n. 56, at 33; Papp, *supra* n. 43; Belinda A. Barnett, *Criminalization of Cartel Conduct – the Changing Landscape*, U.S. Department of Justice (Apr. 3, 2009), <http://www.justice.gov/atr/criminalization-cartel-conduct-changing-landscape> (accessed Dec. 5, 2015); Wouter PJ Whils, Efficiency and Justice in European Antitrust Enforcement 178 (Hart Pub. 2008); Peter Whelan, The Criminalization of European Cartel Enforcement: Theoretical, Legal, and Practical Challenges 55 (Oxford University Press 2014).

86 Resolution of the Novgorod Department of the FAS No. 657/02 to impose a fine on the case No. 3 of Feb. 13, 2014.

87 *See supra* n. 73.

88 Criminal Code, Art. 285(1).

89 *Id*. Art. 159(4).

90 *Id*. Art. 178(2).

of official power[91] and bribery.[92] V. Samoylov was found guilty for swindling committed by an organized group or on an especially large scale, abuse of powers,[93] restriction of competition by means of making an agreement (cartel) restricting competition committed by a person with the use of his official position as such actions have inflicted serious damage to the state (RUB22,122,642).[94] He was sentenced for swindling to imprisonment for a term of two years and six months and a fine of RUB200,000, with disqualification to hold organizational and administrative positions in state and municipal institutions, for one year and six months; for bid rigging to imprisonment for a term of one year and six months and a fine of RUB150,000, with disqualification for one year; for abuse of power to imprisonment for a term of one year, with disqualification for one year and six months.[95] For multiple offenses, by partial addition of punishments, the final punishment is a fine in the amount of RUB300,000, imprisonment for four years and disqualification for two years and six months.[96] The imprisonment is suspended with a trial period of four years to prove the correction and probably will never happen.

Being formally custodial, the sentence in the 'Road case' highlights that anticompetitive agreements on tenders are not perceived by the law enforcement system as serious crimes: first, the weight of penalty for bid rigging is less than half of the total punishment and, second, the actual sanction is likely to be limited by disqualification and a fine only due to suspension of imprisonment. To illustrate the severity of punishment for bid rigging, Table B presents sanctions for all committed crimes from Samoylov's and Vishnyakov's sentences.

Table B. Maximum possible sanctions for crimes committed in the 'Road case' along with bid rigging set in the Criminal Code

Article	Fine	Disqualification	Compulsory labor	Deprivation of liberty
Article 159(4)	Up to RUB1 million or in the amount of the wage / salary, or any other income of the convicted person for a period of up to three years			Up to 10 years with or without a fine, with restriction of liberty for a term of up to two years or without such

[91] Criminal Code, Art. 286(1).

[92] *Id*. Art. 290(5)(b).

[93] *Id*. Art. 286(1).

[94] *Id*. Art. 178(2)(a).

[95] Sentence of the Novgorod District Court of March 27, 2014. Case No. 1-349/2014.

[96] Criminal Code, Art. 159(4).

Article 178(2)	Up to RUB1 million or in the amount of a wage / salary or other income of the convicted person for a period of up to five years	Up to three years	Up to five years with or without disqualification	Up to six years with or without a fine
Article 285(1)	Up to RUB80,000, or in the amount of the wage / salary, or any other income of the convicted person for a period up to six months	Up to five years	Up to four years	Up to four years or arrest for a term of fouf to six months
Article 286(1)	Up to RUB80,000, or in the amount of the wage / salary, or any other income of the convicted person for a period up to six months	Up to five years	Up to four years	Up to four years or arrest for a term of four to six months

Actually, for both defendants, the final punishment is lower than the maximum sanction which is allowed for the partial or full adding-up of penalties where the final punishment in the form of deprivation of liberty may not exceed half the maximum term of punishment in the form of deprivation of liberty provided for the gravest of the committed crimes.[97] So, the maximum length of imprisonment could be up to five years. The court mitigated punishment due to active assistance of defendants in the detection and investigation of the crime, exposure and prosecution of other participants in the offence and also admission of guilt, remorse, active assistance in investigating corruption crimes and positive professional references.

3.4. Concluding Remarks on the 'Road Case'

To summarize, the success of prosecution in the 'Road case' is caused by its connection with corruption violations where the anticompetitive agreement was one of the methods to commit the crime of corruption. Among other reported cases where Art. 178 of the Criminal Code was mentioned the 'Road case' is distinguished as the first case where criminalization has been used properly. Notably, the first custodial sentence for cartel concerned an anticompetitive agreement on tenders. It is unlikely that lessons from this verdict can be extended to the entire anticartel enforcement system. However, some features of the case raise a question about the adequateness of procedural regulation and 'law in action' in relation to cartel criminalization.

First of all, the corruption element of the committed crimes secured involvement of well-educated and well-equipped investigators long before the bid rigging was completed, which helped in collecting the necessary data and acceptable evidence

[97] Criminal Code, Art. 69.

that is usually inaccessible; the risks of application of the limitation period was also minimized because there was no gap between the commission of an offense and the moments of detection or adjudication, which is very typical for similar cases.[98] The next peculiarity is the unconventional composition of the potential cartelists: instead of building trust among participants, organizers attempted to 'motivate' other bidders by threats of administrative resources, so there was no real consensus between them. The conflict of interests eliminated the usual secrecy of cartels. Investigation of corruption crimes and full engagement of the investigating agency was strengthened by the FAS decision establishing an anticompetitive agreement on auction.

It is worth noting that although the success of the prosecution of bid rigging is based on the public attitude to corruption followed by additional remedies for investigations, the verdict does not demonstrate intolerance to bid rigging: imposed sanctions are not severe and imprisonment is suspended, which usually means its non-use. That may be a sign of high dependence of prosecuting cartels on the attitude of other enforcement agencies rather than on rule of law while administrative fining of individuals definitely cannot replace all the functions of criminal responsibility since they have no 'stigmatising effect of the criminal penalty.'[99]

Therefore, findings of the 'Road case' are unlikely to be used for other bid rigging cases, where closer agreement among tenderers may be found. A remarkable element of the case is the cooperation between competition authorities and investigating agencies for prosecution of bid rigging. To detect more common obstacles for criminalizing bid rigging, the next section examines empirical data.

4. Some Observations of Application of Sanctions for Bid Rigging. Obstacles for Criminalization

In this chapter empirical data shows that social norms in Russia, indeed, are the main challenge of cartel criminalization.[100] Data is collected by interviewing officials of the FAS, collecting data from the FAS official website, court database and statistics from other researchers. First of all, evolution of Art. 178 of the Criminal Code and procedural regulation accompanying investigation, the position of competition authorities in the investigation of criminal cases, deficiency of interest in investigating agencies to cartels as a serious crime, insufficient qualification of investigators and both formal and informal opinions of courts demonstrate tolerant public attitude to cartels. The relative youth and foreignness of competition authorities in the whole system and lack of political influence may also cause malfunctioning of criminal cartel enforcement.

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98 Decision of the Commercial Court of the City of Moscow of July 31, 2014. Case No. A40-10601/14.

99 Papp, *supra* n. 43.

100 Andreas Stephan, *Beyond the Cartel Law Handbook: How Corruption, Social Norms and Collectivist Business Cultures Can Undermine Conventional Enforcement Tools* 10 (CCP Working Paper 08-29, September 2008), <http://competitionpolicy.ac.uk/documents/8158338/8256111/CCP+Working+paper+08-29.pdf> (accessed Dec. 5, 2015) [hereinafter Stephan, *Beyond the Cartel Law Handbook*].

4.1. Some Evidence That Cartel is Not Perceived as a Dangerous Crime in Russian Legal System

The evolution of norms criminalizing cartels illustrates that initially any violation of competition law was criminalized and cartels (or bid rigging) have not been distinguished as a crime of particular seriousness. Insufficient definition of cartel agreements and extremely broad and vague wording of the Art. 178 in the Criminal Code undermined criminalization, although since 1997 the Criminal Code provided fines, disqualification and imprisonment for individuals for anticompetitive actions. The lack of focus on the issue and inaccurate design of substantive criminal cartel law also undermined the principle of legal certainty which is crucially important for criminal cartel enforcement.[101]

4.1.1. Incoherence of Criminal Law Norms

The first version of Art. 178 of the Criminal Code criminalized a quite random list of violations with focus on monopolistic abuse: '[m]onopolistic actions committed by setting monopolistically high or low prices, as well as restriction of competition by dividing the market, restricting access to the market, elimination of other economic entities from the market, establishing or maintaining uniform prices.' Some signs of agreements could be found only in para. 2 of this article providing elements of more serious crime: '[t]he same acts committed repeatedly or by a group of persons with preliminary conspiracy or by an organized group;' however, para. 3 brought up elements which are not typical to cartel agreements: '[v]iolence or threat of violence, as well as the destruction of or damage to property or the threat of destruction or damage if there is no evidence of extortion.' There were three attempts to improve Art. 178: in 2003,[102] 2009[103] and 2011.[104] Criminalization of very uncertain anticompetitive offences was burdened with indistinct definition of agreements restricting competition.[105] The FAS assumes that only after clarification of anticompetitive agreements in 2009[106] has the definition of cartel been introduced and the link between cartels and criminalized offences in Art. 178 of Criminal Code has become strong enough for prosecution.[107] It is thus unsurprising that 380 criminal cases under Art. 178 were filed in the period of time from 1996 to 2013 and 60

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101 Peter Whelan, *Legal Certainty and Cartel Criminalisation within the EU Member States*, 71(3) Cambridge Law Journal (2012). doi:10.1017/S0008197312000864

102 Federal Law No. 162-FZ of December 8, 2003.

103 Federal Law No. 216-FZ of July 29, 2009.

104 Federal Law No. 401-FZ of December 6, 2011.

105 Interview with Konstantin Aleshin, *supra* n. 2.

106 Federal Law No. 164-FZ of July 17, 2009 (basic law of the so-called 'Second Antimonopoly Package').

107 Interview with Konstantin Aleshin, *supra* n. 2; Kinyov, *supra* n. 1.

people were sentenced, but none of the sentences concerned antitrust violations, and most of the individuals concerned were small-scale entrepreneurs.[108] The Ministry of Internal Affairs admitted incoherence of the criminal norms as one of the main reasons for the failure of criminalization.[109]

Since 2012, the definition of cartels in Art. 11 of Federal Law No. 135-FZ has been very close to Art. 101 of TFEU. Nowadays cartels are defined as follows:

> Agreements between competing economic entities, *i.e.* economic entities that sell goods on the same market, shall be recognized as cartels and shall be prohibited if such agreements lead or can lead to:
>
> 1) fixing or maintaining prices (tariffs), discounts, markups (surcharges) and (or) additions to prices;
>
> 2) increasing, reducing or maintaining prices in the course of competitive bidding;
>
> 3) dividing the goods market according to the geographic principle, quantity of sales or purchases of the goods, the mix of goods or a composition of buyers or sellers (customers);
>
> 4) reducing or terminating production of the goods;
>
> 5) refusing to conclude contracts with particular sellers or buyers (customers).[110]

In March 2015 cartels including bid rigging were introduced as the only crime among other violations which affect competition,[111] whereas all other types of anticompetitive violations were excluded from the Criminal Code. In the opinion of the Deputy Director of the Cartel Department of the FAS Konstantin Aleshin this amendment would essentially increase prosecution of cartels.[112]

4.1.2. Spare Use of Administrative Sanctions Discounts Criminalization

One more peculiarity of social norms in Russia is an idea to penalize any agreement which formally meets the criteria of Art. 11 of Federal Law No. 135-FZ, disregarding the effect for competition and dividing cartel (bid rigging) offences into administrative offences and crimes depending on the amount of damage.[113]

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[108] *Титов С.* Малый бизнес может получить иммунитет от уголовного преследования за картели [Titov S. *Malyi biznes mozhet poluchit' immunitet ot ugolovnogo presledovaniya za karteli* [Sergey Titov, *Small Businesses Can Obtain Immunity from Prosecution for Cartels*]], *Vedomosti* (Dec. 8, 2014), <http://www.vedomosti.ru/finance/articles/2014/12/08/slishkom-malye-dlya-kartelya> (accessed Dec. 5, 2015).

[109] Kinyov, *supra* n. 1.

[110] Federal Law No. 135-FZ, *supra* n. 18, Art. 11(1).

[111] Federal Law No. 45-FZ of March 8, 2015.

[112] Interview with Konstantin Aleshin, *supra* n. 2.

[113] *See supra* Sec. 2.4.2.

Competition authorities justify this differentiation, first, by the need to prevent any anticompetitive agreement as potentially dangerous for a developing economy,[114] and, second, by the illegality of cartels *per se* in accordance with substantive competition law. In reality this approach makes criminal enforcement less certain even if it fits the traditions of the Russian legal system where the main difference between a crime and administrative offence is the social danger.[115] In practice this division ends up in 'spare' imposition of administrative fines by competition authorities if a criminal case is not opened by an investigating agency.

Officials admit that they often initiate administrative cases and impose penalties on individuals not because the violation meets tests of an administrative offence, but because the investigating authorities refused to initiate criminal proceedings, and uncertainty of legislation, very high standards of proof and very short limitation period prevents them from further attempts to prosecute. On the one hand, administrative liability for an individual is better than nothing, and other jurisdictions justify administrative fines as a quite effective tool if they are high enough.[116] However, on the other hand, first, administrative sanctions in Russia are relatively low;[117] second, they do not mean much for an individual because there is no 'stigmatising effect of the criminal penalty'[118] and, practically, although paid by individuals fines are often reimbursed to them by companies.

4.1.3. Classification of Cartels as Crimes of Medium Gravity and Issues of Limitation Period

There is no good faith information concerning why ordinary anticompetitive agreements were classified as crimes of medium gravity while, *e.g.*, corruption crimes, which often accompany bid rigging, are classified like more dangerous crimes.[119] One possible explanation could be hasty and very formal criminalization of anticompetition violations at the very beginning of transition of the post-Soviet economy to free market economy in the 1990[s] without proper examination of the issue.

The threshold for classification is a maximum length of imprisonment in the particular article. Criminal sanctions for cartels are within three years, which corresponds to crimes of medium gravity. It is worth noting, that aggravating circumstances such as the use of the official position, or by destruction or damage of

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114 Interview with Konstantin Aleshin, *supra* n. 2.

115 *Id.*

116 Papp, *supra* n. 43.

117 *See supra* Sec. 2.4.2.

118 Papp, *supra* n. 43.

119 Criminal Code, Arts. 285, 290.

another's property or by a threat of its destruction or damage, in the absence of any indicia of extortion, especially large damage or an income in an especially large size transfer cartel agreements[120] into the category of grave crimes because the maximum sanction increases to deprivation of freedom for a term of up to six years. However, considering standards of proof[121] introduction of aggravating circumstances are unlikely to facilitate criminal cartel enforcement.

Medium gravity of bid rigging resulted in inconsistencies between the limitation period for administrative procedure carried out by competition authorities and the limitation period for crimes. Therefore, in many cases, criminal prosecution is impossible due to missing a limitation period. Competition authorities can open a case within three years after committing a violation of the antimonopoly legislation, and, in the case of an ongoing violation of the antimonopoly legislation, after the date the violation was stopped or discovered.[122] The competition authority shall initiate administrative proceedings and make a decision on the fine for violators within two months from the date of the decision of the antimonopoly body, which established the fact of violation of the antimonopoly legislation.[123] However for bid rigging Art. 78 of Criminal Code establishes that a person shall be released from criminal liability on expiry of two years after committing a crime; the limitation period shall be counted from the day of committing a crime to the time of the entry of a court's judgment into legal force. Since cartels are usually detected only after market reaction[124] and a few months are required for completing all proceedings in competition authorities, very often a limitation period for a crime expires before the material transfer to the investigating agency.[125]

4.1.4. Value of Leniency is Undermined[126]

The conflict of limitation periods for criminal enforcement and administrative sanction undermines the leniency programme while whistleblowing in administrative proceeding is widely used by companies.[127] Actually, there is no sign that the leniency programme has contributed to criminal enforcement; indeed, considering a limitation period of two years since the conclusion of an anticompetitive agreement, the duration of proceedings for administrative sanctions and time for appealing the FAS

120 Criminal Code, Art. 178(2).

121 *See infra* Sec. 4.1.5.

122 Federal Law No. 135-FZ, *supra* n. 18, Art. 41.1.

123 Ruling No. 30, *supra* n. 59, ¶ 10.1; Code of Administrative Offences, Arts. 4.5(6), 28.1(1.2).

124 Interview with Konstantin Aleshin, *supra* n. 2.

125 *Id.*

126 For legislative provisions on leniency in criminal and administrative proceedings *see supra* Sec. 2.5.

127 Interview with Konstantin Aleshin, *supra* n. 2.

decisions in commercial courts, concealment of cartel looks much more attractive than the uncertainty of results in case of application to the investigation agency under a number of conditions.[128]

Leniency programs for undertakings and individuals in administrative proceedings, on the one hand, play an important role in detecting bid rigging: officials of the FAS admit that the majority of bid rigging cases have been disclosed due to reports from cartel members.[129] However, on the other hand, the position of the Supreme Commercial Court of the Russian Federation interprets the ideas of leniency quite widely, which reduces the intended effect of leniency.[130] The Supreme Commercial Court set that a person can apply for leniency before the announcement of the decision of the competition authority that establishes the fact of violation of the competition legislation of the Russian Federation that is a ground for initiating an administrative proceeding in accordance with Art. 28.1(1.1) of the Code of Administrative Offences.

That approach is inconsistent with the role of leniency policies as the most important tool for detecting cartels and for deterring future infringements from occurring.[131] Actually, exemption from administrative liability does not facilitate criminal enforcement because, first, there are no special requirements on the form and content of the leniency application to competition authorities, so even a very general statement is sufficient for exemption of an applicant; data from statements are unlikely to be used to prove in criminal proceeding where standards of proof are very high and, in addition, acts of competition authorities establishing cartel are not mandatory for the investigating agency and collected evidence have no legal effect for criminal investigation.

4.1.5. Standards of Proof

Since the leniency programme does not meet expectations, the problem of proof in bid rigging cases escalates because there is no uniform standard of proof of anticompetitive agreements for administrative and criminal proceeding proceedings. Competition authorities use necessary complex of circumstantial evidence in bid rigging cases.[132] Thus, the achieved result of the tender with some econometric analysis can prove the existence of an anticompetitive agreement without need to analyze direct evidence of individuals' guilt. This approach is being actively implemented in the administrative practice of the FAS: the following facts and circumstances

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128 Criminal Code, Note 3 to Art. 178.

129 Interview with Konstantin Aleshin, *supra* n. 2.

130 Ruling No. 30, *supra* n. 59.

131 Andreas Stephan & Ali Nikpay, *Leniency Theory and Complex Realities* 4 (CCP Working Paper 14-8), <http://competitionpolicy.ac.uk/documents/8158338/8199490/CCP+Working+Paper+14-8.pdf/3a273397-457c-4109-8920-d79c6709774b> (accessed Dec. 5, 2015).

132 Interview with Konstantin Aleshin, *supra* n. 2.

used as evidence of bid rigging can be extracted from the decisions of competition authorities: lack of bidders' proposals for the contract until an auction step is reduced to a minimum;[133] registration of bidders under the same address;[134] one individual is a holder of certificates of electronic digital signatures for different companies – bidders;[135] one IP-address for different applications and other acts during an auction;[136] contract / subcontract of winner with one of the bidders;[137] resale of the goods on offer among the bidders when a seller refused to participate in auction;[138] meeting of officials of competing companies on the eve of trading and maintaining prices at a level specified by the manager of the company.[139] In general, the Supreme Commercial Court did not deny the possibility of using circumstantial evidence, although it gives priority to documentary evidence of anticompetitive agreements.[140]

However, court approaches are not unanimous. To date, the courts have no uniform position on admissibility of circumstantial evidence for resolving bid rigging cases. Some courts have upheld the FAS position and accept circumstantial evidence as sufficient to prove bid rigging. For example, the ruling of the Federal Commercial Court of the East-Siberian District[141] upheld the decision of the antimonopoly body because the applicants prior to the auctions and tenders previously participated in other tenders for similar state contracts and were aware of each other's actions. The Federal Commercial Court of the Moscow District[142] found that the actions of economic entities resulted in the highest possible price for a state contract and recognized fact of reaching a verbal agreement proven, although there was no direct evidence of guilt. Federal Commercial Court of the North-Caucasus District concluded[143] that the behavior of the bidders who bear the costs of participating in the auction, but did not participate in it, is illogical, and acknowledged that the actions of the bidders were aimed at maintaining prices at auctions and restricting competitiveness in the

133 Decision of the FAS No. 1-16-228/00-22-13 of February 19, 2013.

134 Decision of the Sakhalin Department of the FAS No. 08-14 of September 4, 2012.

135 *Id.*

136 The FAS press-release (Apr. 23, 2014), <http://www.fas.gov.ru/fas-news/fas-news_35455.html> (accessed Dec. 5, 2015).

137 Decision of the Sverdlovsk Department of the FAS of March 18, 2014. Case No. 12.

138 Decision of the FAS of May 25, 2012. Case No. 1 11/202-11.

139 Decision of the Sverdlovsk Department of the FAS, *supra* n. 137.

140 Ruling No. 30, *supra* n. 59, paras. 2, 10.3.

141 Ruling of the Federal Commercial Court of the East-Siberian District of March 25, 2014. Case No. A74-2372/2013.

142 Ruling of the Federal Commercial Court of the Moscow District of April 22, 2013. Case No. A40-94475/12-149-866.

143 Ruling of the Federal Commercial Court of the North-Caucasus District of Apr. 3, 2013. Case No. A53-21732/2012.

establishment of prices. In other cases courts refuse to accept circumstantial evidence to prove the bid rigging. Some courts assume that the mere fact of the lack of activity among the bidders cannot confirm the existence of an anticompetitive agreement between them;[144] that competition authorities have to prove that actions of bidders are not caused by objective circumstances, equally affecting all companies;[145] that bidders' behavior expressed in the absence of quotations for the contract is not a sufficient proof of the agreement between economic entities.[146] Thus, there is no agreed position on the methods of proving bid rigging as an administrative offence.

Since the procedural legislation does not consider any specific aspects of anticompetitive crimes, the situation with proving the crime under Art. 178 of the Criminal Code is even more complicated.[147] First of all, even though Art. 178 refers to the definition of cartel agreement in competition law, the decision of competition authorities is not a necessary element of the criminal investigation. Then, only direct evidence is required for proof of time, place, other circumstances of committing a crime and of an individual's guilt. Considering secrecy of anticompetitive agreements and obtaining of circumstantial evidence mainly by analysis of data from electronic platforms for tenders, direct evidence is unlikely to be obtained in the 'classic' bid rigging.

Competition authorities also note that there is no guidance regarding the calculation of consequential loss and loss of profit necessary for proving threshold between bid rigging as an administrative offence and a crime (RUB10 million or illegal income from RUB50 million). Whilst illegal income can be proved by money transfers between cartelists,[148] damage in the context of Art. 178[149] shall be understood rather as undeceived profits, which this person would have derived under ordinary conditions of civil turnover if his right were not violated (the missed profit)[150] rather than expenses, which a person whose right has been violated made or will have to make to restore the violated right, the loss or the damage done to his property (the compensatory damage). Practically, litigators very often avoid claiming loss of

144 Ruling of the Federal Commercial Court of the Ural District of August 2, 2011. Case No. A76-14962/2010.

145 Ruling of the Federal Commercial Court of the Ural District of March 15, 2013. Case No. A60-23089/2012.

146 Ruling of the Federal Commercial Court of the Central District of May 30, 2013. Case No. A64-4201/2012; Decision of the Supreme Commercial Court of the Russian Federation No. VAS-10923/13 of September 16, 2013.

147 Interview with Konstantin Aleshin, *supra* n. 2; Interview with the Deputy Director of the Sverdlovsk Region Department of the Federal Antimonopoly Service of the Russian Federation Sergey Volkov (Mar. 12, 2015) [hereinafter Interview with Sergey Volkov].

148 Interview with Konstantin Aleshin, *supra* n. 2.

149 *Id.*

150 Civil Code, Art. 15(2).

profit even in civil trials due to impossibility to prove, and courts are reluctant to compensate them.

4.1.6. Increase of Proof Threshold

Underestimation of danger of a crime in question mirrors in the recent tenfold increase of the threshold for criminalization. Now damage from RUB10 million or illegal income from RUB50 million is to be proved for prosecution.

First, scale of damage as determined in the civil legislation does not contain all hazardous effects of cartels and especially of bid rigging on public tenders, on the competition. Second, the issue of decriminalizing of bid rigging on the regional municipal auctions with low-cost contracts arises. Considering increased sums of damage and illegal income, the vast majority of anticompetitive agreements in small cities are now out of criminalization. For example, over 85,000 tenders with the initial sum of contract less RUB10 million were opened in the period of time from January 1, 2015, till May 5, 2015.[151] Consequently, even if an anticompetitive agreement restrict competition in the course of municipal tendering a criminal case cannot be initiated since amount of damage or illegal income does not meet a new threshold.

4.2. Engagement of Enforcement Agencies

4.2.1. Investigating Agencies in Prosecution of Bid-Rigging: Lack of Knowledge and Enthusiasm

Notably, allocation of cartel cases under Art. 178 of the Criminal Code extends the approach to cartels as to not dangerous crimes. While corruption cases and many other gravest crimes are the competence of the special Investigative Committee,[152] the units of the Ministry of Internal Affairs (police offices) are authorized to investigate cartels. The Investigative Committee is higher than units the Ministry of Internal Affairs in the hierarchy of state institutions and its investigators often have higher qualification.[153] Competition authorities highlight deficiency of investigators' qualification as a major obstacle for opening and investigating criminal cases.[154]

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[151] Procurement portal for tenders pursuant Federal Laws No. 44-FZ and No. 223-FZ, <http://www.zakupki.gov.ru/epz/order/quicksearch/update.html?placeOfSearch=FZ_44&_placeOfSearch=on&placeOfSearch=FZ_223&_placeOfSearch=on&_placeOfSearch=on&priceFrom=0&priceTo=10+000+000&publishDateFrom=01.01.2015&publishDateTo=05.05.2015&updateDateFrom=&updateDateTo=&orderStages=AF&_orderStages=on&_orderStages=on&_orderStages=on&_orderStages=on&sortDirection=false&sortBy=PRICE&recordsPerPage=_50&pageNo=1&searchString=&strictEqual=false&morphology=false&showLotsInfo=false&isPaging=false&isHeaderClick=&checkIds> (accessed Dec. 5, 2015).

[152] Code of Criminal Procedure, Art. 151(2)(1).

[153] Federal Law No. 403-FZ of December 28, 2010, 'On Investigative Committee of the Russian Federation' [Федеральный закон от 28 декабря 2010 г. № 403-ФЗ «О Следственном комитете Российской Федерации» [*Federal'nyi zakon ot 28 dekabrya 2010 g. No. 403-FZ 'O Sledstvennom komitete Rossiiskoi Federatsii'*]], Art. 16(1).

[154] Interview with Konstantin Aleshin, *supra* n. 2; Interview with Sergey Volkov, *supra* n. 147.

Considering the vague wording of Art. 178 of the Criminal Code before March 2015, very complex categories of loss of profit to prove and unawareness on norms of substantial competition law on cartel agreements, over 80 percent of petition of competition authorities to open a criminal case (47 of 56)[155] after detecting a cartel were rejected. In the opinion of competition authorities officials the main reason explaining this fact is lack of knowledge expressed in unspecific and generic causation of rejections[156] and unwillingness to delve into the issue, to clarify the cases and find opportunities to correct deficiencies.[157] Before March 2015, one of the most common reasons to reject was investigators' requirement to competition authorities to prove both anticompetitive agreements and repeated abuse of a dominant position as necessary elements of one crime.[158] Earlier investigators applied Art. 178 to conflicts on local farm markets 'to strengthen' prosecution.[159]

These peculiarities of social norms resulted in weak solutions: only special training of investigators from training centres of the FAS are proposed to solve the issue.

4.2.2. Insignificance of Cartels in the Judiciary System

With respect to independence of the judiciary and the judicial discretion, some data on reversing the FAS decisions, interpretation of leniency and an informally expressed position of the judges also look like manifestation of specific social norms.

Abnormal statistics on reversing the FAS decisions on cartels is widely discussed by business and analytics.[160] Some resources report that up to 62 percent of the FAS decisions establishing cartels and appealed to the courts are reversed fully or partially by the lower commercial courts. Substantiality of this share of reversed decisions can be indirectly confirmed by the FAS statistic on the percentage of reversed cases of all FAS decisions including those which have not been appealed.[161] Indeed, the FAS statistic on fully reversed decisions in 2011–13 shows that an average of 20.3 percent cartel decisions are annulled (Table C).

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155 Interview with Konstantin Aleshin, *supra* n. 2.

156 *Id*.

157 *Id*.; Interview with Sergey Volkov, *supra* n. 147; Letter of the FAS No. IA/14139/13 of April 10, 2013.

158 Interview with Konstantin Aleshin, *supra* n. 2; Interview with Sergey Volkov, *supra* n. 147; Resolution of the detective of the Department of Economic Security and Anticorruption Enforcement of the Main Department of Internal Affairs of Sverdlovsk Region of May 12, 2014 'On the Refusal to Open Criminal Proceeding.'

159 *See supra* Sec. 3.1; Interview with Konstantin Aleshin, *supra* n. 2.

160 Avdasheva et al., *supra* n. 23; Shtykina & Galaktionova, *supra* n. 68; *Новиков В.* Ежегодный аналитический доклад по итогам 2014 года [Novikov V. *Ezhegodnyi analiticheskii doklad po itogam 2014 goda* [Vadim Novikov, *Annual Evaluation Report on the Results of 2014*]], <http://antitrusteconomist.ru/research/show/byulleten-antimonopolnoy-statistiki-2015> (accessed Dec. 5, 2015).

161 Avdasheva et al., *supra* n. 23; Kinyov, *supra* n. 1.

Table C. The FAS statistic on fully reversed decisions on Art. 11 of Federal Law No. 135-FZ (cartel agreements) in 2011–13[162]

	2011	2012	2013
Number of FAS decisions	315	189	202
Number of FAS decision fully reversed by courts	65 (20.6 percent)	48 (25.4 percent)	30 (14.9 percent)

The usual practice for correcting enforcement mistakes is an official clarification of law and order of enforcement by higher courts which is mandatory for enforcement agencies. The only Ruling No. 30 with amendments in 2010[163] has been issued for competition enforcement which is unlikely to contribute to certainty of enforcing numerous reversed decisions in 2011–13.

Tolerance or even encouragement of anticompetitive practices in the very recent past may be one justification for the courts' position.[164] Indeed, there are some examples when outside the courtroom, judges of higher courts expressed doubt for the need to fight cartels because the agreement between undertakings 'is just a form of normal business cooperation'[165] clearly drawing parallels with the Soviet planned economy and a centrally controlled market.

Actually, the lack of intolerance in the attitude of courts to cartels resulted in transformation of leniency programme from the tool to detect cartels to another way to avoid administrative liability if in the course of ongoing investigation violators realize strength of the FAS evidence[166] and insignificant weight of punishment for bid rigging in the 'Road case,'[167] which was suspended with a trial period of four years. Therefore, case law is designed more to soften violators' liability than to impose sever sanction to strengthen effectiveness of criminal cartel enforcement.

4.3. Role of Competition Authorities in Criminal Enforcement: Is Their Influence Sufficient?

Institutional and organizational conditions are absolutely necessary in developing countries[168] for efficient enforcement of competition law including criminalization.

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[162] Kinyov, *supra* n. 1.

[163] As amended by the Ruling of the Plenum of the Supreme Commercial Court of the Russian Federation No. 52 of October 14, 2010.

[164] Stephan, *Beyond the Cartel Law Handbook*, *supra* n. 100, at 11.

[165] Interview with Konstantin Aleshin, *supra* n. 2.

[166] *See supra* Sec. 2.5; Interview with Konstantin Aleshin, *supra* n. 2.

[167] *See supra*, Table B, at 54–55.

[168] Michal Gal, *The Ecology of Antitrust: Preconditions for Competition Law Enforcement in Developing Countries*, in Competition, Competitiveness and Development: Lessons from Developing Countries 21 (United Nations 2004), available at <http://unctad.org/en/docs/ditcclp20041ch1_en.pdf> (accessed Dec. 5, 2015).

Few deficiencies of institutional conditions can be identified in criminal anticartel enforcement.

It is noted that in jurisdictions successfully prosecuting cartels, competition authorities can make use of a full arsenal of criminal investigatory powers to investigate suspected criminal antitrust violations.[169] Competence of the FAS is limited to requests of information from undertakings and individuals and access of officers of an antimonopoly body to a territory or premises for the purposes of inspection.[170] However evidence collected due to the inspections has no any legal force for criminal investigation because, as it was mentioned above, there is no correlation between FAS opening a case on anticompetitive agreement and opening a criminal investigation.[171] Considering the complexity of cartels as a legal category and the insufficient expertise of investigating agencies, the need to provide some power to collect evidence for criminal proceedings to competition authorities has been raised many times. However, the suggestion has met fierce resistance from business interests and a number of government bodies including the Ministry of Economic Development, the Ministry of Internal Affairs, the Investigative Committee and the Office of General Prosecutor.[172] Considering intensive debate around expansion of the FAS power and 'political painfulness'[173] of such alterations it was suggested to regulate the issue rather by interagency agreements and 'development of cooperation among law enforcement authorities.'[174] Although interagency working groups holding monthly discussions of legal and organizational obstacles for investigating antitrust violations[175] are organized, and some of these agreements have been negotiated and concluded between regional agencies,[176] they are unlikely to be enforceable. The regional 'agreements' can facilitate the exchange of information and networking, but they definitely do not correspond to the role of the FAS as a law enforcer, and under no circumstances can they affect the scope of rights and obligations in the criminal proceedings.

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169 Whils, *supra* n. 85, at 163.

170 Federal Law No. 135-FZ, *supra* n. 18, Ch. 5 'Functions and Authorities of the Antimonopoly Body.'

171 *See supra* Sec. 2.4.3.

172 *Рубникович О.* ФАС проявила тягу к дознанию [Rubnikovich O. *FAS proyavila tyagu k doznaniyu* [Oleg Rubnikovich, *The FAS Showed Craving for the Inquiry*]], *Kommersant* (Jun. 24, 2014), <http://www.kommersant.ru/doc/2497880> (accessed Dec. 5, 2015); *Титов С., Папченкова М.* Силовики хотят сами заниматься картелями [Titov S., Papchenkova M. *Siloviki khotyat sami zanimat'sya kartelyami* [Sergey Titov & Margarita Papchenkova, *Security Forces Want Investigate Cartels*]], *Vedomosti* (Oct. 8, 2013), <http://www.vedomosti.ru/newspaper/articles/2013/10/08/siloviki-hotyat-sami-zanimatsya-kartelyami> (accessed Dec. 5, 2015).

173 Kinyov, *supra* n. 1.

174 *Id.*

175 Letters of the FAS No. IA/14139/13 of April 10, 2013; No. IA/51142/14 of December 12, 2014.

176 Letter of the FAS No. IA/51142/14 of December 12, 2014.

Competition authorities also failed to get a special procedural status in investigating proceeding rather than witnesses[177] and investigating agencies still can open a case at any time without detecting cartel by competition authorities. The absence of relation between cartel detection by competition authorities and opening cases by investigating agencies obviously deprives the prosecution of the possibility to collect and provide convincing evidence.[178] Interestingly, competition authorities have no more rights than any other applicant who suggests a crime has been committed and reports it to investigating agencies.[179] Moreover, the influence of court decisions on the criminal proceedings regarding cartel cases looks asymmetric: while a FAS decision is not a mandatory element for opening a case, while if there is a reversal by a court the termination of criminal proceeding is mandatory.

The lack of procedural rights suggests some isolation of competition authorities from the system of enforcement agencies by formal and informal perspectives. Indeed, the main enforcement agencies (courts, commercial courts, units of the Ministry of Internal Affairs, regional prosecution offices) are a kind of successors of the functions and powers by the same institutions in the USSR and in the transitional period when many of formal and informal tools were transferred. For example, after the USSR collapsed, the Supreme Commercial Court of the Russian Federation adopted the Ruling No. 7 of April 15, 1992, 'On the Action of Guidance of the State Arbitration of the USSR and the State Arbitration of the RSFSR' according to which many guidelines of the State Arbitration of the USSR remains in effect to the extent that they do not contradict the law of Russia. So even formal influence of the previous system on enforcement was quite strong. The FAS is one of the newest enforcements agencies,[180] which may cause its isolation from enforcement agencies, lack of power in terms of investigations and inefficient communications among agencies.

So obtaining of proper evidence[181] and, consequently, dissemination of information among investigating agencies and competition authorities still remains one of the main practical issues which is regulated one the basis of nothing else than an internal letter of the FAS No. IA/14139/13 of April 10, 2013, which prescribes to report about cartels to investigating agencies, to demand and to appeal against refusals to investigate if the refusals are not justified. However, this document hardly organizes more than workflow and discipline in the regional departments of competition authorities and definitely does not provide any procedural rights to improve prosecution.

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177 *See supra* Sec. 2.4.3.

178 Interview with Konstantin Aleshin, *supra* n. 2.

179 Code of Criminal Procedure, Art. 140.

180 Указ Президента РФ от 9 марта 2004 г. № 314 «О системе и структуре федеральных органов исполнительной власти» [*Ukaz Prezidenta RF ot 9 marta 2004 g. No. 314 'O sisteme i strukture federal'nykh organov ispolnitel'noi vlasti'* [Decree of the President of the Russian Federation No. 314 of March 9, 2004, 'On the System and Structure of Federal Executive Bodies']].

181 Interview with Konstantin Aleshin, *supra* n. 2.

4.4. Concluding Remarks on Empirical Observations

Empirical analysis proves dependence of anti-bid rigging criminal enforcement on social norms and suggests that weakness of criminalization can be caused by political factors.

Medium gravity of cartel as a crime, uncertainties in Art. 178 of the Criminal Code and spare use of administrative sanctions illustrate that cartel is not perceived as a great danger. The short limitation period for this category of crimes and uncertainty of conditions for exemption from criminal liability resulted in non-use of criminal leniency. The programme of exemption from administrative sanctions is unlikely to meet the purposes of leniency programme because it can be used in the open administrative proceeding at any moment before announcement of the decision of completion authorities.

Criminalizing norms were introduced without any adjustment of other legislative instruments; therefore, high standards of proof, which are not backed either by exceptions specific to cartels or power of completion authorities to obtain evidence for criminal proceeding, have become a real stumbling block.

Other enforcement agencies do not demonstrate great enthusiasm in fighting cartels and this dispassionateness can be caused by political factors. For example, cooperation within the system of enforcement agencies has existed since the USSR; the most powerful and better qualified investigating bodies are not involved in cartel cases; the status of the FAS in criminal proceeding is insufficient for efficient prosecution of bid rigging and comparable to the status of any individual who informs investigating agency about a committed crime. Non-binding agreements without any legal power between FAS and investigating agencies cannot solve the issues of the lack of power on the side of competition authorities and the lack of qualification on the side of investigating agencies.

Therefore, the danger of cartels seems to be underestimated; competition authorities experience lack of power in cartel enforcement; synchronized leniency does not compensate these deficiencies. These limitations result in big differences in the number of cartels detected by competition authorities, the FAS decisions recognized by commercial courts and crimes resulting in custodial sentences.

5. Conclusion

Anti-bid rigging enforcement in Russia exists within anticartel enforcement with minor exemptions, such as a special fine for undertakings calculated from intimal maximum price and a black list for unscrupulous suppliers preventing from public tendering for two years. Undertakings concluding anticompetitive agreements are subject to administrative fines, and although a great share of decisions imposing fines is reversed by courts, this type of enforcement is relatively consistent.

The establishment of sanctions for any anticompetitive agreement without regard to the effect on the market results in the enormous number of cases considered by

competition authorities. This approach is justified by the need to deter every cartel and determination of cartels as a violation *per se*, however, it erodes the danger of cartels for society, exhausts resources of competition authorities and decreases the quality of decisions. As to the rest, the design of sanctions for individuals for bid rigging in some aspects is similar to the German system: depending on seriousness of an offence, administrative sanctions in the form of a small fine and disqualification or criminal sanctions in the form of higher fines, disqualification or imprisonment can be imposed. It seems that enforcement of administrative sanctions is less controversial, than criminal ones or at least more visible and consistent.

It is very hard to examine trends in criminalization of bid rigging because references to Art. 178 in the statistics on criminal cases had nothing in common with anti-bid rigging enforcement till 2014 when the first custodial sentence was imposed for anticompetitive agreement on public tender along with a set of corruption crimes. However, the analysis of empirical data provides some evidence of peculiarity of social norms which can affect criminal enforcement.

Social norms affected legislative aspect of criminalization cartels. An attempt to criminalize all types of anticompetitive behavior without focus on cartels and special tools for proving this type of crimes, the very vague wording of Art. 178 of Criminal Code, the classification of cartels as medium-grave crimes with limitation period shorter that an average length of cartels and leniency programmes which do not meet needs of anticartel enforcement and, finally, the spare use of administrative sanctions are evidence of cartel criminalization being rather a forced formality than a real interest.

The attitude of other enforcement agencies to the issue in question also shows determination of anti-bid rigging criminal enforcement by social norms: over 80 percent of petitions of competition authorities for opening criminal cases are ignored or returned with irrelevant justification; courts reverse a large proportion of decisions establishing cartels, and no one wishes to delegate some power to competition authorities to obtain evidence for criminal enforcement.

The first custodial sentence in the 'Road case' is a brilliant example how enforcement changes as soon as other enforcers' attitude changes. Due to early involvement of investigating agencies and proper exchange of information, all direct evidence was obtained and accepted by the court. However, this sentence does not cause much optimism. First, disinterested persons have been involved in the anticompetitive agreement so that secrecy has been weakened. Second, even in this exemplary case the severity of sanctions was quite far from criminal sanctions imposed for cartels.

Therefore, there is no completed condition for effective deterrence cartels by custodial sentences:[182] there is no dedicated investigator and prosecutor; no sufficient powers of investigation; no judges willing to convict; no sufficiently broad political and public consensus that cartels are really bad and thus deserve severe punishment.

[182] Whils, *supra* n. 85, at 189.

One of the possible justifications for malfunctioning of cartel criminalization in Russia can be political weakness of competition authorities as a newcomer in enforcement system, so the first point to start with could be empowerment of the FAS and its regional departments with sufficient competence to obtain evidence and participate in criminal investigation. However, the massive criticism of the criminalization due to imperfections of criminal enforcement and its foreignness to the system,[183] which is very close to rhetoric of German opponents to criminalization,[184] the powerful lobby of business interests by the Ministry of Economic Development and some non-governmental organizations, and the influence of other opponents among enforcement agencies do not allow reliance on empowerment in the nearest future.

Since empowerment of competition authorities in criminal proceeding is passionately rejected and quasi-agreements are not enforceable, some interim measures can be considered. One of the obvious steps increasing both certainty and severity of anticartel norms could be simplification of Art. 178 of the Criminal Code to transfer cartels to the category of grave crimes, *i.e.* to extend sanctions over three years of imprisonment. That measure would automatically exclude risks of short limitation period, strengthen the meaning of leniency and attract focus of investigating agencies; however, without correcting social norms and promoting the role of competition authorities, amendments of substantive law are unlikely to lead to changes in anti-bid rigging enforcement. In the long perspective, changing social norms seems the most optimistic option, and an 'obvious avenue for changing social norms'[185] is education programmes for public and engaged representatives of enforcement agencies.

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[183] *See Новиков В., Верещагин А.* Антимонопольная статья Уголовного кодекса станет опаснее [Novikov V., Vereshchagin A. *Antimonopol'naya stat'ya Ugolovnogo kodeksa stanet opasnee* [Vadim Novikov & Aleksander Vereshchagin, *Antitrust Article of the Criminal Code Become More Dangerous*]], *Vedomosti* (Apr. 12, 2013), <http://www.vedomosti.ru/opinion/articles/2013/04/12/gde_suma_tam_i_tyurma> (accessed Dec. 5, 2015); *see also* Letter of the Russian Union of Industrialists and Entrepreneurs No. 632/05 of Apr. 17, 2013, to the Chairman of the State Duma of the Federal Assembly of the Russian Federation S.E. Naryshkin, at <http://www.forbes.ru/sites/default/files/Scann001.pdf> (accessed Dec. 5, 2015); Letter of the All-Russia Public Organization 'Business Russia' No. 449 of April 17, 2013, to the Chairman of the State Duma of the Federal Assembly of the Russian Federation S.E. Naryshkin, at <http://www.forbes.ru/sites/default/files/Pismo_Naryshkinu_Galushka.pdf> (accessed Dec. 5, 2015).

[184] Papp, *supra* n. 43.

[185] Stephan, *Beyond the Cartel Law Handbook*, *supra* n. 100, at 10.

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