

# Does the New Design of Russia's Anti-Cartel Offence Contribute to the Deterrence of Cartels?

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## Introduction

The principal aim of anti-cartel enforcement is to deter cartel activity which is harmful to consumers because it leads to increased prices and reductions in innovation.<sup>1</sup> Custodial sentences are believed to be exceptionally effective for this purpose,<sup>2</sup> unlike civil or administrative sanctions because companies may indemnify fines for individuals. Imprisonment also carries a strong message to society that anticompetitive agreements are inadmissible.<sup>3</sup>

## Harmfulness as a Base for Criminalization

The application of criminal law is traditionally determined by harm and morality. But the commercial nature of price fixing makes it difficult for many to formulate a moral judgement.<sup>4</sup>

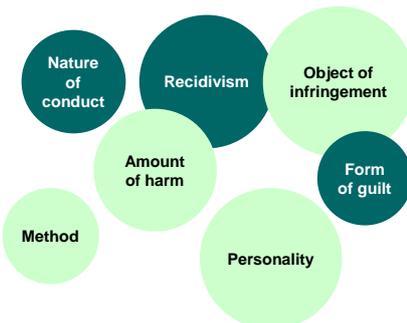
Use of harmfulness for a cartel offence maintains the legitimacy of the cartel offence because the harm from hardcore cartel conduct strikes at free market as an important institution which permits an individual's ability to secure their well-being in a liberal society.<sup>5</sup>

Also, the offence is limited to situations in which the prosecution can show that the accused was involved in a horizontal arrangement.<sup>6</sup> However, the reference to simply 'competition' or the 'competitive market' leads to issues of economic evidence.<sup>7</sup>

Inclusion of the moral elements in the cartel offence often employs emotional reactions explaining price-fixing as 'theft by well-dressed thieves', 'cancers on the open market economy' or 'supreme evil of antitrust.' On the other hand, some suggest that cartels are morally neutral<sup>8</sup> and therefore not a crime.

## 'Specific Russian Legal Term' as a Base for Criminalization

'The social danger' is a compulsory element for criminalization in Russia which encompasses all types of harm to legally protected social relations (values). The concept has been inherited from the Soviet criminal law and remains very controversial.

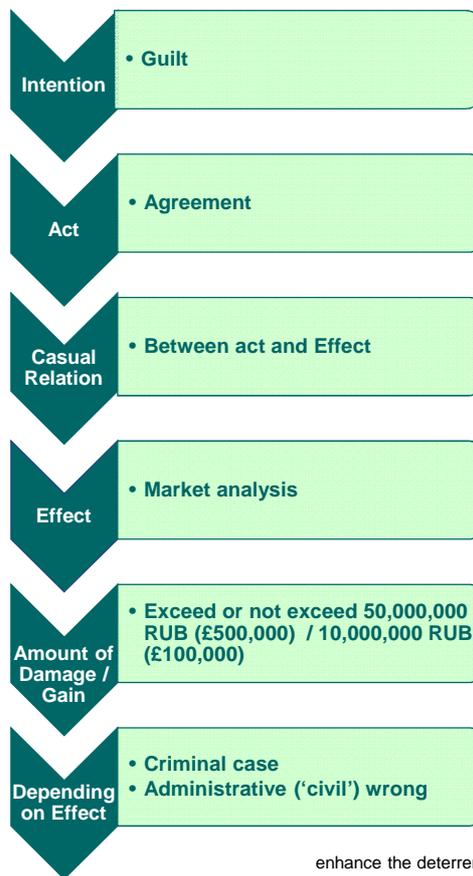


The social danger does not work well in a cartel offence. The measure of social danger causes co-existence of parallel criminal and administrative enforcement for individuals including anti-cartel enforcement.

## Cartels Only a Crime if They Achieve Sufficient Economic Harm

In Russian criminal law estimation of damage determines whether a wrongdoing is a crime or an administrative wrong, not a mental element.

### Per Se or Effect-based criminal offence?



The social danger is manifested in Russia's cartel offence through an amount of damage as in theft, fraud and robbery. The temptation to draw parallels between price fixing and theft or fraud is not unique, but 'the acts of price fixing, theft and fraud are not morally equivalent. Price fixing does not require physical interference or violence, nor does it necessarily involve a positive deception. The harm caused by the act of price fixing is often remote (regarding a perpetrator and a victim) and widely dispersed'.<sup>9</sup>

## Failures of Russia's Criminal Regime

Calculating the cost of such harm causes problems because the damage is not directly, personally or sensibly felt by other parties, it can be dispersed among ten thousand end-consumers. Also, harm may be experienced remotely in the case of any 'upstream' products. Damage-based approach contradicts with socially or economically approvable causes and creates confusions with business risks since the maximisation of profit is a natural and legitimate objective from a business perspective. Some specific issues arose in Russia: the effect-based anti-cartel offence questions per se principle of prohibition of cartels; social norms prevent victims to claim damage, this results in overall poor experience of proving damage.

## Conclusion

Empirical data from Russia demonstrates that an amount of damage should not be used as a measure of cartel harmfulness in a criminal cartel offence because it blocks criminal anti-cartel enforcement. The new design of the cartel offence does little to enhance the deterrent effect of the anti-cartel offence. It is very unlikely that the western concept of harmfulness can replace so-called social danger in Russia's cartel offence considering that this factor is an integral element of the criminal law and the cartel offence is a part of criminal law system. However, considering that cartels are bad for the market as a whole, it would be reasonable to decide between administrative and criminal sanction for individuals and retain the only criminal offence. Also, the domestic social norms may make the idea of cheating the state looks more perspective while narrowing of the cartel offence to bid-rigging only would make the offence more understandable

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