

# Law and economics vs. formal legal approach in criminal prosecution of the cartel<sup>1</sup>

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## Abstract

Criminal prosecution of monopolistic activities in the form of market cartelization is the most sensitive instrument for individuals and can both have a serious deterrent effect and restrict behavior that is beneficial to the public welfare. The paper considers theoretical and economic aspects of choosing an antitrust enforcement regime in view of the projected changes in the discussion and application of the norms of article 178 of the Criminal Code of the Russian Federation, taking into account possible differences between organizing a cartel, entering into a cartel agreement and participating in a cartel. It is obvious that there are various options for correlating the concept of concluding an agreement and participating in it, including anti-competitive. However, it requires realistic assumptions about human behavior. Based on the principle of methodological individualism and the concept of bounded rationality used in economic sciences, the authors demonstrate restrictions on projecting the ratio of agreement conclusion/participation of legal entities (economic entities) on actions of individuals. Practical issues of designing criminal punishment for cartels are considered taking into account various legal concepts, including the form and types of guilt, as well as on the basis of comparison with other articles of the Criminal Code providing punishment for collective unlawful acts. In connection with the reproduction of the tradition of hostility in antitrust legislation, the Russian antimonopoly legislation has identified the risks of objective imputation (risks of type I errors) and insufficient punishment of the cartel organizer (risks of type II errors) in case of underestimation of the weight of economic concepts based on the principle of methodological individualism and the assumption of bounded rationality of individuals.

**Keywords:** cartel, agreement conclusion, participation in agreement, objective imputation, methodological individualism, bounded rationality, forms of guilt, direct intent.

**JEL:** K21, K42.

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## Introduction

The directions of present-day economic research forming the research core of the disciplinary field are basically the theory of individual choice (not to be confused with methodological individualism). However, depending on the approach to individual choice modeling, different “solutions” can be found in terms of distinguishing important aspects of behavior from the point of view of law enactment and enforcement. In this context, the issue of correlation between the realism of the accepted assumptions and the explanatory and predictive power of the models built on the basis of these assumptions is important. Let us recall that, according to one of the fundamental principles of positive economic research formulated by Milton Friedman about seventy years ago (Friedman, 1966), many things can be explained by a limited number of reasons, even at the cost of losing the realism of the assumptions used.

According to law and economics, the issue of the assumptions used and their realism is the key one. Economic assessment of the system of punishment for law violations is based on the decision-making model for committing illegal actions proposed by Gary Becker (Becker, 1968). But its predictions are based on the assumption of full rationality. The weakening of this assumption<sup>2</sup> raises a fundamental question: What are the grounds for expecting the impact of bans and sanctions for their violation on people’s behavior?

One of non-trivial practical examples showing different approaches to behavior modeling is a discussion of the model of applying criminal sanctions in the context of deterring cartels. This issue has become one of the most acute and prominent in public discussions concerning changes in Russian antitrust legislation.

In the context of interdisciplinary discourse, primarily economic science and law, the purpose of this article is to show the advantages of an approach to modeling individual behavior that is in line with the principles of methodological individualism and is based on the assumption of bounded rationality of decision-makers, which is compatible with the idea of functional rationality (as opposed to instrumental rationality<sup>3</sup>) and the principle of the realism of the model (even at the expense of its strictness). Solving this problem, in its turn, will allow us to see from the economic theory prospective the methodological roots of the phenomenon of objective imputation of a crime committed by a group of individuals, as well as to distinguish between organization of a cartel, conclusion of a cartel agreement and participation in a cartel.

The first section provides a detailed description of the problem, taking into account the proposals of the antimonopoly authority to change the norms of article 178 of the Criminal Code of the Russian Federation. The second section reveals flaws in the concept of liability for participation in a cartel agreement without its conclusion through the prism

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<sup>2</sup> Discussions on the topic have been going on for the past twenty years. See, for example, Korobkin and Ulen (2000) as one of the starting points of such disputes.

<sup>3</sup> Let us recall that the fundamental difference between functional and instrumental rationalities is that in the first case, human behavior is investigated as it is, while the instrumentality of rationality is based on convenience, operability of the research, regardless of actual algorithms used for making individual decisions.

of the concepts of methodological individualism and bounded rationality. The third section deals with the reverse situation — organization of a cartel without participation in it and the related issue of the first and second types of errors. The main results and directions for further research are formulated in the conclusion.

This paper is a continuation of the study of the problem of designing norms of criminal punishment for cartel for individuals presented in (Avdasheva & Shastitko, 2010; Shastitko, 2020). As it is well known, there has always been a problem of an interdisciplinary barrier in social sciences, including due to specific concepts used by researchers. This article attempts to overcome this barrier. That is why, along with the concepts of methodological individualism, bounded rationality, cartel, and contract that are well-known to economists, the concepts of direct intent, guilt, and negligence will be used, which, although reflected in law and economics to a certain extent, have not yet been applied to the economic study of practical antitrust issues in the context of determining the grounds for applying criminal sanctions against individuals for a cartel.

## 1. Formulation of the problem

Today, one of the most significant and pressing issues of reforming the antitrust legislation in Russia is introduction of amendments to article 178 of the Criminal Code. One of the possible new laws is specialization of the article's wording in terms of extending punishment to both those who have concluded a cartel agreement and those who participate in it: *“The **conclusion** of a cartel prohibited by the antitrust legislation of the Russian Federation, as well as **participation** in it, if this act caused major damage to citizens, organizations or the state, or entailed the extraction of income in a large amount.”*

We will further show that attitude to such proposals will differ depending on the accepted behavioral assumptions (explicit or implicit), and/or depending on the awareness of the participants. But first of all, questions arise on how participation in a cartel differs from its conclusion and what standards of proof must be met to test the hypothesis of participation or non-participation of particular individuals in a cartel. We are talking about criminal prosecution of individuals since we consider this issue on the example of a jurisdiction where criminal sanctions against legal entities are not provided. And against the background of the questions raised, somewhere behind the scenes — there appears another one: What difference does it make whether the subject concluded an agreement or participated in it, or both, and how does the presence or absence of this difference correlate with the legal doctrine that underlies criminal punishment for offenses?

It would seem there is no problem. What difference does it make if the subject concluded a cartel agreement or only participated in it? If a cartel agreement is a set of illegal rules supported by mechanisms of enforcement, then such an agreement must also be accompanied by actions that can be interpreted as participation in a cartel agreement. Let us note that although cartels (with the exception of export ones) are generally prohibited per se and do not require analysis of effects, as in the case of the rule of reason, they can

and should be an object of economic study, including the application of the economic theory of contracts (Shastitko, 2013). A study of the rich world of cartel agreements indicates not only what they actually consist of, but also who concluded them, how the agreements are structured to ensure their operation, and what sanctions can be applied to violators of the terms and conditions of cartel agreements.

If we consider interaction of economic entities that are subject to the provisions of article 14.32 of the Code of Administrative Offences of the Russian Federation, which establishes penalties for violations of the Law “On Protection of Competition” in terms of the ban on anti-competitive agreements, no difficulties should arise. There are officials authorized to make decisions that are considered as sources of actions of the entire firm (the entire economic entity) in the market.

However, there are no sufficient grounds for extending the same logic to individuals. Discrepancy between the two logics is based on the fact that the identification or synonymization of an economic firm (an economic entity, if we use terms from Russian antitrust legislation) with an individual is possible if we take a classic (individual) company where functions of the owner, top manager and entrepreneur are concentrated in one person. Of course, it can be found in present-day economies, even in fairly large companies. However, the fact that it is possible to find such examples does not negate the main point: modern large corporations are built on a principle of functional specialization related to interaction with the outside world, in our case — with competitors.<sup>4</sup> The fundamental question here is how this specialization can be combined with the principle of criminal responsibility of particular individuals for the cartel.

To begin with, we will describe the options of the situation through the prism of the concluding an agreement/participating in an agreement ratio (Figure 1). Let us note at once that the set of possible situations is much broader if we also consider the relationship between organizing a cartel and concluding an agreement (for more details, see the next section).

**Figure 1.** Options for participating in an anti-competitive agreement

		Participation in an agreement	
		Yes	No
Conclusion of an agreement	Yes	1	2
	No	3	4

Two symmetrical situations, where everything is quite simple, are situations 1 and 4. In the first case, a party enters into an agreement and participates in it. It is a usual situation with the conclusion of the vast majority of contracts, regardless of whether these contracts comply with the law or not. The second case is even simpler: there is no agreement or participation in it. It is clear that the mere fact of existence or absence

<sup>4</sup> The authors are aware that active participation in the daily business activities of shareholders possessing a stake sufficient enough to ensure control over companies is still a peculiarity of Russian corporate governance.

of an agreement often has to be proved, especially taking into account the wording of article 4 of the Law “On Protection of Competition,” which defines an agreement for the application of antitrust law.

Let us recall that in accordance with clause 18 of this article, an agreement is a written understanding contained in a document or several documents, as well as a verbal understanding. As you can see, one agreement may well consist of a number of documents, between which there shall be a certain relation, as well as (possibly) oral agreements related to these documents. Further, we are not going to specifically consider how to prove existence or absence of an agreement, but we will take into account that this information, especially if it is an illegal agreement, can be unavailable not only to the regulator, but also to a large number of individuals who work in cartel member companies. It is unlikely that illegal activity is possible in a situation where all employees of a large company know about it.

If an agreement is concluded, it does not follow that it is, in principle, being executed, or that it is carried out by all those who entered into it. It is the second situation which can serve as a basis for raising the question of the operability of the concluded agreement, as well as different degrees of guilt (for example, for those who have concluded the agreement, have not participated in it, but have not informed the regulator about the agreement conclusion and those related to implementation of the agreement by other persons). This aspect is addressed, in particular, in (Shastitko, 2013).

For a substantive discussion of the issue, it is also worth considering the conceptual differences between cartel as a type of illegal agreement (permitted export cartels are not considered) and concerted actions that are prohibited by provisions of article 11.1 of the Law “On Protection of Competition” and are also known in economic science as tacit or implicit collusion. Although tacit collusion can lead to consequences that are similar to those of a cartel (higher prices, smaller volumes of transactions in kind compared to competition conditions, redistribution of consumer benefits in favour of monopolistic entities, reduced efficiency — both static and dynamic), nevertheless, the mechanism for achieving this result is such that it is extremely difficult to verify it if strict standards of proof and an effective presumption of innocence are met (Avdasheva & Shastitko, 2010).

Therefore, if we do not verify the hypotheses that explain the obtained results, but do not proceed from the assumption of anti-competitive behavior, consistently rejecting them on the basis of empirical verification, then there is a high risk of a type I error — obtaining a conclusion about an antitrust law violation. For errors in law enforcement, including those related to the antitrust legislation application, see (Shastitko, 2011). It shall be taken into account that the costs of administrative, and even more so of criminal prosecution, are very high: they include the risk of erroneous charges against both bona fide business practices and bona fide entrepreneurs themselves. A legal system that makes mistakes even in a few percent of cases is highly likely to sentence bona fide entrepreneurs. For example, if it is known as a fact that there are 5% of cartels in the market that restrict competition by lots of agreements between market participants, and the legal system is wrong in 10% of cases (type I and II errors), twice as many innocent people will be charged and convicted as criminals (Easterbrook, 1984).

Enforcement technology may well contribute to such errors. The antimonopoly authority analyzes a particular doing business method of a company with which it is familiar. Moreover, the applied estimates bear traces of a “hostility tradition” based on misinterpretation of business practices. Then the case is referred to the court, which examines business models even more superficially and, in the absence of expert support from qualified independent economists, is even more likely to make a wrong decision. With the transfer of the case to the investigative authorities (if there are signs of a crime and criminal proceedings are initiated along with arbitration), the connection with the economic background of a particular business activity, as well as decisions made by particular entrepreneurs, becomes even more elusive (Avdasheva & Makarov, 2017).

The investigators focus on certain legal facts that are fixed in certain legal acts of the antimonopoly authority and courts, but without any special features individualizing any particular offense: the state of the market, customary business practices used by a particular firm, and personal characteristics of top management. Thus, receiving a set of facts already established by the antimonopoly authority and the court, the investigator follows the simplest way: he/she simply agrees with the conclusions already made before him/her and transfers the charges from the legal entity (company) to the individual — a particular top manager or an employee, or to both of them.

Such a mechanism actually points to the way objective imputation works. To a certain extent, this can be described by the 3<sup>rd</sup> situation from Figure 1 when there is no direct evidence of a concluded agreement (according to the signs from clause 18, article 4 of the Law “On Protection of Competition”), but nevertheless, companies operating in the market are considered to be participating in the agreement (therefore, tacit collusion). Herewith, it shall be taken into account that article 5 of the Criminal Code of the Russian Federation expressly prohibits objective imputation, i.e. the application of criminal liability for an innocent act.

Here it is necessary to make a small digression and focus the reader’s attention on the fact that objective imputation is not the application of criminal sanctions for negligent actions that caused harm. Negligent homicide is still homicide, although it is more leniently punished than intentional homicide. Forms of guilt will be discussed in more detail below.

Next, we will show how objective imputation works on the example of fighting cartels in the light of the discussion of the proposed amendments to article 178 of the Criminal Code of the Russian Federation and will offer its economic interpretation.

However, the problem discussed in the article implies that we do not need to answer the question whether an agreement was concluded or not, and this is different from the case with concerted actions. In order to simplify and focus on the problem in question, we assume that an agreement has indeed taken place. Moreover, we assume that we do not need to prove whether this agreement is illegal, based on the fact that the agreement is illegal, and the actions of the companies participating in the illegal agreement caused damages. Accordingly, we are interested in the question that corresponds to the 3<sup>rd</sup> situation in Figure 1: participation in an agreement without its conclusion.

## 2. Methodological individualism and bounded rationality: What is wrong with the concept of liability for participating in an agreement without concluding it?

A cartel is always a result of collective actions. However, as a rule, it is a result not only of collective actions in the market, but also at the level of individual companies (economic entities). The larger the companies operating in the market, the more complex the mechanisms of their interaction, and the more likely it is to detect the involvement of a large number of people in the process of preparing and making illegal decisions and illegal actions. It means that within a single company, the actions of multiple individuals that are, if desired, causally linked to the company's actions in the market can be interpreted as participation in a cartel agreement, if not as participation in its conclusion. In our opinion, it is here that the main risk of the proposed formula, implying punishment for participation in the cartel without discussing and investigating the moment of joining the cartel through an agreement conclusion (or joining an anti-competitive agreement), lies. Of course, stating that there are such risks is not a sufficient reason for rejecting the idea itself, and even more so for refusing to discuss proposals.

Two theses are important for further discussion.

1. *Methodological individualism*. From the position of a number of economic theories, including the position of the new institutional economics and the Austrian economics, “only people make decisions” research principle is used to explain any social phenomena. Therefore, there is not and cannot be an identity between analyzing a company's behavior (this is quite possible instrumentally) and analyzing behavior of individuals (including those working in a particular company). It means that, in the context of applying antitrust legislation, the logic of interaction between companies cannot be projected (without any reservations) to the study of interaction of individuals both within different companies and within the same company.

The basic principle of the presumption of innocence states that any person can be held criminally liable only for those crimes and their consequences for which the guilt of this person is established. And this is where a number of questions arise. What form of guilt should be defined for a criminal cartel? Criminal law deals with two forms of guilt — intent and carelessness, which are divided into many types. With regard to cartels, both types of intent (direct and indirect) are common for a person to understand the danger of an anti-competitive agreement and foresee socially dangerous consequences. On the contrary, all types of carelessness (thoughtlessness and negligence) are characterized by a cartel participant's lack of understanding of the actual danger of the act and inability to foresee socially dangerous consequences.

A legal entity (for simplicity, it is used interchangeably with the concept of an economic entity) does not require proof of psychological and intellectual attitude towards the actions performed. The formula of guilt for a legal entity is as follows: the legal entity has not taken all the measures it could take to prevent the violation. Everything is extremely objective and without any psychological component. As far as an individual is concerned, an assessment

of his/her attitude to the deed is vital for evaluating his/her actions since there can be no punishment without guilt (Shargorodsky, 2003). The form of guilt makes it possible to separate a crime from a non-crime, while the content of guilt allows separating elements of crimes similar in objective characteristics from each another. Separation of a criminal cartel (article 178) from a fraud (article 159) and criminal community organization (article 210) can be seen as an example of such a distinction.

2. *Bounded rationality of a person.* Despite all the attempts of a person to maximize his/her own benefits, they face the fact that even the information available to them can be misinterpreted or completely ignored if, for example, it does not pass through the so-called pragmatic filter (Kobrinsky et al., 1982). For example, a person knows about certain facts in business and business turnover, but does not project them on the conditions for maximizing his/her benefits and therefore leaves them without attention. Or a person knows about certain legal prohibitions, but misinterprets them or simply does not understand and does not project them on his/her person in principle.

How can we prove the intent and benefits of particular employees of a company who, without holding senior (or even top) positions, were involved in development of decisions and actions that can be qualified as conclusion *and* participation in a cartel of the company as a whole? What form of guilt is considered for a criminal cartel?

Who is at risk in this case? Is it only the top management of the company? What are the standards for proving intent and can there be a careless cartel? And what about the estimates of income received from the performance of official duties which, as it may later turn out, are related to illegally received income and yet are embedded in the system of key performance indicators of the employees? How and when to verify whether the very key performance indicators that a company's employee focuses on in his/her daily activities are pro-competitive and, as the case may be, guarantee that investigators will not have any questions for such an employee? Who and how can prove whether a particular employee knew about the nature of the decisions and actions that had been made in the company and by the company in the market? And should he/she have known about such actions? And if so, how did he/she interpret them? Ultimately, does the result of an investigation against a company that has been found guilty of violating antitrust laws change anything *de facto* (rather than *de jure*) in terms of the presumption of innocence of a particular individual? Are there standards of proof that, on the one hand, are practicable at a reasonable cost and, on the other hand, allow for targeted punishment?

Such a set of questions is not accidental. Do we really assume that qualifying such actions as a cartel activity amounts to nothing? Descriptions of particular examples (Shastitko & Golovanova, 2014; Shastitko & Ménard, 2017), as well as problems of the hostility tradition in antitrust in general (Pavlova & Shastitko, 2014), provide grounds for a less optimistic conclusion: when deterring cartels, type I errors may occur in terms of qualification of commercial practices.

Do we proceed from the assumption that employees of the company can be equally informed about the context of the performed actions, taking into account one of the most important behavioral prerequisites in the present-day economics — bounded rationality (Williamson, 1996, p. 689; Furubotn & Richter, 2005, p. 264)? How can we determine

what they knew and what they should have known because of their job responsibilities? Can development and application of the corporate antitrust compliance policy help in clarifying the issue of future (probable) liability of the company's officials? How will distribution of presumptions affect the setting of incentives for the company's officials and, accordingly, the assessment of the antitrust risk premium, which can become the basis for adjusting the employees' compensation package?

It should be noted that the problem of individualization of punishment for corporate offenses is not only an antitrust prerogative. All the aspects of a corporation's business activities may at one moment or another face violation, each of which is backed by particular individuals. People make decisions and people execute them. And here we need to understand that some large corporations are often more effective than the states since they can use their own security services to deal with the facts of illegal behavior of their employees, including through disciplinary penalties, which are applied only after investigation of all the details and circumstances of the offense (Fisse, 1995).

As an illustration, we will draw a few analogies with other types of offenses, for which, as well as for the cartel, criminal penalties are provided.

Article 210 of the Criminal Code of the Russian Federation provides for punishment for creation of a *criminal organization*, as well as for participation in it. Herewith, creation and participation are separated and covered by different parts of article 210 of the Criminal Code of the Russian Federation and are punished differently. In addition, there is even a separate resolution No. 12 of the Plenum of the Supreme Court dated June 10, 2010 "On Court Practice of Consideration of Criminal Cases on *Organization of Criminal Community (Criminal Organization) or Participation in It*," which provides definitions of all the key concepts of article 210 of the Criminal Code of the Russian Federation. The situation is similar with article 282.2 of the Criminal Code of the Russian Federation, which provides for liability for creation of an *extremist organization*, as well as for participation in it. In this article, creation and participation are also separated and covered by different parts, as well as recruitment and engagement. There is Resolution No. 11 of the Plenum of the Supreme Court of the Russian Federation dated June 28, 2011 "On Judicial Practice in Criminal Cases Regarding Extremist Crimes" which contains all the definitions.

When assessing the liability of the cartel organizer and its participant, another analogy suggests itself: the ratio of responsibility of the organizers of the *terrorist community* (article 205.4 of the Criminal Code of the Russian Federation) or the organizers of the *terrorist organization* (article 205.5 of the Criminal Code of the Russian Federation) and ordinary participants. The analogy between a cartel and a terrorist organization is hyperbolized, though it clearly demonstrates the disparity of sanctions for the organizer and for an ordinary member: for an ordinary member the liability can reach twenty years of imprisonment, while for the organizer — life imprisonment. Resolution No. 1 of the Plenum of the Supreme Court of the Russian Federation dated February 9, 2012 "On Certain Issues of Judicial Practice in Criminal Cases Regarding Terrorist Crimes" clearly explains what is meant by an organization and what is meant by participation in a terrorist organization.

What about article 178 of the Criminal Code of the Russian Federation? It is obvious that from a formal legal point of view, a cartel is exactly the same organization of people

to achieve illegal goals. But we and law enforcement agencies can only vaguely guess this, based on the unclear provisions of the Law “On Protection of Competition.” It should be noted here that such an approach is not acceptable in principle in matters relating to criminalization of certain acts. Considering serious consequences of the sentence (namely, imprisonment), the criminal penalty should be justified and the law should be very clear (Whelan, 2014).

In this regard, the approach to the construction of article 178 of the Criminal Code of the Russian Federation should be similar to the approach used to structure Articles 210, 282.2, 205.4 and 205.5 of the Criminal Code of the Russian Federation. The well established idea of the cartel from economics point of view is based on the model of an oligopolistic market, in which the parties to an agreement agree on production quotas (sales volumes) and, accordingly, set (maintain) prices in order to get higher profits compared to competitive conditions (for example, according to Bertrand competition). This specificity also explains the peculiarities of cartel research through the prism of incomplete contracts with appropriate mechanisms of enforcement and adaptation to changing circumstances (Shastitko, 2013). However, it does not provide a direct answer to questions about relations within the company to establish the guilt of an employee.

A terminological inaccuracy should be noted in the new version of article 178 of the Criminal Code of the Russian Federation. It is obvious that it is impossible to participate in an agreement without confirming a strong-willed decision to join it, that is, to conclude a cartel agreement with the participants who have already joined the cartel. So, why then did the legislator need to give in the disposition of article 178 of the Criminal Code of the Russian Federation two alternative criminal actions: conclusion or participation?<sup>5</sup> Herewith, the legislator considers these two actions equal in their severity, as a result, each of them is subject to the same liability. Conclusion of a cartel involves any action that can be expressed in the form of negotiations on the conditions of the existence of the cartel, its activities, the roles of participants, distribution of quotas, and resolution of disputes. The result of these actions is a cartel organization with the aim of limiting competition and obtaining criminal income.

Participation in a cartel is an active action aimed at implementing obligations assumed under the cartel agreement. Therefore, these two actions must be inextricably linked in the disposition of article 178 of the Criminal Code of the Russian Federation and not separated from each other. At the same time, the issue of a cartel organization and creation remains unresolved (Shishko & Derevyagina, 2017) since the terms “conclusion” of a cartel and “organization/creation” of a cartel are not equal. A cartel organizer is a person who, as in the examples with articles 210, 282.2, 205.4 and 205.5 of the Criminal Code of the Russian Federation, initiates creation of a cartel and assumes leadership and decision-making related to planning, material support, organization of criminal activities, as well as the cartel functioning as a single organization and roles distribution among the cartel members

<sup>5</sup> Here and further, a disposition is a structural part of a legal norm (along with a hypothesis and a sanction), which includes the very rule of behavior that participants in legal relations should or can follow. A disposition is the main regulatory part of a legal norm. Dispositions of norms of the Criminal Code of the Russian Federation contain signs of prohibited acts, in other words, they describe what should not be done (Ilalutdinov, 2012).

(Semenikhin, 2018). Why is it important to understand it in order to correctly qualify the actions of a cartel member? It is the cartel organizer who is the center and gathering point of the cartel, it is the organizer of all other cartel participants who is the most rational in choosing their criminal behavior and the least constrained in time, resources, and cognitive abilities when conceiving and implementing the criminal intent to create a cartel, as well as involving other participants in it. In this regard, liability for entering into or participating in a cartel and organizing or creating a cartel should be different, and punishment for the organizer should be stricter than for an ordinary participant. As for the presumption of innocence and objective imputation, it is still more ambiguous.

What does objective imputation mean and how does it differ from subjective imputation? The principle of subjective imputation assumes that only those circumstances of the crime that were known to the person who committed it can lead to criminal liability. The degree of awareness is expressed in forms of guilt. As for objective imputation, the criminal's awareness of the act does not matter. The principle of objective imputation is best expressed in the saying "ignorance of the law is no excuse." This is fair, if the laws in a state are clear even to children. But how can a manager of a tender department, for example, who has never seen a single regulatory antitrust act and who deals with price offers at auctions, receiving instructions from the head of the tender department, and following the instructions of the deputy general director called "On Restriction of Competition at Auctions..." be aware of his/her own actions?

The vast majority of law enforcement agencies agree that a cartel, like a criminal community, can only be created with direct intent but not carelessly (Viden'kina, 2014). In fact, this position is based on a simple prerequisite: it is not difficult for anyone to qualify an agreement as a cartel if he/she has known about it. There may well be a situation when a certain new high-yield business practice of a number of competing companies, which arose from a joint development strategy but without taking into account all the risks and legal aspects, is recognized as illegal over time, the cartel participants themselves understand that their actions are illegal, and then they become conscious (deliberate) cartel participants. Thus, it is obvious that the volitional aspect of guilt flows from negligence (the person had every opportunity to foresee the negative consequences of his/her behavior, but did not do so) to direct intent (the person was aware that his/her actions were illegal, and also wanted them to have negative consequences for society).

But what direct intent to commit a crime can the above-mentioned manager of the tender department have? He/she has never communicated with the managers of the competing companies and has never discussed the restriction of competition in the course of the trading procedures with them. What revenues does he/she want to get? However, if we change the situation to the opposite, we can imagine a situation where it is the ordinary managers of the tender departments of the competing companies who have created a cartel to "win back" tenders, while the top management remains completely unaware of the activity of their employees. The direct intent of the managers is obvious, but how do you qualify the actions of, for example, the CEOs of the competing companies? Could they have known about or anticipated the illegal activity of their managers? Does the answer depend, for example, on the structure of managers' key performance indicators, and if

so, is there a basis for dividing liability between those who set such indicators and the actions of the managers in question? Partly, an answer to this question can be given by the currently actively discussed and implemented system of antitrust compliance — a set of internal local acts in a company that regulate the procedure for making decisions and implementing operational functions in the context of a risk-based approach, that is, knowledge, understanding and considering antitrust risks. A well-functioning compliance system does not allow a manager of a tender department to claim ignorance of antitrust requirements, because he/she was instructed and trained by the company's compliance manager and signed a statement confirming that he/she is aware of the content of the company's compliance policies, etc. (Luz & Spagnolo, 2017). However, what remains to be done if the compliance system fails? The answer to “who is to blame” question will again be based on the degree and form of guilt of particular individuals, regardless of their position in the company. Of course, this question is closely related to another one — whether there are grounds to give discounts to companies that violate antitrust laws, but at the same time apply corporate compliance programmes (Shastitko, 2016).

### **3. Was not, did not agree, did not participate ...**

Is it possible to organize a cartel without being a party to it within the meaning of part 1 of article 11 of the Law “On Protection of Competition?” It turns out that it is possible. It happens when the antimonopoly authority cannot identify the cartel organizer in the case (a formally hidden organizer, about whom everything is actually known, but there are no sufficient grounds to bring him/her to justice under article 178 of the Criminal Code of the Russian Federation). He/she doesn't seem to exist. At the same time, there are a number of cases when charging cartel participants — distributors in concert under part 1 of article 11 of the Law “On Protection of Competition” — is adjacent to charging under part 5 of article 11 of the same Law for a vendor company, which, by coordinating distributors, is in fact a subject embodying criminal intent to create a cartel.

The real organizer of the cartel seems to fall out of the antimonopoly authority's field of vision. He/she is not the direct performer of the criminal plan, but he/she is the one who organizes the entire system of illegal relations. In this case, the vendor is the person who has all the information about the cartel, and it is he/she who makes the decision to create it. And then the issue of the distributors' guilt arises: If they knew about the intent of the vendor — everything is clear, but what if they did not know? And if they didn't know, could they have known and foreseen that their actions were guided by the vendor's will to limit competition? And what kind of conclusion of a cartel and/or participation in it can we talk about if conclusion of a cartel and participation in it are conscious volitional actions of cartel's participants to limit competition and to get monopoly profits?

An interesting example of antitrust enforcement is the case of Apple and the largest US publishers — Penguin, Hachette, Harper Collins, Simon & Schuster and Macmillan. Thus, Panel of the United

States Court of Appeals for the Second Circuit in New York announced that the terms Apple had offered to five book publishers allowed them to participate in a price-fixing conspiracy.<sup>6</sup> Herewith, an original goal (perhaps, just declarative) was set with good intention. Thus, in 2010, Apple appeared in the e-book market, which was dominated by Amazon and its Kindle Reader service, with its iBookstore service. Publishers, disappointed by Amazon's pricing policy, welcomed the new retailer, its iPad device, and its willingness to let them set their own prices in exchange for Apple's right to get a share of every sale. Not willing to act alone to raise e-book prices and push Amazon out of the market, Apple solved this problem by organizing a coordination of book publishers (led by Apple) to force Amazon to abandon pro-consumer pricing policies. As a result, the proposed "agent-based model" of cooperation led to inflating the prices of books in the iBookstore service by a total of two or three dollars. There is no doubt that Apple's role here is obvious. However, did book publishers understand that their behavior could be considered illegal when they agreed to Apple's "agent-based model"? And if not, did they realize it later?

Let us assume that the distributors really don't know that the vendor manipulated them and they are de facto involved in the cartel. How can the vendor's actions be evaluated? Was it coordination, and will it only be punished with an administrative fine? And what about the actual intent to create a cartel? It turns out that the real organizer of the cartel can avoid liability (type I error caused by a defect in the projection norm). Herewith, based on the current practice of the antimonopoly authorities, distributors themselves will be punished on the basis of indirect evidence, and materials for criminal prosecution of their officials will be sent to law enforcement agencies.

Objective imputation in relation to cartels is an extrapolation of the behavior of companies to the behavior of their employees without assessing the degree of guilt of the employees themselves, their awareness and conscious involvement in the cartelization process. The charge template for a legal entity is applied to an individual without any adjustments or details. Here the principle of objective imputation is revealed as follows: the human factor is not taken into account either from the position that only people make decisions, or from the position that people are not always sufficiently knowledgeable to understand that their actions constitute a crime. Both ignorant managers of the tender department who are not aware of the intentions of their management, and ignorant top managers who do not have information about the criminal actions of their subordinates, as well as top managers of distributors who do not actually realize that their vendor is manipulating them — all these individuals inherit cartel charges from their companies due to a gap in the legislation and superficial work of antitrust and law enforcement agencies.

If there is no clear and reasonable answer to the questions raised, then only creation of a cartel and participation in it *solely with direct intent* should be prosecuted, and only those company stakeholders who had *direct* and *immediate* relationship either to organizing the cartel, or to the conclusion of and participation in the agreement (but not those who just participated in the cartel), who had an understanding of the obligations assumed by the

<sup>6</sup> United States vs. Apple, Inc., No. 13–3741 (2<sup>d</sup> Cir. 2015). <https://law.justia.com/cases/federal/appellate-courts/ca2/13-3741/13-3741-2015-06-30.html>

company *in general* and/or *sufficiently* assessed their compliance with antitrust legislation, and who not only understood the public danger of the committed acts but also foresaw and desired the onset of negative consequences for society. It is necessary to separately consider that, by analogy with article 35 of the Criminal Code of the Russian Federation, a person who created and directed a cartel should be criminally liable under article 178 of the Criminal Code of the Russian Federation for both his/her own actions and for all other offenses committed by other members of the cartel even if the organizer was not directly involved in particular crimes committed by other members of the cartel, but they fell under his/her intent.

## Conclusions

The need to present evidence in criminal proceedings in order to eliminate all doubts about the guilt of the accused (presumption of innocence) gives more weight to miscarriages of justice in a guilty verdict than in an acquittal since one incorrect sentence generates social costs comparable to the costs of several erroneous acquittals for similar crimes. In particular, unclear and ambiguously interpreted norms of criminal law form the costs of criminals themselves claiming not violating the norms, as well as the costs of erroneous verdicts of courts and law enforcement agencies. Therefore, the goal of a clear wording of the law is to significantly reduce the cost of obtaining information about possible liability to the law, as well as a clear distinction between legal and illegal behavior. The high cost of obtaining such information requires a clear and consistent understanding of what constitutes a criminal act, both for a criminal element and for a law enforcement officer. The lack of such understanding makes it impossible to pass a guilty verdict in criminal proceedings (Posner, 2004).

To sum up, it should be noted that the answer to the question of criminal prosecution of a person only for participation in a cartel, as opposed to entering into and participating in a cartel agreement, is not self-evident. The difference between entering into and participating in a cartel is the same as between entering into and participating in any other agreement (contract). We cannot transfer conclusions about participation in a cartel without considering the fact of an agreement conclusion in relation to the company as a whole (when some companies act in accordance with the agreement, while the rest in the same market — in fact, as followers) to the actions of individuals who are, in particular, officers of the companies (or their shareholders), because employees of the cartelized company are informed about its activities to a different degree, and application of the criminal prosecution depends on the balance between established facts (which became the basis for the recognition of the agreement as a cartel) and information available to individual employees that may not be sufficient to evaluate the essence of the company's activities in the market. Considering the fact that the technique of obtaining evidence about the degree of knowledge of a particular employee does not give reliable results and contributes to the practice of applying objective imputation, let us not forget about the presumption of innocence, application of which involves placing the burden of

proof on a law enforcement officer who is obliged to interpret all doubts about the guilt of the accused in his/her favor.

On the other hand, the content of the concept of participation in a cartel should answer the question of how to restrain initiators and organizers of cartels who are not participants in the relevant market.

The research shows that the ideas of rationality explicitly or implicitly influence how the subject of protection should be formulated in connection with sanctions for illegal behavior. This thesis is important primarily for the economic analysis of law. The fact that inaccuracies in wording will lead to legal errors that reduce the positive effect of applying bans makes it possible to discuss the issues raised much more widely than the problems of article 178 of the Criminal Code of the Russian Federation, or even criminal legislation in general.

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