LEGAL ASPECTS OF ESCAPE FROM CRIMINAL LIABILITY FOR CARTELISTS IN RUSSIA

“The person that hides his sins shall not prosper, but those who confess and forsake them shall have mercy.”

The Holy Bible

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ABSTRACT

The article is based on the conference speech made by the author during the “Per Se Cartel Offences – Legitimacy and Utility of Criminal Sanctions?” conference, organized by the University of Luxembourg on the 23rd and 24th March 2012 and covers current cartel regulations in Russia, administrative and criminal liability for cartelists and aspects of escape from criminal liability.

Keywords: cartel regulations in Russia; criminal liability for cartels; escape from criminal liability for cartelists; Russian competition law

1. BACKGROUND

Participation in cartels is a serious criminal violation in Russia. This story goes back to the middle of the 19th century, when imprisonment as a criminal punishment for the collusion, deal or other agreement of sellers on price increases was adopted in law.

A definition of “cartel” appeared in Russian law only at the very end of 2011, with new amendments to the set of competition laws.

Looking into the modern period of life in Russia, in 1996 a new article appeared in the Criminal Code providing for the punishment of coordinated activity, however for almost 8–10 years it was a “sleeping clause” due to some historical peculiarities of the development of the Russian economy, which throughout the Soviet period was a planned economy, with the State as sole coordinator of the activities of

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manufacturing, fixing unified terms and conditions, as well as product pricing. When twenty years ago the economy changed from a planned economy to a market economy it was still extremely difficult to clear this “planning” scheme from the minds of market players.

Another reason is the following: the development of effective competition authorities also took some time. A totally new State competition authority was created, and passed through several stages of transformation before finally becoming a fully equipped and effectively operating body. While all these factors slightly complicated the immediate implementation of Criminal Code provisions into practice, they have not prevented later implementation as we may see in current times.

2. HOW MAY CARTEL COMPETITION LAW VIOLATIONS BE PUNISHED?

There are two types of punishment, established by current Russian regulations: administrative and criminal.

*Administrative* sanctions are applied by competition authorities (such as the Federal Antimonopoly Service (FAS), the federal state body responsible for competition regulation and the application of administrative measures). The FAS is absolutely independent in initiating cartel prosecutions and applying administrative sanctions;

*Criminal* sanctions are applied by a law enforcement office (the Ministry for Internal Affairs, which has responsibility in the sphere of criminal investigations and criminal responsibility) and can be applied only to individuals.

One more participant in cartel prosecutions is the Procurator’s Office of the Russian Federation, which enters the case at a later stage.

Based on article 2.1 of the Russian Code on Administrative Offences, the liability of legal entities does not exclude the further administrative or criminal liability of its managers and vice versa.

Administrative sanctions are fixed by article 14.32 of the Russian Code on Administrative Offences. Criminal liability is fixed by article 178 of the Russian Criminal Code.

It is important to stress that criminal liability cannot be applied by the competition authorities alone. Where the violation is serious and should be punished by a criminal sanction, the involvement of both the competition authority and the law enforcement office is necessary. However, only the competition authority may collect initial information and ascertain if competition law has been violated.
3. ESCAPE FROM CRIMINAL LIABILITY: ISSUES AND COMPLICATIONS

The procedure of escape from criminal liability is regulated by the Russian Criminal Code and the Russian Code of Criminal Procedure. In Russia, this procedure does not in any way connect with the leniency procedure applicable to legal entities in administrative procedure.

Looking from a practical perspective, it is now obvious that several obstacles influence the effective application of both types of liability to cartel participants. The first is the coordination of administrative liability and criminal liability, which do not depend on each other. A party which escapes administrative liability through the leniency programme does not automatically escape criminal liability. These two processes exist in parallel.

Another problem is the calculation of third party loss, which ought to be compensated by the violator. Unfortunately, the rules on calculation and reimbursement are not well-defined and there are practical issues in applying such calculations.

An essential part of the application of criminal liability is that in Russia it can be applied only to the individual; there is no criminal liability for entities. In the context of the application of cartel liability, this state of affairs gives rise to some specific difficulties.

First of all, when an administrative case is initiated by the competition authorities, a participant in the case may use its leniency right, and begin cooperation with the competition authorities. However, this only works where the participant is the first cartelist to cooperate, where competition authorities possessed no information or documents about the violation in question, where the applicant avoids any further cooperation within the framework of the cartel, and where sufficient information to fix the administrative case is produced. Compliance with the above conditions releases the applicant from administrative liability. However the story does not stop at this stage.

Criminal prosecution of the cartel participation then passes into the hands of the law enforcement office. As mentioned above, the leniency program applied by the competition authorities does not automatically lead to an escape from criminal liability. Since these processes are not interconnected, cartel participants having successfully invoked the right to leniency in administrative proceedings may face further criminal investigation.

It is important to mention that legal entities are not subject to criminal investigation and liability: at this stage, only natural persons may be subject to subsequent prosecution and criminal sanctions.

Criminal prosecutions are handled by a law enforcement office – the Ministry for Internal Affairs – on the basis of information provided by competition authorities.
beforehand. Only competition authorities are empowered to assess information and find traces of cartel behaviour in business activity, however the Ministry for Internal Affairs officers have procedural rights to collect further information, interview suspects and perform other necessary actions within their competence.

Application of criminal liability to the cartelist is regulated by clause 178 of the Russian Criminal Code. Depending on the seriousness of the crime, this article fixes criminal penalties starting from a fine of 300,000 Russian Roubles (about 7,000 Euros) and going up to 7 years’ imprisonment. Although criminal prosecution is considered a separate procedure in the process of punishing cartelists, and therefore the leniency programme has nothing to do with the criminal process, there do exist other options to escape or sufficiently reduce punishment.

In cases where the cartel participant receives high income or causes serious damage in accordance with clause 178 of the Russian Criminal Code he/she can be released, provided that there is no other criminal offence in the actions of the cartel participant and that the following conditions are fulfilled jointly: he/she assisted in the cartel disclosure; the cartel participant has compensated third parties (natural or legal persons) for damages sustained or repaid income received as a result of unlawful actions to the State budget.

Analysing these pre-conditions to escape from criminal liability we may see the concept of active repentance, which is in such a way fixed by Russian law and can be applied to cartelists. What is understood by active repentance?

Active repentance consists of voluntary actions of individuals, who performed criminal actions, consisting of the reimbursement or smoothing down of the harm caused by the criminal conduct, by its elimination or the reduction of its consequences. Such a concept has existed in Russian law for quite a long time and can now be applied to cartel crimes.

The main purpose of this procedure is to reduce expenses and efforts for the investigation to take all relevant measures for effective crime disclosure. This legal institution also aims to compensate losses incurred by the State or market players. It is important to consider that individuals’ fault is still in place. However, understanding the harm which unlawful activity caused to the State and/or third parties, this individual makes his own decision to cooperate with investigation authorities and compensate for harm done.

In cases where a cartel participant is not able to satisfy all the requirements in order to escape from criminal liability there is the possibility to enter into pre-court agreement with the Procurator’s Office after the criminal case has started. However, this decision must be accepted by both the cartel participant and the Procurator’s office.

If such a Pre-trial Agreement for Cooperation is accompanied by active cooperation with the Law Enforcement office, the penalty may be reduced to not more than fifty percent of the maximum penalty applicable for the type of case in question.
As we may see, there is clear controversy in cases where the individual released from administrative responsibility remains liable to be punished by criminal penalties. This matter is further complicated by the fact that cartel participants are usually legal entities. This legal entity generates income, however the violation can in fact be committed by an employee who signs the documents in question. In these cases, where the legal entity is released from liability, the employee will be punished in accordance with the Criminal Code. However, the only ‘fault’ of the employee was that he was acting within normal business practice established in this violating company.

4. CONCLUSION

Top managers\(^1\) of competition authorities in Russia express the position that release from criminal liability for cartelists is a highly effective measure in the fight against cartels on the market. This release follows the active contact of the cartelist with competition authorities, when the cartelist provides full information about the cartel and its participants to the state authorities, thus reducing time and effort expended to find and stop concrete cartel activity. Competition officials agree that cartels are among the most difficult, time- and effort-consuming cases of all violations of competition laws. Nonetheless, application of this disclosure entails some difficulties such as the collection of valid evidence, calculation of losses and proof of the criminal nature of actions.

This official position is also confirmed by local scientists and practicing lawyers, stating that it is also problem of uncertainty of legislation and contradictory clauses in different branches of law, when, for example, cartelists having escaped administrative liability remain subject to criminal liability. In addition, it is important to define quite clearly just who is responsible for the real damage caused by cartel actions. Is it the common manager, who only signed papers without gaining personal profit from the cartel actions? Or is it the shareholders of the company, who actually profit from fixing prices or other similar cartel activity? This makes it necessary to clearly define the real subjects of the cartel-legal relationship.

It falls within the frameworks of a general trend that if competition authorities are highly interested in the discovery of the cartel and their removal from the market, competition authorities are highly interested in making participants come and discover cartels. When market players will be sure that when they discover cartels, coming first to the competition authorities means a release from any type of liability – both administrative and criminal – this will make the activities of Competition regulators more effective and will ultimately benefit the State and all market players.

\(^1\) Deputy Director of FAS Andrey Tsarikovsky formalised this position during his recent visit to several Russian regions.
On the other hand one must be careful not to overestimate the role of criminal sanctions in the participation of individuals in cartels. On the one hand, the existence of criminal sanctions for cartels is a rather effective instrument of pressure on top managers of the companies, who make the decisions to engage in cartel activities. On the other hand, criminal sanctions for cartels may act as a brake on investigative efficiency. This is because even if the company successfully applies for ‘leniency escape’, its employees are not guaranteed to be free from criminal liability, since these procedures are in the hands of different State authorities.

There can be no doubt that for the purposes of even more effective activity of competition authorities on the market, punishing only those who really brought harm to the market, market players and finally the State, it is time to begin working on the harmonisation of competition, administrative and criminal law with the aspiration of fully realising the following provision, enshrined in the Russian Constitution: “In the Russian Federation the integrity of economic space, a free flow of goods, services and financial resources, support for competition, and the freedom of economic activity is guaranteed”.2

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