# Does citizens’ involvement always improve outcomes: procedures, incentives and comparative advantages of public and private law enforcement

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# Abstract

Comparative social efficiency of private and public enforcement of law is debated. This question is not of academic interest only, it is also important for the development of the legal system and regulations. Generally, involvement of ‘common citizens’ in public law enforcement is considered to be beneficial, while involvement of interest groups representatives is not.

Institutional economics as well as law and economics consider the difference between public and private enforcement to be rather mechanical. Actions of bureaucrats in government agencies are assumed to be driven by the incentives linked to social welfare (or other indicator of public interest) and their own benefits. In contrast, actions of participants in private enforcement are driven by their private benefits. However administrative law enforcement may be designed in such a way that it would become driven mainly by individual incentives of alleged victims. We refer to this system as *reactive* public enforcement.

Citizens may prefer using *reactive* public enforcement even if private enforcement is available. However replacement of public enforcement by *reactive* version of public enforcement negatively affects deterrence and reduces social welfare.

We illustrate the problem of private *vs* pure public and private *vs* *reactive* public enforcement models with the examples of three legislation subsystems in Russia – labor law, consumer protection law and competition law. While development of private enforcement instead of public (especially in *reactive* public model) is desirable, replacement of both public and private enforcement by *reactive* model is definitely not.

# Key Words:

Public enforcement; Private complaints; Legal errors, Competition protection, Labor law, Competition law, Russia

# JEL Classification:

K21, K42.

# Introduction

The comparative social efficiency of private and public law enforcement has been debated for many years. The issue is important, inter alia, for the development of the legal system and regulations, including rules on private suites and court hearings, on responsibilities and authorities of governmental bodies. Traditional concern about public enforcement is that officials in governmental agencies without wide control and accountability towards citizens follow selfish bureaucratic incentives, avoiding efforts or even being corrupted by interest groups. One of traditional receipts to this challenge is wide involvement of private actors in the public enforcement. In the countries where excessive administrative cost is among priorities of economic policy governments search the ways to promote accountability of executive authorities. Proposed solutions include suggestions, first, to eliminate discretion of civil servants in the authorities responsible for control and supervision procedures to the greatest extent possible, and, second, move regular to reactive (based on victims’ complaints) control and supervision. There is implicit belief that in this way administrative enforcement combines advantages of both public and private enforcement.

The goal of this paper is to show that strictly opposite is also possible: promotion of private actors’ involvement in the administrative enforcement cannot replicate the advantages of private enforcement but can substantially deteriorate the outcomes of public authorities’ activity. We propose to separate *reactive* public enforcement as separate type, together with ‘pure public’ and ‘pure private’ enforcement and develop an analytical framework that allows us to compare the incentives of private parties, the level of deterrence, and the effects on welfare under three alternative models.

We illustrate the issue of private *vs.* pure public and private *vs.* reactive public enforcement models using examples of three types of legislation in Russia – consumer protection law, labour law, and antitrust law. Recent enforcement trends in these three types of legislation differ: although both private and public enforcement are allowed in all of the legislative domains, labour and consumer protection law enforcement are drifting toward the private model, while antitrust rules are frequently enforced through selective public enforcement. We explain how the choices are made and demonstrate their impacts on deterrence and welfare.

The paper is organized as follows. Section 2 reviews the literature on comparisons between public and private enforcement, emphasizing our approach. Section 3 defines *reactive* public enforcement as distinct model of administrative law enforcement and analyses determinants of enforcement errors and therefore deterrence. Section 4 compares the trends of public and private enforcement in three areas of administrative law in Russia, where both enforcement by private actors and by executive authorities are possible, with special attention to the factors of individual choice between private enforcement and *reactive* enforcement model. Section 5 concludes.

# Public and private enforcement: need for complementarity

The literature on public versus private enforcement begins with Becker and Stigler (1974), who argue that private enforcement could achieve deterrence as efficiently as optimal public enforcement. Private and public enforcement exhibit comparative advantages in different settings.

Landes and Posner (1975) and Posner (1992) show that private enforcement can lead to over-deterrence. Polinsky (1980) argues that it can result in under-deterrence for low-income offenders. Garoupa (1997) shows that it can lead to under-detection and less accurate investigations. Shleifer and Hay (1998) argue that private enforcement has comparative advantages if the bureaucracy is corrupt.

There are many papers comparing private and public enforcement, particularly in terms of aspects of the law including antitrust law (see Segal and Whinston 2006 for a survey), immigration law (Pham 1996), and corporate security law (Armour et al. 2009; Roe and Jackson 2009).

The comparative advantages of enforcement models depend on a number of factors. Public enforcement can concentrate on violations that reduce social welfare and can take into account opposite effects of the given action, while the main reason for private enforcement is to prevent or compensate for private damages. Thus, private enforcement could be neutral or even detrimental to social welfare because private parties underestimate the potential positive externalities of actions that harm them. However, public enforcement suffers from an agency problem that is not generally the case for private enforcement. An injured private party has more incentive to collect information and to initiate legal action. Powerful incentives allow private parties to achieve cost advantages in enforcement. However, private enforcement necessarily suffers from a collective action problem, and this restricts its effectiveness when the number of persons injured is high enough.

The long list of factors affecting the comparative advantages of private and public enforcement makes selecting a model very complex. The law and economics literature considers different combinations of the aspects of the enforcement environment that influence the comparative advantage of models. For instance, according to Poilinsky and Shavell (2000), public enforcement is advantageous when the victim cannot easily identify the violator, there are economies of scale in law enforcement, and the costs faced by victims of crime are high.

However, in our opinion, the literature on private and public enforcement is missing two aspects of the problem. One is the artificial limitations placed on the models of enforcement under comparison. There are many studies on the advantages of private over public enforcement and vice versa. Moreover, insufficient attention is paid to the model of public enforcement, when government authorities act on the complaints of private parties. In some legal systems, selective public enforcement plays an important role. In Russia, it is currently considered a desirable direction for reforming public control and supervision. In this paper, we call it *reactive* public enforcement, which stresses that targets for investigation and prosecution are chosen neither by any risk-based principle nor at random, but instead are chosen based on the complaints of actual or alleged victims. In this respect, our approach follows (Freeman, 2000) because we also believe that the distinction between public and private interests in administrative law is somehow artificial and because we believe that decentralized decisions—as opposed to centralized decisions—should be analyzed to explain enforcement outcomes. McAfee et al. (2005) argue that public complaint enforcement can replicate advantages of private and public enforcement, but we concentrate on the conditions that replicate both models’ shortcomings.

The important for the comparison of public and private models of enforcement is the likelihood of Type I legal errors (*false positives*). In contrast to Type II errors, their effects have received insufficient academic attention. However, the impact of Type I errors on deterrence and the welfare effects of enforcement may be substantial, especially in countries with less developed legal traditions and relatively poor standards of evidence in litigation. Type I errors significantly affect deterrence and therefore social welfare; in some settings, they generate more severe effects on coordination than Type II errors (Shastitko 2011). Legal errors and their effects have been extensively studied (Calfee and Craswell 1984, 1986, Kahan 1989, Grady 1989, Poilinsky and Shavell 2007) but mostly with respect to the particular type of the enforcement. In turn, we concentrate on how the probability of legal errors depends on the enforcement model.

Enforcement error determinants are important. The probability of enforcement errors may be considered an exogenous result of limited cognitive ability. However, these errors might also be considered endogenous and explained, for instance, by standards of evidence (Rizzolli, Saraceno, 2011). The specific approach of this paper focuses on the determinants of probabilities of errors in specific enforcement model. Another difference between our framework and the previous literature is that we explain the origin of enforcement errors by endogenous budget allocated for one investigation, and this explanation changes the traditional view on the interplay between the probabilities of Type I and Type II errors. The assumption of the exogenous authority budget allocated among investigations — which is predicated on the independent choices of actual or alleged victims—corresponds well with the practice of civil law enforcement by the Russian executive authority. One important outcome of this assumption is that the main predictor of the probabilities of both Type I and Type II errors is the number of complaints. Increasing complaint pressure causes an increase in both error types and a corresponding decline in the deterrence effect under given legal rules and prescribed standards of evidence. Moreover, in this setting, increasing the penalties may provide the opposite effect of that expected: the gains expected from filing a complaint will increase, the number of complaints and cases under investigation will increase—as will the probability of errors—but the deterrence effect will be further diminished.

# Determinants of legal errors and deterrence in reactive public enforcement

By *reactive* public enforcement model it is meant an enforcement model where civil servant in executive authority is responsible for control and monitoring of compliance with the legal requirements in the area where non-compliance affects individual welfare, initiate inspection and investigations on non-compliance and follow-up legal actions on complaints of alleged victims only.

Reactive public enforcement model creates specific sources of legal errors, which affect deterrence. Probabilities of legal errors of both types (Type I, or *wrongful conviction,* and Type II, or *wrongful acquitals*) are predicted by, first, the incentives for individual complaints under certain type of violation, and, second, the amount of resources dedicated for one inspection or investigation. Following section is based on the logic developed in (Avdasheva, Kruychkova, 2014, in press) for antitrust investigation, but we consider this model is of explanatory power for different areas where reactive public enforcement is applied.

## **Executive authority**

The governmental agency receiving the complaint chooses between two options: to open an investigation or to prepare a reasoned decision of refusal to open an investigation. There are no other options under Russian administrative law; a ‘non-reaction’ option is considered an administrative procedure violation, and the authority and/or officer in question can be charged for not responding to a complaint.

This choice depends on comparing expected net gains from a reasoned refusal compared with launching an investigation. Key performance indicators for many executive authorities in Russia are based on the number of cases closed and do not seriously consider the effects of decisions on total welfare. There is no ‘penalty’ for opening a case without any evidence of potential welfare improvement, for closing a case due to lack of satisfactory evidence, or for wrongful conviction. However, there is a potential ‘penalty’ for refusing to open a case if the motivation for such refusal proves unsatisfactory. Therefore, the cost of the analysis at the initial stage of a case investigation may be even higher for the ‘reasoned refusal’ option compared with the ‘opening the case’ option. Although not strictly compelled to open an investigation on every complaint, an officer in the governmental agency typically prefers to.

As a result, in light of the increasing number of complaints, the limited resources of the agency (including financial, human, and time resources) are allocated among a spiraling number of cases. A decline in the resources dedicated to each investigation, along with the high ratio of cases opened by complaints, increases the probability of Type I (i.e., wrongful conviction) and Type II (i.e., wrongful acquittal) enforcement errors.

The probability of wrongful conviction increases because of two reasons, i.e., two different groups of complaints, which can be understood as ‘honest’ (i.e., ‘non-abusing’) and ‘abusing’ complainants. The complaints in the first group are inspired by a desire to change the business practices of the offender. Even an ‘honest’ complainant, however, cannot determine whether his complaint is reasonable and applies to a specific type of violation. In any case, these complainants base their assumption that a violation has occurred on an overestimation of individual effect compared with the impact on total welfare. The second group of complaints is inspired by the intention to cause additional costs for the offender. The complainant presumably knows that there is no infringement but expects that there is a probability of wrongful conviction by the governmental agency.

## **Complainants: non-abusing and abusing**

Both groups of complainants decide to file a complaint by comparing the expected gains with the cost of filing. The cost of filing can be considered minor, but expected gains differ. For the first group, these gains result in the offender changing its business practices, whereas the second group expects gains from an alleged offender’s wrongful conviction. The first group’s number of complaints generally increases as deterrence decreases, whereas the number of complaints in the second group increases with the growing probability of Type I errors.

It is important that complainant of any type making decision on applying complaint takes into account only it’s individual gains and losses. It means among other that actions with high negative impact on total welfare but with minor impact on individual welfare have lower chances to be an object of complaint, comparing with actions providing high negative impact on individual welfare but minor negative impact (or even positive impact) on social welfare. Opportunity to provide collective complaint align the chances to become an object of complaint (and correspondingly inspection or investigation) if and only if collective action problem is solved. Otherwise the sample of potential violations under investigation will always be skewed towards actions with high individual effect.

## **Potential infringer**

Comparing the gains from the two options, a potential infringer commits to obeying or disobeying legal rules by comparing gains from two options (Becker, 1968). An increase in the probability of a wrongful conviction decreases the gains from lawful behavior gains. An increase in the probability of a wrongful acquittal increases the gains from infringements. Therefore, increasing the number of complaints and decreasing the amount of resources that can be dedicated to each investigation correspondingly increases the number of wrongful decisions that further distort deterrence.

The logic of interaction between the main actors in the ’reactive’ public enforcement model is presented in Figure 1. Both non-abusing and abusing complaints increase the number of investigations and shift the structure of investigation by the governmental agency toward cases with high individual harm in contrast to the cases with large harm on total werlfare, and this increases the probability of Type I enforcement errors. The growing number of investigations decreases the resources available for any one investigation, and decreasing resources increases the probability of both types of enforcement errors. Type I enforcement errors make abusing complaints more profitable, but both types of errors lower deterrence. As a result, law violations become more probable, resulting in more (non-abusing) complaints.



Figure 1. Determinants of enforcement errors under the *‘reactive’* model of public enforcement

The framework developed explains limits on deterrence within *reactive* public enforcement model:

* If the number of complaints is high enough increasing number of complaints limits enforcement by increasing the ratio of legal errors of both types in the decisions made;
* Inspections and investigations are skewed towards actions with high individual effects. If the cases with high effect on total welfare provide low individual harm, the probability of their inspection by public authority is lower than socially desirable one.

The important issue is why we consider large (excessive) number of complaints and corresponding increase of legal errors specific feature of law enforcement by executive authorities. In the first glance, pure private enforcement in the form of court litigation can exhibit the same features: large number of suits, decreasing resources of the judge to analyze every case and corresponding increase of enforcement errors. One of the possible answers is the basic differences in the incentives of courts and executive authorities. Administrative law enforcement implies *inquisitorial* justice model, while courts generally follow adversarial model. This predicts difference in the goal-setting and relative assessment of legal errors of different types: roughly judge assesses cost of wrongful conviction higher than the cost of wrongful acquittals, in comparison to the servant in executive authority.

Another specific feature of private vis-à-vis reactive public enforcement is costless complaint. Under private enforcement, the party affected compares potential gains from suing the violator with positive cost of litigation. Even the latter is small enough it may prevent potential litigant from suing. The magnitude of this effect increases with the increase of cost of evidence collecting and presenting.

In practice reactive public enforcement results from specific design of the incentives of executive authorities (including high importance of complaint and inquisitorial enforcement model) but also from incentives of alleged victims. Under private enforcement victim as a result of successful litigation receives compensation for damages while under enforcement by executive authority generally it is not the case. However under private enforcement he or she bears the cost of litigation, including evidence collecting. If the costs saved by filing a complaint to an authority exceeds the gains from the expected compensation for damage, individual prefers to complaint instead of filing suit in the court. In this manner reactive public enforcement might become individually preferable in contrast to private one.

In the next paragraph we consider the development of three areas of administrative law in Russia explaining them in the context of choice between private and *reactive* public enforcement.

# Individual choice between private and *reactive* public enforcement: the case of Russia

Russia has several branches of the law where both public and private enforcement can be applied as alternatives. These include, among others, consumer protection, labour law, and competition legislation. While victims in the first two spheres overwhelmingly choose private enforcement, in the sphere of antimonopoly legislation, there is no private litigation and reactive public enforcement dominates. We now attempt to explain these situations using conclusions derived from the theoretical framework presented above.

On very general level, Russian court system has the features that promote but also features that prevent private enforcement of law. On the one hand, cost of private suits are low, some suits in the trial courts of general jurisdiction are costless. The backlog in the court proceedings is almost absent. On the other hand, standards of compensation for damages in the Russian court decisions are relatively low. Generally, the compensations underestimate the damage imposed. Even more important is that judges refrain from imposing damages when very direct and mechanical evidence (calculation of damages) is absent.

Executive authorities of the Russian Federation have the power to inspect compliance with legal requirements either on their own initiative or on the basis of complaints received. Recent developments in control and monitoring in Russia attach great importance to responding to complaints. A special law, ‘On the procedure of considering complaints of citizens of the Russian Federation’ (2006), requires a responsible authority to consider every complaint and either open an investigation or provide a reasoned refusal within 30 days. The logic behind such a requirement is simple and understandable; it prevents discretionary decisions of the supervisory bodies to not open cases. It is assumed that in the absence of strict regulations, authorities have strong incentives not to open investigations if violations will be difficult to prove. In addition, the Russian public considers the right to decide which cases to open, along with any other discretion, to be fertile ground for the growth of corruption. Obligations to react to complaints are considered a prerequisite for accountability of the bureaucracy.

Authorities and public servants are responsible for both decision-making delays and unjustified refusals to open complaint investigations. Although executive authorities are formally entitled to select among complaints and cannot be compelled to conduct investigations on every complaint received, they are strongly incentivised to do just that. Citizens and companies can sue authorities and officials for any harm that results from inaction. The number of court cases brought against Russian government agencies that have ruled in favour of the plaintiffs is substantial and growing (Trochev, 2012). Remunerations and promotions of civil servants on every level, including leading posts for federal authorities, depend (negatively) on the number of court decisions resulting from the responsible authority’s inaction. Officer compensation strictly depends on delays in proceedings and ‘unjustified refusals to inspect the case’; such delays and refusals reduce quarterly bonuses, which are a significant share of public servants’ total salary. By contrast, decisions to open investigations never lead to sanctions against officers or agencies. This incentive system does not seriously consider the credence of complaint allegations, the subsequent costs of investigation, or the standard of proof. In other words, if there is any likelihood that a court might qualify the subject of a complaint as a violation of law and that an investigative refusal might therefore result in harm, the expected payoff for an officer is always higher when inspections are opened. As a result, complaints have a substantial impact on the selection of companies for inspections and investigations.

The framework developed predicts three hypotheses on the trends in enforcement when citizens can decide about the way to protect their rights:

H1. *Reactive* public enforcement is preferable in the areas where:

* + Cost of evidence collection is higher;
	+ Ratio of expected compensation for damages to the damages imposed is lower.

H2. Deterrence is most likely achieved in the areas of legislation where private enforcement is individually preferable and outperforms enforcement by executive authorities;

H3. Individually preferred *reactive* public enforcement results in the structure of cases under inspection and investigation substantially skewed in comparison with what would be expected under pure public enforcement.

## **Consumer law**

A basic law On Protection of Consumer Rights is in effect in Russia. This is a law of direct action: an individual consumer can file a court claim on violation of his consumer rights. In addition, there is a public agency authorized to monitor compliance and impose sanctions for the violation – the Russian Federal Service for Surveillance in the Sphere of Consumer Rights Protection (Rospotrebnadzor), which also controls the abidance by sanitary and epidemiological standards. In some regions consumer rights protection bodies are functioning at the municipal level and are vested with certain monitoring functions.

The principles applied to consumer claims in Russia ensure advantages of private enforcement:

- the costs of the lawsuits are low (consumers are exempt from state duty, the principle of concurrent jurisdiction is in effect – a claim can be filed at the claimant’s location, at the respondent’s location or at the place where the damage was inflicted, there are no restrictions regarding representation – the consumer can apply to court independently, without the help of an attorney or appoint any person to act as his representative in court);

- the indemnification of litigation cost is in effect: the losing party covers legal expenses of both parties;

- if claimant’s requirements are satisfied, the offender pays a penalty imposed by the court tied to the amount of the claim, and if the claim is filed by a public consumer organization or a body of local administration, 50% of the penalty is transferred to this organization in accordance with the law (this rule reduces the costs of collective actions and ensure benefits due to specialization);

- violations of prescribed deadlines for reviewing cases are rather rare in cases of consumer rights protection (in less than 10% of cases).

The available legal statistics enable to assess the probability of winning a court suit in cases of protection of consumer rights, as well as the amount of compensation (Table 1).

Table 1. Results of Review of Cases of Protection of Consumer Rights by Trial Courts of General Jurisdiction

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
|   | 2008 | 2009 | 2010 | 2011 | 2012 | 2013 |
| Total cases completed, thou | 136,72 | 160,81 | 232,24 | 391,60 | 300,88 | 371,87 |
| Cases reviewed and decisions issued, thou | 92,49 | 115,71 | 150,63 | 296,72 | 232,13 | 298,05 |
| Claims satisfied, thou | 78,66 | 100,53 | 127,97 | 258,39 | 205,21 | 261,39 |
| Amount paid on satisfied claims (including moral damage), mln. RUR  | 5580,69 | 16703,75 | 12786,52 | 13309,91 | 13349,29 | 23135,72 |
| Share of satisfied claims in the total number of completed cases, % | 67,7 | 72,0 | 64,9 | 75,8 | 77,2 | 80,2 |
| Share of satisfied claims in the total number of reviewed cases, % | 85,0 | 86,9 | 85,0 | 87,1 | 88,4 | 87,7 |
| Amount per one satisfied claim, thou. RUR /approximate equivalent in thou Euro | 70,95/1,8  | 166,17/ 4,3 | 99,92/ 2,6 | 51,51/1,26 | 65,05/1,63 | 88,51/2,09 |

*Source*: Reports of trial courts of general jurisdiction on review of civil cases for 2008, 2009, 2010, 2011, 2012, 2013 Judicial Department at the RF Supreme Court, [*http://www.cdep.ru/*](http://www.cdep.ru/)

Legal statistics show that over 85% of claims are being satisfied by courts. A considerable part of cases completed but not reviewed with the issuance of decisions are cases settled out of court, which means that the result required for the consumer has been attained.

This means the probability of satisfying a filed consumer claim can be assessed at 0.85. The top margin of the probability of filing a claim can be assessed on the basis of survey of Russian citizens as 0.7 (70% of respondents are ready to apply to court in the event of significant violation of their rights).[[1]](#footnote-1) Average compensation is relatively high keeling in mind number of court cases. This means that consumers apply to court if their rights have in fact been seriously violated.

The data of legal statistics does not lead to direct conclusions on the probability of Type I and Type II errors in consumer cases. However, the fact that less than 1% of decisions in cases of consumer rights protection are cancelled by cassation instances is indirect evidence of a relatively small probability of Types I and II errors.

The data on legal statistics can be compared with the data on results of Rospotrebnadzor’s control and supervisory activities.

Rospotrebnadzor carries out 139,000 inspections in 2013 in cases of protection of consumer rights, which is almost 3 times less than the number of court claims. The average amount of penalty in cases of consumer rights protection in 2013 was around RUR 3,800 (or less than 100 Euro).[[2]](#footnote-2) Standard of penalties is beyond comparison with the standards of compensations paid to consumers on court orders. Therefore, the deterrent effect with respect to the violations detected by Rospotrebnadzor is admittedly low. The chances of producing a deterrent effect are much higher on the results of private claims.

The structure of detected violations is also interesting. According to the 2013 data facts of absence of information for consumers on products, jobs, services, and persons providing them prevail in the structure of violations of the legislation on consumer rights protection (36% of total number of violations). Violations of Art. 7 of the Law concerning the safety of products, jobs, and services accounted for 3% of the total detected violations. Violations of Art. 4 of the Law concerning the quality of products, jobs, and services accounted for 6% of the total detected violations. Over time the structure of cases remains largely the same.[[3]](#footnote-3) Therefore, the attention of the controlling authority is focused on far from the most dangerous types of offences. Absence of information includes, e.g. incorrect price tags.

It seems that public control in the sphere of consumer rights protection can presently be completely abandoned in favor of exclusively private enforcement. It should be admitted, however, that in certain spheres the mechanisms of legal protection are not efficient enough. Personal experience of one of the authors in the International Confederacy of Consumer Societies (ConfOP) and interviews with lawyers working in the consumer protection sphere, the following bottlenecks can be identified:

- violations where moral damage considerably exceeds material losses. A typical example is electricity shutdowns. Nominally from the point of view of Russian judges there is no material damage at all in such cases: if there is no electricity there is no need to pay for it. In turn, he amounts paid in compensation for moral damage in cases of consumer rights protection seldom exceeds a few thousand rubles;

- claims requiring a specific evidence and proofs. A typical example is protection of the rights of consumers of medical services. All such cases require an independent expert evaluation. Physicians are quite reluctant to act as experts in cases versus their colleagues;

- absence of an institution of group lawsuits, which actually requires the presentation of individual evidence by each victim and issuance of individual legal decisions in each of identical cases. In principle, this does not prevent satisfying the claims, but results in a considerable increase of both individual and social costs.

The existence of these problems, in our opinion, provides grounds for improving legal procedures, but not for developing the system of public control.

It is interesting to note one more trend. In recent years a considerable part of municipal bodies for protection of consumer rights have reoriented their activities from discharging controlling functions to consultative assistance to consumers and support of their lawsuits. This, undoubtedly, facilitates private legal enforcement.

## **Labor law**

Recent trends of labor law enforcement in Russia are basically similar with those in consumer protection legislation: large number of private suites, relatively high ratio of private claims satisfied both in reviewed and completed cases (even higher than in consumer protection cases), and moderate amount of average compensation decided (Table 2).

Table 2. Results of Review of Labor Disputes by Trial Courts of General Jurisdiction

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
|   | 2008 | 2009 | 2010 | 2011 | 2012 | 2013 |
| Total cases completed, thou | 505,72 | 915,72 | 864,64 | 715,83 | 646,56 | 595,47 |
| Cases reviewed and decisions issued, thou | 442,56 | 823,39 | 766,90 | 635,14 | 567,42 | 523,8 |
| Claims satisfied, thou | 406,44 | 781,20 | 701,34 | 596,81 | 532,28 | 491,06 |
| Amount on satisfied claims, mln. RUR  | 10409, 89 | 27181,84 | 21986,70 | 17772,22 | 15597,08 | 15712,05 |
| Share of satisfied claims in the total number of completed cases, % | 87,5 | 89,9 | 88,7 | 83,5 | 82,3 | 82,5 |
| Share of satisfied claims in the total number of reviewed cases, % | 91,8 | 94,9 | 91,5 | 94,0 | 93,8 | 93,7 |
| Amount per one satisfied claim, thou. RUR/ approximate equivalent in thou Euro | 25.61/0.66 | 34.79/0.88 | 31,35/0,79 | 29,78/0,72 | 29,3/0,73 | 32,0/0,75 |
| Including:  |
| - on reinstatement in a job, thou.RUR / approximate equivalent in thou Euro | 59,12/ 1,48 | 60,8/ 1.56 | 65,22/ 1.64 | 55,93/1,37 | 60,7/1,52 | 66,0/1,56 |

*Source*: Reports of trial courts of general jurisdiction on review of civil cases for 2008, 2009, 2010, 2011, 2012, 2013 Judicial Department at the RF Supreme Court, [*http://www.cdep.ru/*](http://www.cdep.ru/)

For comparison, let us turn to statistics of the Federal Service for Labor and Employment (Rostrud). A total of 182,734 inspections were conducted in 2010, 135,309 in 2012. Thus, the amount of inspections is more than 4 times lower than the amount of lawsuits.

Prevalence of private enforcement in the labor law area is much more notable because employees whose rights are violated can not only suit in a court but also file a complaint to the regional labor inspections. In turn, officers in labor inspection can make almost the same decisions as judges in the court, not only on reinstatement in a job but also on compensation to be paid to the employees, together with monetary penalties on violators. In spite of all that lawsuit options are more attractive for the victims of violation.

Deterrence effect of monetary sanctions for labor law violations is presumably higher in a court decisions, since the average penalty decided by labor inspection is RUR 5,510 (approximately 135 Euro) per one inspection that reveals violations, that is ten times lower than amount of compensation decided by the court.[[4]](#footnote-4)

The percentage of court decisions in labor disputes cancelled by cassation courts is slightly higher than in consumer cases (approximately 1.2%), but is not high either, which constitutes indirect evidence of an insignificant number of Type I errors.

Presumably, in this case private enforcement also happens to be relatively more effective. From our point of view, public control could be abandoned in this sphere as well while strengthening private enforcement mechanisms (for example, facilitating the registration of trade unions and their capabilities of filing claims in protection of their members and not only their members).

## **Competition law**

Competition law in Russia is in force since 1991, however before the 2006-2007 antitrust legislation reform penalties for antitrust violations were negligible and essentially unable to provide deterrence. In 2006-2007, the rules on competition legislation enforcement were substantially revised. The most important change was the introduction of turnover penalties – up to 15% of a violator’s turnover on the effected market, but not more than 4% of the overall turnover (3% for highly specialised companies). Most analysts expected an increase in the effectiveness of enforcement, taking into account that on the side of substance competition rules in Russia are highly harmonized with the relevant European legislation. Paradoxically, however, after the increase in the possible penalties, competition legislation entered another problematic period of development.

Number of complaints and subsequent investigations by the competition authority (Federal antitrust service) grew rapidly, reaching about 10,000 investigations in 2012. At the same time there is almost no evidence of private suits on the violation of the antitrust law, in spite they are possible. The Supreme Arbitration Court of Russian Federation specially explained in 2008 that the courts were not eligible to refuse from initiating proceedings in a case of violation of the antimonopoly legislation if the antimonopoly authorities have refused to consider a certain complaint. The senior officials of the Russian antimonopoly authority, Federal Antitrust Services (FAS) recently have been actively advocating private lawsuits.

FAS opens very few investigations by own initiative, most of them are inspired by complaints. As a result, sample of cases investigated by FAS is seriously skewed towards cases with high individual damage but relatively low social cost. There are two types of evidence for that. First, skewness of investigations towards relatively small companies and markets, which became central point in the recent critique of competition policy. Second, skewness of investigations and infringement decisions towards so-called exploitative practice where redistribution effects are high without any restrictions of competition.

Large-scale enforcement does not guarantee deterrence of restrictions on competition, especially taking into account its bias. Developed framework allows to explain three objects of criticism of Russian antitrust enforcement by Russian and international scholars (Girgenson, Numerova, 2012): an excessive level of enforcement, enforcement objectives that are unrelated to the promotion of competition (more precisely, unrelated to the deterrence of anticompetitive actions), and the marginal role of economic analysis in the investigations. The erosion of standards of evidence due to the overload of investigations represents a strong challenge to Russia’s competition policy.

In accordance with conceptual framework presented, competition enforcement exhibits both large number of legal errors in the decisions of authority and limited deterrence. There are indirect but important evidence of large number of legal errors. First is high ratio of infringement decisions reversed by the arbitration courts of first instance to overall number of decisions appealed from 30 to 35% in recent years (evidence on Type I errors or wrongful convictions). Second is that among more than 10 thousand investigations annually recently almost none is open against large international cartels prosecuted worldwide (evidence on Type II errors). It is necessary to stress that legal errors are made not only in the cases decided by competition authority. Probably the most important source of mistakes is the principle of selection cases for inspections and investigations. Competition violations with largest harm on social welfare can provide relatively small individual harm (imagine for instance the collusion against highly dispersed buyers). As a result under reactive public enforcement agency does not investigate the most important cases, which are at the same the cases that would be investigated under pure public model.

As in other areas of law to assess the deterrence in antitrust cases we can rely only on expert estimates. In contrast to consumer protection and labour law, which are considered effective in spite of limited sanctions, effectiveness of competition law in terms of deterrence is considered to be very limited in spite of relatively high sanctions available for competition authority and large-scale enforcement.

Contrast between trends in consumer and labour law, on the one hand, and competition law, on the other, supports the hypotheses developed:

* Reactive public enforcement is preferable for antitrust legislation where cost of evidence collection, interpretation and presentation is higher, but ratio of expected compensation for damages to damages imposed due to position of Russian court is lower;
* Lower probability of legal errors explains higher deterrence effect in consumer and labour legislation in spite of very limited monetary sanctions on law violator;
* In turn, distortion of deterrence in the area of competition policy is explained exactly by the active involvement of alleged victims in the activity of competition agency by the means of complaints.

Shift from *reactive* to *pure* public enforcement requires to balance the rights of alleged victims to complaint by increasing discretion of the public officers.

# Conclusion

Promoting involvement of private actors in public enforcement within the administrative legislation is not such desirable as it was traditionally assumed to be. Under some circumstances (limited incentives for private enforcement due to high cost of evidence collection and low expected compensation on the side of alleged victims and limited discretion of public officers) additional protection of rights of complainants may completely distort deterrence. Two important channels of distortion of deterrence are: skewness of structure of investigations to the cases with higher individual harm at the expense of cases with higher decrease of total welfare (distortion on the stage of case selection), and increase of errors in the cases decided (distortion on the state of case investigation). Under certain conditions, the *reactive* enforcement model replicates the shortcomings of both the private and pure public enforcement models in terms of social welfare.

Analysis of *reactive* public enforcement use the evidence on the administrative law enforcement, we believe however that implications of the analysis are of general interest for different countries and areas of administrative law application:

* To prevent an erosion of public enforcement into *reactive public* one and keep the probabilities of both types of legal errors low under public enforcement and especially *reactive*  public enforcement, design of incentives of all parties in the enforcement is important. Unlimited discretion of the officers in the executive authority is dangerous, however very limited discretion is also undesirable;
* Procedural rules of enforcement can be even more important than substantive norms. Even under ideal description of illegal vs legal practice on the side of substance, skewness of structure of investigated cases and decreasing resources dedicated for one investigation due to growing number of inspections and investigations may distort deterrence;
* Not only comparative advantages of public and private enforcement but also desirability of combining them varies across different areas in one country, and across countries with different legal and administrative traditions. In enforcement system such as the Russian one, with a prevalence of administrative control and supervision, the comparative advantages of private enforcement are important.

In many areas private enforcement is a simpler and more accurate tool, that allows to detect the most significant violations, minimise Type I errors and provide deterrence. In Russia in some areas (such as consumer protection, and to lesser extend labour law) enforcement by executive authorities can be almost completely replaced by private enforcement with some restrictions regarding some imperfections of national judicial system. Even though completely abandoning public enforcement in favour of private enforcement is impossible, the opportunities to develop private enforcement are much greater than they might seem at first glance, especially in countries with strong traditions of administrative control.

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