How KPI of competition authority can distort standards of evidence in competition investigations: the case of Russian Federation

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ABSTRACT

Incentives of competition authority may provide strong influence on the standards of evidence applied in the authorities' investigation and also by the courts that resolve competition cases. In the Russian competition enforcement motivation of the authority to achieve high ratio of the decisions coming into force results in the distortion of enforcement structure and welfare standards.

Using a unique dataset of the appeals of infringement decisions in 2008-2012 years, we classify the investigated cases according to their potential impact on competition. The analysis reveals that the majority of cases would never be investigated under an appropriate understanding of the goals of antitrust enforcement, restrictions on competition and basic cost-benefit assessments of agency activity. Our analysis shows that antitrust authorities tend to investigate cases, which require less input but result in infringement decisions with lower probability of being annulled. Practice of enforcement is skewed towards cases where harm is an independent evidence of competition law violation.

Key Words: antitrust enforcement, authorities' incentives, motivation, competition, harm, Russia.

JEL classification: K21, K42

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I. INTRODUCTION

Appropriate standards of evidence are *sine qua non* condition for effective competition enforcement. Under given substantive norms they emerge as a result of interaction between judges, suspected in violation and competition authority. The latter is crucial under administrative system of enforcement. Indicators of performance assessment of competition authority are no less important than welfare standards of enforcement. They are of special importance for the newborn competition enforcement, without considerable experience in the field. Leading by performance indicators, competition authority takes enforcement actions, which create interpretation of substantive norms by market participants and courts.

Positive analysis of enforcement allows explaining how institutional features, including model of performance assessment contribute to the development of competition enforcement. Russian competition enforcement, which is relatively young and still under formation, is of interest in this respect. Extremely large number of antitrust investigations in Russia presents a challenge for the assessment. On the one hand, many infringement decisions may be interpreted as an indicator of high enforcement efforts. On the other hand, if investigations proceed under poor legal and economic standards the impact of enforcement on competition is questionable. Large number of investigations may indicate even the ineffectiveness of enforcement, and in any case represents miracle that requires an explanation.

One obvious explanation is that competition authority does not properly understand the goals of enforcement. Antitrust is aimed to prevent anticompetitive behavior, thus restricting its negative effects on welfare. The distinctive feature of antitrust legislation is that being *welfarist* also means *process-oriented* (Farrell, Katz, 2006). Only actions that reduce social welfare through restrictions of competition are prosecuted. In this respect antitrust legislation differs from other legislations which have similar purposes to protect one group of economic agents from harmful actions of another group such as consumer protection legislation and legislation relating to the regulation of natural monopoly activities where liability rests on just a finding of harm to others. That is why in most countries the policies are often governed by different and independent institutions or at least by independent structural divisions of the same institution with well-defined and distinct sets of responsibilities.

In Russia the legal backgrounds are the same. The fundamental objective of antitrust or more broadly of competition policy - to protect competition rather than competitors. However, outcomes are different at the end, and that is what we plan to discuss in this article.

The Federal Antimonopoly Service (the FAS, hereafter) is the authority that controls the execution of the antitrust legislation in Russia. The FAS is responsible for regulating and controlling compliance with antitrust law, as well as with regulations of natural monopolies, advertising, procurement for the federal government and foreign investment in strategically important sectors. Thus its functions are defined wider than in other countries.

At first glance, the antitrust authority and its responsibilities are clearly defined and delineated from other government bodies in Russia. Consumer complaints about violations of the Law on protection of consumer rights are considered by the Russian Federal Service for Surveillance on Consumer Rights Protection and Human Wellbeing (Rospotrebnadzor). Tariffs of natural monopolies are established by the Federal tariff service and regional energy commissions. However regulation of access of customers to goods which are made by natural monopolies is not an area of responsibility of the bodies. It is done by the FAS.

Yet at the second glance, it reveals that the delineation of responsibilities between the authorities is not clear enough. Analyzing the texts of thousands of FAS decisions carefully we find that it often considers not proper antitrust cases. For example, commercial conflicts causing harm to one of the parties or failure to comply with natural monopoly regulations are frequent targets of antitrust investigations

This gives us an alternative vision of the fact that according to the Rating Enforcement, Global Competition Review, in 2013, Russia led the number of investigations in the rating of competition authorities all over the world. Specifically, the FAS investigates more abuse of dominance cases than all other competition authorities in the world: in 2013 - 2,635 investigations were opened, 2,212 were cleared.

The contradiction between high number of cases under investigation and consideration, on the one hand, and the complexity of a typical antitrust case that requires the application of high standards of economic analysis, on the other hand, has been discussed many times (Girgenson, Numerova, 2012). The FAS resolves this contradiction by decreasing the quality of the decisions in terms of the economic analysis undertaken. Even the data of the Rating Enforcement show that decisions of the FAS are ‘cheap’ in terms of the resources spent: the average duration of an investigation is only 3 months (it is almost 10 times longer for cases in the European Commission).

There are competing explanations of the combination of large-scaled enforcement with modest targets of investigations and infringement decisions, including lack of experience of competition agencies and commercial courts, demand for antitrust enforcement to achieve ‘complementary’ policy objectives not specific for antitrust. An important complementary explanation stresses the importance of procedural rules for selecting cases for investigation in Russian competition policy and other areas of control and monitoring (Avdasheva, Kryuchkova, 2014). The legal rules of administrative actions in Russia attribute a high importance to complaints, which makes the absence of a response to complaints expensive for every official at the FAS. Because of the importance of complaints, antitrust

enforcement is skewed towards cases with large individual effects (where harm to specific market participants is more important than restrictions on competition). However, effects of motivation of competition authorities on the selection of cases for investigations is not studied enough though it could be of primary importance. Specific feature of motivation of competition authorities in Russia is that the latter are motivated on number of tasks (cases) that are successfully completed by positive as well as negative incentives. Legal rules of working with citizens' complaints impose negative incentives on the number ('no complaint should remain without answer') while internal system of motivation of FAS positive incentives ('higher share of infringement decisions that came in legal force') to the number of technically successful decisions.

The goal of this article is to explain the impact of the incentives of authorities concerning antitrust enforcement on the structure of enforcement and understanding of the substantive norms and welfare standards in Russia using case-level evidence. We use the unique dataset of the claims to commercial courts to annul the infringement decisions of the competition authorities from 2008-2012, which represents more than one-third of all the FAS decisions (collected by the Laboratory of competition and antitrust policy, Institute of Industrial and Market Studies Higher School of Economics, LCAP dataset hereafter). We also combine quantitative and qualitative analyses to restore the understanding of antitrust prohibition in the practice of enforcement. We discover at least three important drawbacks to the practices of judges and the public authorities regarding antitrust legislation. The first shortcoming is the interpretation of the main goal of antitrust enforcement as prevention of the harm imposed on market participants, irrespective of the size of the harmed group and the magnitude of harm. The second drawback is the interpretation of any harm imposed by the dominant seller in the contractual relationship as sufficient evidence of abuse of dominance. The third weakness is the interpretation of any loss or dissatisfaction of the counterparty to the dominant supplier as evidence of harm.

The content of the cases shows that not only competition authorities but also judges often consider harm is sufficient evidence of a competition law violation. The probability of a successful claim to annul the infringement decision of the FAS is significantly lower for cases where the harm imposed is independent evidence of a competition law violation. In turn, it is an important advantage for competition officers to consider these cases because they are incentivized by the large number of rapid decisions with a low likelihood of reversal by the courts. Emerging standards of evidence in antitrust cases concentrate attention on structural features (dominance) and then directly on harm, which is defined in such a broad way and does not sufficiently consider the restrictions of competition. Significant efforts and complex changes are necessary to correct the distortions in Russian antitrust enforcement.

We concentrate the research on specific Russian enforcement and use data on national commercial court system, but research question is important not only for competition enforcement in one transition country. Competition policy

is among the most analysis-intensive directions of economic policy, and analysis of competition becomes more complex. Category-based enforcement (enforcement of per se prohibition) is displaced by effect-based enforcement (enforcement of provisions based on rule of reason) that requires large intellectual resources, and also lot of spending. At the same time many areas of competition policy become more complex. Governments widely accept the idea that competition protection cannot restrict itself on the enforcement of few simple rules, i.e. do not fix prices and share markets with your competitors. At the same time organization of competition policy tries to capture synergies of specialized expertise in the assessment of welfare effects of public intervention. Expertise of antitrust authority might be successfully applied in consumer protection for instance. In many countries, including OECD and non-OECD, competition authorities become responsible for enforcement of access to networks in deregulated industries and consumer protection. Finally, in the framework of effect-based enforcement notion of efficiencies expands. Narrow understanding of total and consumer welfare as a function of cost, price and quantities are often complemented by long-term considerations of sustainability of economic development and long-term competitiveness.

These developments might affect organization of public authorities responsible for different areas of competition policy. First, many tasks become more difficult to fulfill and more demanding of resources. Second, among the tasks competition authorities should fulfill the difference arises between 'simple' and 'different' targets. Traditional split between 'category-based' enforcement and 'effect-based enforcement' is only one example of the divide. Another is competition protection vis-à-vis competition promotion: cases from these two groups require different types of expertise, with different level of 'difficulty'.

Difference between 'simple' and 'difficult' targets is not only in terms of cost but also in terms of welfare effects. Other things being equal, antitrust proceedings in *per se* cases are less difficult than those *rule-of-reason* type of cases because the latter require complex economic evidence and analysis of specific efficiencies. Competition investigations of large multinationals are more difficult than the cases against medium-sized companies, at least because larger market participants have higher incentives and higher budgets to defend their position. In innovative industries economic analysis is more difficult than in mature ones.

Allocation of scarce resources – including efforts that we consider throughout the paper - of the authority predicts welfare effects of overall activity. Decisions of authorities differ from those predicted by total welfare maximization. Policies of *prioritization* within public authorities try to overcome mismatch between socially desirable resource allocation and resource allocation desirable for the staff in public authority. In spite of close attention to this issue in the policy debates and important contribution in modelling of prioritization within competition policy in the framework of multi-tasking (Schinkel et al, 2014), recently there is little or no empirical analysis on the allocation of resources of competition authority. The aim of the article is to fil this gap.

The article is structured as follows. Section 1 presents brief overview of the role of performance indicators in the allocation of efforts in public agencies, including competition authorities. Section 2 briefly describes the development of antitrust legislation and enforcement in Russia. Section 3 describes research strategy and data. Section 4 analyzes the structure of cases providing the comparison between competition restrictions and the harm imposed. Section 5 discusses the impact of 'proper' and 'non-proper' antitrust cases on the cost and performance indicators of competition authorities. Section 6 concludes.

II. PERFORMANCE INDICATORS AND PRIORITIZATION IN ANTITRUST ENFORCEMENT

Motivation in the public sector attracts close attention of researchers (see Dixit, 2002 for survey of the research agenda). Design of incentives under multiple dimensions of tasks and multiple tasks (Holmstrom, Milgrom. 1991) is one of the most difficult issues if observability of different dimensions of tasks for principal varies, and efforts on more observable (but less important or worthless for principal) dimension of task substitute efforts on less observable but more valuable for principal tasks. Alignment of incentive contract with the achievement of more observable task crowds out the efforts on less observable one decreasing the utility of principal. This framework traditionally refers to trade-off between *quantity* as easily observable and *quality* that is not. There is an empirical evidence on crowding out of efforts on quality dimensions after the introduction of performance payments in public sector. Crowding-out of efforts on the level of agencies, in contrast to individual public servants, is less studied. We remain aware of no empirical evidence for the role of case selection for antitrust investigations and the influence of case structure on the approach of antitrust enforcement.

Many scholars mention that substantive rules are modifying under the process of transplantation in the new jurisdictions through enforcement practice, where standards of evidence are developing. It is the way in which adoption of the same or similar legal rules results in very different enforcement goals, standards and outcomes. Geradin (Geradin, 2009) describes it as 'decentralized globalization' of competition enforcement. Gal (Gal, 2013) stresses the importance of the institutional structure of the receptive country for the way in which competition legislation is adopted. Our paper describes this story in detail on the example of Russian competition law, explaining the influence of universal administrative procedure rules and a design of incentives for competition authority not only on the outcomes of certain enforcement actions but also on the understanding on substantive rules also by the courts.

III. DEVELOPMENT OF ANTITRUST ENFORCEMENT IN RUSSIA: BRIEF OVERVIEW

History of Russian competition legislation and enforcement accounts for quarter century. Provisions of the Law on competition in Russia are similar with TFEU provisions. Article 11 of the law (on collusion and concerted practice)

and Article 10 of the law (on the abuse of dominance) are actually blueprints of Article 101 and Article 102 TFEU correspondingly. Since 2007 turnover penalties for restriction of competition together with leniency program for cartel participants are applied. Specific feature of the Russian competition law is that any practice that is listed as illegal for dominant company or participants in the agreement may be considered as law violation not only if it restricts competition but also if it imposes harm on the counterparty. For violation without the impact on competition penalties are under the fixed cap.

From the very beginning, institutional structure of competition policy exhibits some specific features. First, responsibilities of Russian competition agencies are broader than those of typical antitrust authority in the world. There is no area of responsibility of any competition agency in the world that is not responsibility of the Russian authority, including antitrust, unfair competition, advertising, part of sector-specific regulation of natural monopolies (tariffs are set by distinct authority the Federal Tariff Service, but access and interconnection issues are under responsibility of the FAS).

The FAS may inspect compliance with legal requirements either on their own initiative (*ex officio)* 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. Authorities and public servants are responsible for both decision-making delays and unjustified refusals to open complaint investigations. Although antitrust authorities are formally entitled to select among complaints and cannot be compelled to conduct investigations on every complaint received, they are strongly incentivized to do just that. Citizens and companies can sue authorities and officials for any harm that is resulted from inaction (Trochev, 2012). Servants` compensation strictly depends on delays in proceedings and 'unjustified refusals to open inspections'; such delays and refusals reduce quarterly payments, which represent a significant share of public servants' total salary.

The FAS has a power for both inspection and investigation, and decision on the infringement, representing a type of 'inquisitorial' system typical for administrative law enforcement in continental model. Violator has a right to appeal the decision of the FAS in a court (during the period under analysis – commercial courts concentrated on litigations in the economic area. Costs of access to court are relatively low in Russia (negligible fees, rule of cost indemnification, no restrictions of representation, no time restrictions on introducing new evidence to litigation etc). That is why decisions of competition authority are very often appealed in Russia. 'Generalist' judges in commercial courts resolve disputes on the decisions. Due to specific rules of FAS motivation judicial review is of primary importance for the authority.

IV. DATA AND EMPIRICAL APPROACH

The sample covers apparently all the decisions made by commercial courts in the Russian Federation non the claims to appeal infringement decisions of competition authorities during 2008-2012. The coverage of our dataset exceeds one-third of all the infringement decisions and half of the infringement decisions concerning agreements (horizontal and vertical) and concerted practice (Table 1).

Table 1. Claims for the annulment of competition authorities' infringement decisions: 2008-2012

	2008	**2009**	**2010**	**2011**	**2012**
Infringement decisions					
Infringement decisions made by the FAS[(1)]	1045	1731	1979	2625	3216
- on abuse of dominance (art.10)	862	1438	1539	2310	3029
- on horizontal or vertical agreements, concerted practice (art.11)	183	293	440	315	187
Claims for the annulment of FAS decisions					
Claims for the annulment of FAS decisions submitted in commercial courts of the first instance (% of the number of decisions in parentheses):	337 (32.25)	648 (37.74)	962 (48.51)	1187 (45.22)	796 (24.75)
Including					
- not proper antitrust (% of the number of claims in parentheses):	259	481	720	1068	727
	(76.85)	(74.23)	(74.84)	(89.97)	(91.33)
- proper antitrust (% of the number of claims in parentheses:	77	167	242	119	69
	(23.15)	(25.77)	(25.16)	(10.03)	(8.67)
Decisions of the commercial courts					
Infringement decisions annulled (completely or partially) in the courts of the first instance (% of claims to first instance)	51.34	42.75	41.27	37.91	32.91
Appeals of the decisions of the courts of the first instance (% of the decisions of court of first instance)	73.29	78.70	84.20	83.99	82.91
Decisions of the court of the first instance, reversed by the higher court, from all the appealed decisions (%)	43.72	39.80	20.12	19.66	17.42
Share of FAS decisions finally annulled (% of claims to the court of first instance)	72.61	65.54	53.09	50.12	44.60
Average time final decision takes (in months, mean, standard deviation in parentheses)	9.36 (7.05)	9.83 (7.40)	9.78 (6.80)	10.76 (6.85)	10.21 (6.54)

Source: LCAP database, data of the Federal Antitrust Service RF

Ratio of claims to annul is high not only for the infringement decisions of the authority but also for decisions of commercial court of the first instance (more than ¾ of the decisions of commercial courts are appealed, Table 1). This

size makes the database a relevant source of information regarding the standards of proof applied by the FAS and the commercial courts. During the entire period, Russia's commercial courts provide us with rapid decisions; on average, it takes less than one year on the case to obtain the final decision.

Table 1 shows that during even a short period commonly accepted by competition authorities and judges, standards of proof developed. In 2012, a noticeably lower share of FAS infringement decisions was annulled by the commercial courts; in turn, the higher courts reversed the lowest share of decisions of the first instance courts.

To describe and explain the standards of proof of competition investigations, we combine qualitative and quantitative analyses. Using the decisions of the commercial court as an observation, we attribute to the observation quantitative characteristics, including the following:

- features of alleged violations (abuse of dominance or agreements and concerted practice, articles 10 and 11 of the law 'On protection of competition' Russian Federation, respectively);
- features of the alleged violator (has the alleged violator the legal status of a natural monopoly);
- indicators of the court decisions (does the court of first instance satisfy or refuse the claim, do the parties (claimant or the FAS) appeal, does the higher court reverse the decision of the first instance);
- duration of the litigation as an indicator of the efforts the parties have made;
- qualitative features of the alleged violation. These features, in turn, are divided into several groups.

One group represents the 'functional' features of a violation. For example, we indicate separately non-compliance with the rules on the final service provision by natural monopolies, non-compliance with the rules on interconnection of competing networks, access to the network by vertically disintegrated competitors, and conflicts between operators of local networks and their sub-subscribers. By impact on competition the sample is divided into cases where restriction of competition represents the main evidence of law violation and cases where the harm imposed is independent and the main evidence of a presumed violation. In cases where the harm imposed is the primary evidence of violation, we also divide these into cases where the harm to the group is sufficiently large relative to the overall market demand or supply in contrast with the cases that consider harm for only a small group (to one physical or legal person in extremis);

- indicators of evidence that are applied to prove a law violation. Specifically, we mention application of the Guidelines for market analysis and competition assessment, developed and legally approved by the FAS, the calculation of the market share of the alleged violators, specialized expertise provided to the parties, and the number of economic experts used by the parties.

We begin with a quantitative description of the structure of infringement decisions to show a 'typical' or 'average' decision in Russian commercial court. For every group, we describe typical examples of the alleged infringements. The combination of qualitative and quantitative analyses allows us to assess the structure of cases in terms of 'harm' and 'competition restriction' as a principal component of proof. To explain the structure described, we compare resources spent by the parties to resolve certain types of cases. The general research hypothesis (specified for empirical hypotheses further in the text) is that *alleged violations that prevail in the structure of antitrust investigations require fewer resources from the competition agency and at the same time provide higher performance indicators.* Hypotheses of empirical analysis correspond to the role of harm as independent evidence of antitrust violation in evidence-intensity of cases.

To test the empirical hypotheses we apply simple comparison of the characteristics of groups of cases that affect cost of competition authority and their performance indicators. Indicators, which are crucial for performance of competition authorities according to their internal guidelines, are rates of reversals of the infringement decisions. Indicators of cost include proxies of economic analysis of substantial and organizational nature. Substantial indicators are, first, quantitative assessment of any variable important for characterize competition and, second, are *Guidelines for market analysis and competition assessment* (elaborated by FAS and legally recognized) discussed before judge. Organizational indicators of economic analysis are specialized expertise provided either by competition authority or by claimant in the court.

V. STRUCTURE OF CASES: RESTRICTIONS ON COMPETITION COMPARED WITH THE HARM IMPOSED

Table 1 shows that the largest portion of cases considered by commercial courts involve alleged violations by natural monopolies. The evidence corresponds well to the data of the FAS; according to the annual reports, cases against natural monopolies represent two-thirds of the activity of the FAS. This group includes large in absolute, not in relative, terms a group of cases where the alleged violation is refusal to provide interconnections for competitors on fair contract terms (especially in telecommunications) or access to networks for competing suppliers (especially in electricity supply).

However, instead of access and/or interconnection issues for competitors, provisions of retail services for final consumers represent the largest group of cases in both absolute and relative terms.

All alleged violators are dominant in the regional market of supply to residential and small industrial customers. Second, there is no evidence of competition restriction, and all the hearings are concentrated on the harm imposed on

the customer. Third, there is no sign that a dominance in the market creates possibilities to impose harm. Fourth, in the cases where the final customers are involved, the harm in question occurs to a small number of them (in extremis, on only one customer). Finally, in many cases, there is no evidence that the harm is intentional.

Consumers complain to the FAS for two reasons. First, in Russia, natural monopolies and their regional subsidiaries have no specific responsibility for non-compliance with the regulated terms of a contract. Therefore, consumers should choose between consumer protection and antitrust legislation to enforce the standards of service provision. The advantage of antitrust legislation is opportunity to impose fairly large penalties. High penalties are applied rarely, but even a low probability makes compliance easy to enforce. Moreover, if the competition authority prescribes contract terms in the form of a remedy, non-compliance with the remedies would almost certainly be penalized.

It is a common situation when one organization connects to a network through a device located at the premises owned by another organization. The parties must agree with one another on the terms of interconnection to the network and their rights and responsibilities. An outstanding contractual relationship may lead to a conflict that results in the restriction of network connections. This group of cases (interconnection with sub-subscribers) represents a sufficient share of claims to annul infringement decisions (more than 10% of all the cases). The common feature of this group of cases is that local networks were defined as relevant antitrust markets. Automatically, the operator of a local network becomes dominant on his own facilities. Then, the approach described in the previous section is applied: any broadly defined harm is considered an abuse of dominance.

The discretionary definition and vague evidence of harm are not specific for cases against owners of local networks or natural monopolies. This imprecision is typical for most of the infringement decisions of the FAS. Harm is an independent proof of violation (without any evidence concerning actions that restrict competition) in more than ¾ of the clams submitted. From this group, in 85% of the cases, harm is considered an alleged loss of one party (one physical or legal person that represents a negligible share of the market demand). In this respect, the practice of identification and proof of an antitrust violation is substantially influenced by routines that emerge in the investigation of natural monopolies.

Fig. 1 indicates the structure of all the infringement decisions across different groups regarding different infringement evidence between ‘restriction of competition issues’ and ‘harm issues’ and also between ‘harm to consumers as a group’ and ‘harm to one specific consumer’. The typical infringement decision does not correspond to internationally recognized and accepted understandings of what constitutes a violation of law ‘On protection of competition’.

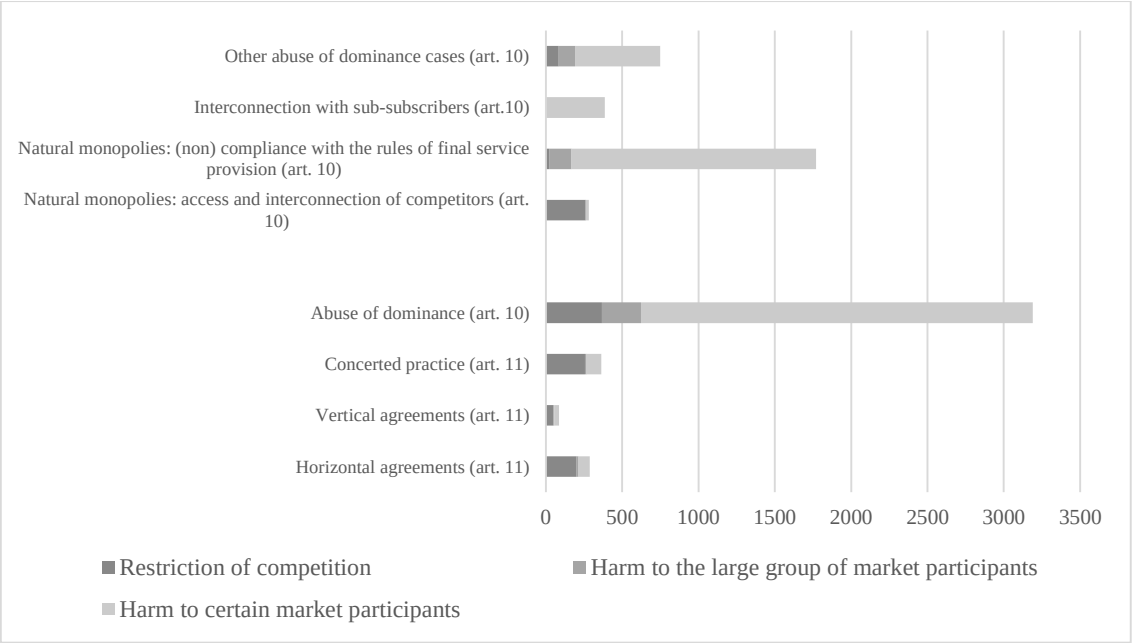

Figure 1. Structure of decisions by the primary infringement evidence across presumed violations

Source: LCAP database

The structure of infringement decisions by the Russian antitrust authority explains the limited positive effects of enforcement on welfare. Most cases have little in common with restrictions of competition. Large part of the investigations would never be opened under a conventional understanding of the objectives and methods of antitrust legislation. Practice of investigations of the cases without impact on competition creates several negative spillovers. First, standards of proof of violation of antitrust legislation consider harm to a certain group of market participants documented by victim's testimony as a *sine qua non* requirement. As a result, it could be problematic to prove a violation of antitrust legislation in the case where harm cannot be proved with the testimony of a given victim. It makes it difficult to prove collusion that is danger of competition number one, if dispersed consumers do not realize the harm imposed on them. Second, because of the scarce resources of the authorities, a large number of antitrust investigations limits the depth of analysis in each investigation and decrease of standards of evidence. Finally, generalist judges in the commercial courts cannot stay neutral to the standards of evidence that are applied by authorities, if law allows for diverse interpretation, at the end judges often perceive typical practice of the authorities as a good benchmark.

VI. IMPACT OF "PROPER ANTITRUST" AND "NON-PROPER ANTITRUST" CASES ON THE COST AND PERFORMANCE INDICATORS OF COMPETITION AUTHORITIES: EMPIRICAL HYPOTHESES AND THE RESULTS OF THEIR TESTING

Public servants in competition agencies are motivated on the quantitative indicators of their activity, which are the number of decisions made and especially on the amount of decisions that were not reversed by the commercial court. Under performance indicators of this type, agencies should prefer to take less 'evidence-intensive' cases. A general indicator of 'evidence-intensity' is the expenditure on evidence that a decision requires because it was not annulled by the commercial courts. Empirically, the lower 'evidence-intensity' cases may be compared using two types of indicators: the probabilities that a decision will take legal effect (that it is not being annulled by the commercial courts) and the economic evidence actually applied in FAS decisions.

Therefore, we test the following two empirical hypotheses.

H1. *Infringement decisions where the harm is independent evidence are annulled by the courts less frequently; the probability that the decision from this group will take effect is higher in contrast with infringement decisions that consider competition restrictions the main evidence.*

H2. *Infringement decisions where harm is independent evidence require less evidence and make it easier to prepare 'economic analysis input'.*

Hypothesis H1 is confirmed. Table 2 shows that infringement decisions on non-proper antitrust cases (NPAs) are reversed less frequently either by courts of first instance or by higher courts, the outcomes of appealing are better predictable. This is eventually true for all groups of NPAs, including conflicts of natural monopolies with final customers (NM_FC), conflicts with subsidiaries (SUBS) and cases where harm is imposed only on small group of individuals in contrast to all consumers of counterparties (HARM_IND). Decisions of judges in commercial courts are important for competition authorities as performance indicators, however attitude of the judge towards standards of proof in competition cases is necessarily affected by the practice of the authority. Today for the judge in Russian commercial court the concept of competition and protection of competition is still less understandable and clear than the concept of harm in the light version – as confirmed by documented non-compliance with the standards of service provision or disagreement with the contract terms. At the next step, a vague concept of harm paradoxically makes the infringement decision more stable. Even with a weak understanding of competition and restriction of competition, indicators allow proving or refuting restriction; it is not as easy with the concept of harm as independent evidence. Judges consider rules of competition law as prohibiting *any harm imposed by a dominant company*. Under this standard of proof, it is difficult to refute the accusation of abuse of dominant position, if dominant position is proven.

This difficulty explains the stability of infringement decisions on abuse of dominance in the form of harm imposed on a counterparty, especially in the cases when dominance is presumed (for example, regional operators of regulated networks).

Table 2. Marginal effects from a probit model of the decisions on the claims to appeal infringement decision of competition authority

	Dependent variables							
	REV_1		***APPEAL_NON REV***		***FIN_REV***		***CH_Non-REV1***	
NPA	-0.07***		0.00		-0.06**		-0.06**	
NM_FC		-0.11***		0.04**		-0.12***		-0.07***
SUBS		-0.19***		-0.06**		-0.16***		-0.04
HARM_IND		0.01		-0.04*		-0.01		-0.05*
Y2008	ref.	ref.	ref.	ref.	ref.	ref.	ref.	ref.
Y2009	-0.08**	-0.08**	0.03	0.02	-0.04	-0.04	-0.02	-0.02
Y2010	-0.10***	-0.10***	0.10***	0.10***	-0.06**	-0.07**	-0.16***	-0.17***
Y2011	-0.17***	-0.16***	0.10***	0.11***	-0.09***	-0.11***	-0.16***	-0.18***
Y2012	-0.17***	-0,19***	0.09**	0.10**	-0.13***	-0.12***	-0.16***	-0.17***
Number of observations	3911	3911	2356	2356	3911	3911	1935	1935
Pseudo R2	0.01	0.02	0.01	0.02	0.01	0.02	0.04	0.05

Notes: REV_1 =1 if infringement decision is annulled by the court of first instance, 0 otherwise.

APPEAL_NON REV = 1 if refusal to annul infringement decision by the court of first instance is appealed by the claimant, 0 otherwise.

FIN_REV = 1 if infringement decision is annulled by one of the instances (from first instance to cassation instance), 0 otherwise.

CH_Non-REV1= 1 if refusal to annul infringement decision by the court of first instance is reversed by one of the higher instances, 0 otherwise.

*coefficient significant at 10%, ** 5%, *** 1%.

The results of H2 testing are less clear (see Table 3 and Table 4). Difference between groups of cases is not recorded clearly because on the average all the investigations of Russian competition authority are 'quick' and 'cheap' in terms of economic inputs spent. However NPA are 'cheaper' in comparison with PA. Time to obtain a final decision negatively correlates with the share of the decisions annulled across types of violations. The consideration of a typical abuse of dominance case (where the share of NPAs is more than 90%) takes less time than the consideration of a case on horizontal agreements and concerted practice. The consideration of cases on non-compliance with the standards of final service provision and on conflicts with sub-subscribers takes less time than 'classical' cases against natural monopolies on interconnection and access for competitors. This result holds for all cases and for the sub-population of cases, where either party appealed the decision of the first instance.

Table 3. Indicators of resources spent under different groups of infringements

	Time of proceedings in the commercial court. months (mean. st. dev in parentheses)		Share of decisions where quantitative assessment of any variable important to characterize competition is discussed before judge. %	Share of the decisions where Guidelines for market analysis and competition assessment applied by either party are mentioned. %*	Share of the decisions where specialized expertise provided to the FAS is mentioned. %	Share of the decisions where specialized expertise provided by the claimant is mentioned. %	Share of the decisions where expert appointed by judge is mentioned. %
	All cases*	Decision of the first instance is appealed*					
Horizontal agreements (art. 11)	11.12 (6.63)	12.48 (6.42)	6.45	11.34	5.15	1.37	0.00
Vertical agreements (art. 11)	9.37 (4.74)	10.61 (3.86)	1.67	13.95	3.49	1.16	0.00
Concerted practice (art.11)	11.81 (7.45)	12.88 (6.74)	33.97	25.00	5.77	0.55	1.37
Abuse of dominance (art. 10)	9.96 (6.03)	11.09 (5.77)	4.73	16.55	2.98	1.35	1.32
Natural monopolies: access and interconnection for competitors	11. 81 (6.02)	12.65 (5.64)	4.97	15.96	1.42	1.42	2.13
Natural monopolies: non-compliance with the rules on final service provision	9.43 (5.76)	10.45 (5.53)	0.90	9.43	2.81	0.83	1.05
Interconnection with sub-subscribers	9.13 (5.93)	10.81 (5.93)	0.00	13.70	1.55	1.29	0.26
Other abuse of dominance cases	11.09 (6.22)	12.61 (5.89)	23.48	12.06	5.84	1.56	0.00

* Difference is statistically significant at a 1% level (Kruskal-Wallis test)

Table 4. Marginal effects from a probit model on the decision to discuss certain evidence before judge in the commercial court

	QA		GUIDELINES		EFAS		EPLA	
NPA	-0.16***		-0.12***		-0.06***		-0.06***	
NM_FC		-0.13***		-0.13***		-0.01**		-0.02***
SUBS		[1]		-0.07***		-0.02**		-0.01*
HARM_IND		-0.06***		-0.07***		-0.04***		-0.01*
Y2008	ref.	ref.	ref.	ref.	ref.	ref.	ref.	ref.
Y2009	0.10***	0.02	0.07**	0.02	0.01	-0.01	0.01	0.00
Y2010	0.06***	0.03*	0.01	-0.01	-0.01	-0.02*	0.00	-0.01
Y2011	0.05	0.03	0.05*	0.00	0.01	0.00	0.00	-0.01**
Y2012	-0.01	-0.02	0.06**	0.02	-0.02	-0.03***	0.00	-0.01**
Number of observations	2103	1863	3912	3812	3918	3918	3918	3918
Pseudo R2	0.11	0.21	0.02	0.05	0.04	0.04	0.11	0.08

Notes:
QA = 1 if quantitative assessment of any important variable (to characterize competition) was discussed before judge, 0 otherwise

GUIDELNIES =1 if application of *Guidelines for the analysis of market and assessment of competition, 2010* was discussed before judge, 0 otherwise

EFAS = 1 if FAS presents and discusses specialized expertise, 0 otherwise

EPLA = 1 if claimant presents and discusses specialized expertise, 0 otherwise

*coefficient significant at 10%, ** 5%, *** 1%

[1] – quantitative assessment was never discuss in the cases devoted to service provision to final customers

The data reported underestimate analysis-intensity of PA cases in comparison with NPA. Imagine that we have introduced the standards of application of the tools of economic analysis for competition investigations, for instance, market share calculation. It requires little analysis to prove that an owner of the local network dominates the network with a market share of 100% (cases on interconnection with sub-subscribers). Similarly, little analysis is required to show that a regional network operator and provider of regulated services (cases on non-compliance with final service provision) are in the same position.

Empirical results confirm the general hypothesis of the study on the importance of the structure of incentives in competition agencies. This result explains a significant number of antitrust cases investigated by the FAS annually with a large share of cases that are not related to the conventional understanding of competition legislation. Under the prevalence of structural analysis, this group of cases requires less effort to generate a decision. With the perceived importance of harm as the most essential component of a competition law violation, this group of cases results in decisions with a lower probability of being annulled and less time expected to obtain a final decision.

Over time investigations on NPA are crowding out PA investigations (see Table 1). Therefore, motivation of competition agencies, both explicit and implicit, limits positive welfare effects of antitrust enforcement.

VII. CONCLUDING REMARKS

The analysis of the Russian competition authorities' decisions appealed in the commercial courts from 2008-2012 shows that the excessive scale of enforcement measured by the number of infringement decisions is explained by the fact that these cases would never be opened under a correct understanding of the goals of antitrust enforcement.

The majority of cases are not proper antitrust ones. Infringement decisions rest purely on finding a harm to a particular counterparty (as it is in cases on commercial conflicts), in contrast to the evidence of harm to a representatively large group of counterparty, and even more to decrease of consumer welfare.

The statistics of enforcement allow reconstructing the incentives of competition agencies and partially those of judges. Procedural rules regarding reactions to citizen complaints explains the high number of filing complaints. The orientation on performance indicators such as the share of complaints obtaining appropriate response and the share of infringement decisions taking effect (not challenged by the court) explains preferences for 'easy to decide' cases. The competition agencies' and the commercial courts' understanding of harm explains the standards of proof applied. All of these factors explain the large number of cases on abuse of dominance, with the importance of structural analysis and the vague interpretation of harm.

Because of the motivation of competition officers, large-scale antitrust enforcement may coexist with difficult competition restrictions and relevant harm to the consumer. In addition, enforcement may have a very low deterrence effect that causes substantial harm to consumers and social welfare. There are several ways in which rules of case selection for enforcement influence outcomes of competition agency's actions. First, competition authorities concentrate on the cases with large individual harm and may do not intervene in the cases with total large effect on social welfare but lower effect on individual gains. Second, general standards of economic analysis are influenced by the standards applied in the typical cases where network operators are involved. Structural approach for proving the dominance is in the center of evidence in most of the cases. Approach may be insufficient for the most part of the alleged competition law violations outside regulated industries. Third, a conflict resolution between natural monopolies and final customers attracts excessive resources because legal rules set threshold of economic analysis for antitrust cases that can be too low for 'proper antitrust cases' but definitely too high for relatively simple conflicts with natural monopolies.

In-depth analysis of cases investigated by competition authority does not only confirm that any quantitative performance indicator may be problematic if principal wants to achieve objective that cannot be reduced to the set of simple tasks. Another important take-off is that it is dangerous to develop performance indicators based on external evaluation by the enforcement participants whose individual interests and knowledge only partially correspond to final goals. Complainants pursue individual objectives but undervalue the impact of competition and violations of competition law on welfare of consumers as a group. In turn, judges hardly can assess if competition law application is appropriate in the case, and if legislation allows for diverse interpretations. Judges at the end tend to be influenced by the interpretation made by competition authority. External assessment as a result may even miss the ultimate objective of the policy.

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