



NATIONAL RESEARCH
UNIVERSITY

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

Svetlana Avdasheva, Svetlana Golovanova,

Dina Tsytsulina

Higher School of Economics

32nd Annual Conference of European Association of Law and
Economics, Wien, 17-19 September 2015

September 2015



Standards of evidence in antitrust cases

- ✓ 'Evidence-intensive' enforcement
- ✓ Standards of evidence explain the effectiveness of enforcement
- ✓ The lower are the probabilities of errors (both Type I and Type II) the higher is deterrence and welfare
- ✓ Standards of evidence are not exogenous
- ✓ Under administrative enforcement system highly depends on the discretion of competition authority (CA)
- ✓ Decisions of CA are explained *inter alia* by incentives



Russian vs European competition legislation: similar rules...

- ✓ Competition law has been introduced in the early 1990s within the framework of “liberalization package”
- ✓ Provisions of the **Law ‘On protection of competition’** are similar to European competition rules (TFEU)
 - ✓ Article 11 (on collusion and concerted practice) = Article 101 TFEU
 - ✓ Article 10 (on the abuse of dominance) = Article 102 TFEU
 - ✓ Article 13 = Guidelines on efficiencies
- ✓ Standards of turnover penalties are a little bit lower (up to 4% in contrast to 10% in EU), but similar



Russian vs European competition legislation:

... but different enforcement

- ✓ Extremely large scale of enforcement (recently about 4 thousand infringement decisions annually)
- ✓ Extremely small objects for enforcement (companies with relatively small turnover)
- ✓ The prevalence of abuse of dominance cases (comparing to agreements)
- ✓ Modest and non-increasing level of economic analysis
- ✓ Underdeveloped analysis of efficiencies
- ✓ Prevalence of *per se* vs *effect-based* approach to enforcement
- ✓ Exaggerated number of remedies imposed



Research question: to explain the unique model of enforcement

Why?

What is the core difference in the standards of evidence?

Why the difference in the standards of evidence emerged?

Impact of *CA incentives* on the standards of evidence?



Approach

- ✓ Case-level analysis of standards of evidence in infringement decisions of Russian CAs using texts of decisions in judicial review during 2008-2012
- ✓ Developing the hypothesis of the impact of incentives on case selection and standards of proof applied
- ✓ Testing the hypothesis on the impact of the standards of proof on the decision to *appeal* infringement decision of CA
- ✓ Testing the hypothesis on the impact of the standards of proof on the outcome of *judicial review of CA* decisions



Database of the outcomes of judicial review

	2008	2009	2010	2011	2012
Infringement decisions					
Infringement decisions made by the FAS¹	1045	1731	1979	2625	3216
- on abuse of dominance	862	1438	1539	2310	3029
- on horizontal or vertical agreements, concerted practice	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)
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



Plan of the rest of presentation

- Literature on incentives of (competition) authority
- Outcomes of qualitative analysis of standards of evidence in antitrust cases
- Incentives of the Russian CAs
- Empirical hypotheses and results



Incentives of competition authority

- Multitasking (Holmstrom, Milgrom 1991) under resource constraints
- Empirical evidence that external review affects incentives of public officers (Leaver, 2009; Bandyopadhyay and McCannon, 2014 and many others)
- Choice of CA maximizing reputation between '*Difficult*' and '*Simple*' tasks (Schinkel, 2014): there is multiplicity of equilibria
- Most of the articles study 'implicit' incentives in contrast to explicit performance indicators of CAs
- And for our knowledge there are no papers on the impact of explicit performance indicators not only on decisions to allocate efforts under multitasking but also on interpretation of the content of particular task



Outcomes of the qualitative analysis of decisions : standards of abuse of dominance

- Harm is an independent proof of violation, including
 - the presumption that any harm imposed by a dominant company on its counterparty represents abuse of dominance (no casual links with restrictions of competition and/or market power); and
 - the interpretation of the harm to any number of counterparties (even to one customer) as evidence of abuse of dominance.

in more than $\frac{3}{4}$ of the claims submitted for judicial review

- Therefore more than $\frac{3}{4}$ of all the infringement decisions are ***not proper antitrust decisions***



Typical 'not proper antitrust' cases

Non-compliance of natural monopolies with the standards of provision of services to final customers (NM_FC)

For instance, complaints on improper metering

Conflicts on the conditions of access to local networks with sub-subscribers (SUBSUBSCR)

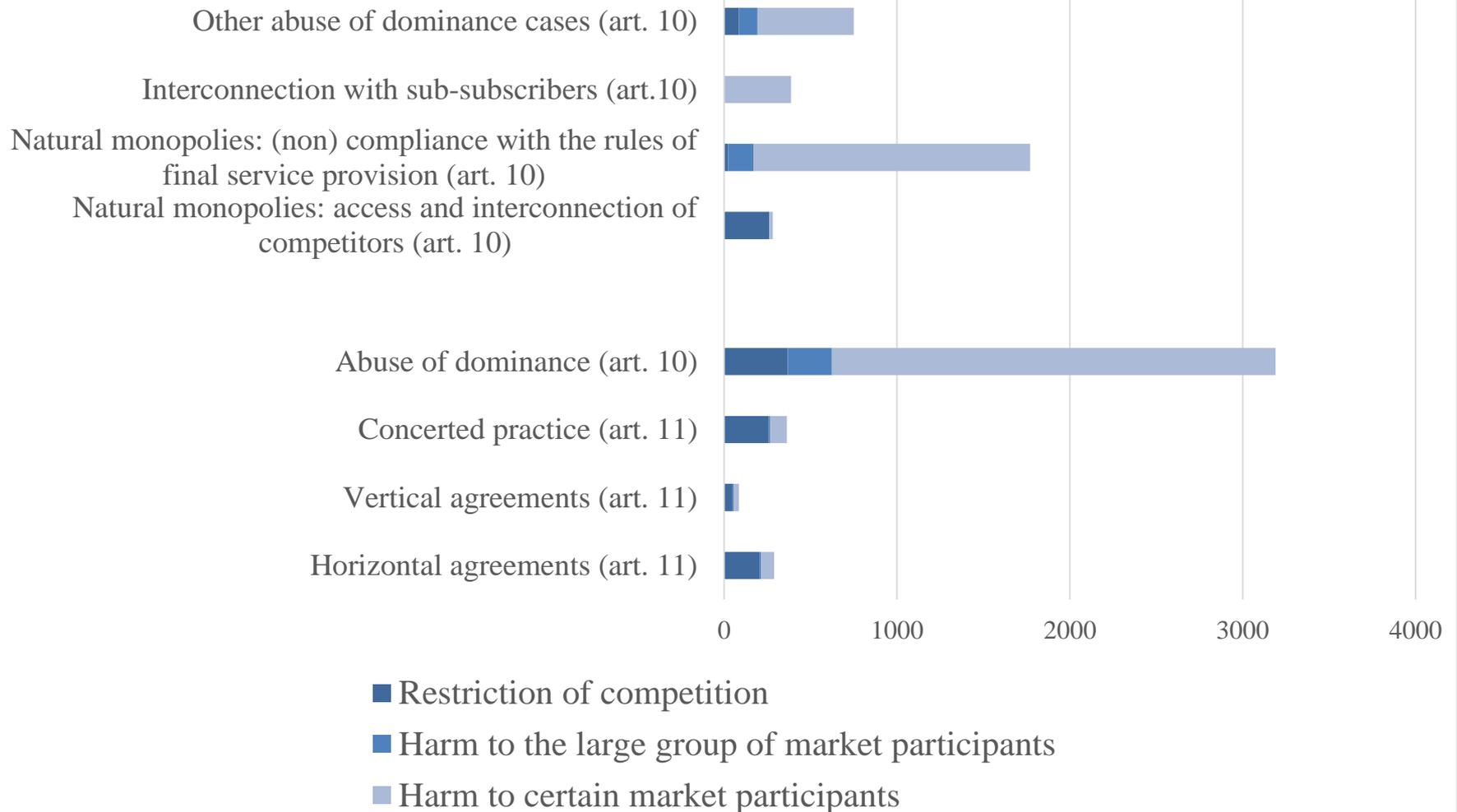
For instance, 'unreasonably increasing interconnection fees'

Exploitative type of abuse of dominance that is based on individual harm (HARM_IND)

For instance, refusal to sign a contract with distributor that does not meet qualification criteria under selective distribution system



Structure of decisions by the primary infringement evidence across presumed violations



The typical infringement decision on art.10 does not correspond to internationally recognized understandings of what constitutes a violation of Competition law



Incentives of the Russian CA

- ✓ **Legal rules of working with citizens' complaints** (negative incentives on the number - 'no complaint should remain without answer')
 - Incentives to take *extra-investigation* when receiving complaint
- ✓ **System of motivation of FAS** (positive incentives to the number of technically successful decisions - 'higher share of infringement decisions that came in legal force' = explicit performance indicator)
 - Incentive to select cases with higher probability of not being appealed and reversed by commercial court



Empirical approach: what standards of evidence are?

Standards of evidence are not observable empirically

What we do observe:

- Number of investigations and decisions of particular type of the cases (share of non proper-antitrust increases over time)
- Features of decisions that meet incentive constraints (cost-saving, lower rate of reversals)

Deriving incentive constraints from non-reversibility of infringement decision planner implicitly assumes existing standards of evidence

- However practice of enforcement contributes to the development of standards
- When number of cases of different type increases because they meet incentive constraints it affect standards of evidence



Empirical hypotheses

- H1. Infringement decisions where the harm is independent evidence are annulled by the courts less frequently than infringement decisions on restrictions of competition.
- H2. Infringement decisions where harm is independent evidence (NPADs) require less cost on economic evidence than PADs

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*
Year effect	+	+	+	+	+	+	+	+
N	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%.



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*
Year effect	ref.	ref.	ref.	ref.	ref.	ref.	ref.	ref.
N	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

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%



Interpretation of empirical evidence

- Standards of evidence in the Russian antitrust enforcement are far from conventionally accepted
- However it is not 'problem of transition' only
- Standards of evidence decrease but not increase over time
- Data are consistent with the conclusion that this is explained by incentives of competition authorities to *open extra-investigation and make extra infringement decision resistant to judicial review*
- Largest group of cases creates standards of evidence over time *and not for authority only but also for judges*



Conclusions

- ✓ Incentives and performance measurement of the enforcer of legislation can indirectly affect standards of evidence, if the latter does not rely on very detailed legal rules
- ✓ Under administrative enforcement of antitrust legislation standards of evidence are vulnerable to the distortions of the incentives of the public officers in the authorities
- ✓ Important implications not for Russian and not for competition authorities only but also for other authorities with responsibility to 'evidence-intensive' legislations.



THANK YOU FOR YOUR ATTENTION

AVDASH@HSE.RU