

Judges in transition: how they decide on the claims to annul infringement decisions of administrative authorities (on the example of antitrust)

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Topic & Motivation

- 1. Continuous modernization of the Russian antitrust legislation:** adoption of four “antitrust packages”, specifying methodology of antitrust investigation
- 2. A significant impact of the judicial system on competition policy:** a result of interaction between the judicial system and competition policy enforcement
- 3. Problems of the Russian case:**
 - i. lack of experience of competition law enforcement by competition agencies,
 - ii. judges’ lack of specific knowledge in economics;
 - iii. questionable quality of argumentation and standards of evidence

Purpose of the Study

assess changes in the effectiveness of Russian antitrust regulation in the framework of researching the key factors influencing the final court decisions in antitrust cases

Theory & Method

Literature Review

- Frequency of economic analysis use in court decisions
Posner, Garoupa, Ginsburg, Baye, Wright
- Parties' incentives to appeal decisions
Baye, Wright
- Factors influencing probability to appeal the court decision
Hüschelrath, Smuda, Carree, Günster, Schinkel, Voigt
- Problems of antitrust law implementation

Theory 1. Presumption of innocence

Theory 2. Rational subjective analysis of standards of evidence

Theory 3. Dependence of the case outcome from the real interest of the parties to win in the antitrust process

Source: Antitrust cases' database
[kad.arbitr.ru]

Period: 2008 – 2012 years

Number of cases: 3 939

Cases: antitrust proceedings against Russian companies
abuse of dominance (art. 10)
agreements and concerted practice (art. 11)

Methods

Model & Data

$$\text{Appellation} = \begin{cases} \text{yes, if } E[B] > E[C] \\ \text{no, if } E[B] < E[C] \end{cases}, \text{ where}$$
$$E[\text{Benefit}] = p \cdot V, \text{ where}$$
$$V = F + M$$

$E[B]$ – expected benefit from winning the case,

$E[C]$ – expected costs from making the appeal,

p – probability of winning the case,

V – value of the win for the defendant,

F – the amount of fine, which is not paid,

M – money equivalent for encumbrance in the form of prescription

1. Characteristics of the judge

- gender
- work experience
- education
- qualification
- experience in judging antitrust cases
- number of cases decided by the judge in whom the FAS was involved in the past

2. Complexity of the case

- cases on concerned practice
- case of “proper antitrust”
- or mentioning the expertise provided by either side

Binary choice model:
probit

Dependent variable:

appellation of the judge’s decision

3. Characteristics of the contested sanctions

- penalties
- conduct remedies

Control variables

1. *Characteristics of the region*
2. *Characteristics of the FAS subdivision*
3. *Characteristics of the time period*

Main Results

1. Support or at least do not contradict to the outcomes of previous researches

- Specific experience (judging antitrust cases) but not general legal experience influences the decision
- Experience of the party in litigation increases the probability to win
- More experienced subdivisions of FAS win with higher probability
- More complex cases result in higher probability of acquittals (annulment of infringement decision of competition authority)
- Decreasing monetary sanctions weakens the incentives to prove evidence in own favor, and under lower sanctions probability not to annul decisions increases

2. Contradict widespread beliefs on the Russian judges

- There is no systematic bias of judges in favor of Russian regulator

3. Not outlined in any research works previously

- Influence of basic economic education on the decisions

Limitations & Extensions

- Russian case is not typical for transition countries or countries with developing institutional framework
- Common beliefs are not always appropriate for any particular case
- The result of no systemic bias of judges towards public authorities is stable
- Decisions in favor of administrative bodies: why is it may be possible?
 - introduction and enforcement of new law
 - changing standards of proof
 - fast accumulation of legal skills both on the side of administrative authorities and judges
 - basic education that judges



Thank you
for your attention!

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Appendix 1

Table 1 Correlation of the decisions by the arbitration courts of the first instance and the courts of the higher level

	2008	2009	2010	2011	2012
	final_annull	final_annull	final_annull	final_annull	final_annull
annull_inst	0.4	0.5	0.46	0.51	0.52

Appendix 2

Table 2 Trends in variables

	2008	2009	2010	2011	2012
Competition authority activity characteristics					
Antitrust investigations opened (total)	6541	9664	11431	11276	10009
Average workload of FAS subdivisions (total)	6.28 (0.24)	9.44 (0.25)	4.84 (0.07)	5.09 (0.07)	4.32 (0.09)
Accusation bias (total)	0.66 (0.01)	0.72 (0.01)	0.73 (0.00)	0.82 (0.00)	0.82 (0.00)
Share of annulments by the first instance court (the sample)	0.45 (0.03)	0.40 (0.02)	0.35 (0.02)	0.32 (0.02)	0.30 (0.02)
Characteristics of decisions in the sample					
Share of cases on abuse of dominance (art 10)	0.85 (0.02)	0.77 (0.02)	0.79 (0.01)	0.80 (0.01)	0.87 (0.01)
Duration of litigation in months	9.41 (6.38)	9.98 (6.03)	9.87 (6.28)	10.71 (6.42)	10.25 (5.81)
Mentioning the expertise	0.14 (0.34)	0.19 (0.39)	0.12 (0.32)	0.09 (0.29)	0.03 (0.18)
Share of decisions with monetary penalties	0.03 (0.17)	0.07 (0.26)	0.07 (0.26)	0.17 (0.38)	0.18 (0.39)
Share of decisions with behavioral remedies	0.30 (0.46)	0.28 (0.45)	0.36 (0.48)	0.28 (0.44)	0.31 (0.46)
Characteristics of judges in the sample					
Share of judges with economic education	0.01 (0.12)	0.01 (0.11)	0.01 (0.08)	0.02 (0.13)	0.04 (0.20)
Share of male judges	0.34 (0.47)	0.31 (0.46)	0.35 (0.48)	0.35 (0.48)	0.32 (0.47)
Share of judges with PhD	0.10 (0.3)	0.08 (0.27)	0.09 (0.28)	0.08 (0.27)	0.09 (0.29)
Average working experience (years)	6.34 (5.60)	7.18 (5.45)	7.49 (5.62)	7.91 (5.48)	8.46 (5.46)
Average qualification class	2.04 (0.75)	2.08 (0.80)	2.17 (0.82)	2.28 (0.85)	2.34 (0.87)

Standard deviation in parentheses

Table 3 Interrelation of characteristics of cases

	Abuse of dominance (art 10)	Collusion and concerned practices (art 11)
Share of annulments by the first instance court	0.33 (0.01)	0.41 (0.02)
Duration of litigation in months	10.07 (0.11)	10.61(0.25)
Mentioning the expertise	0.10 (0.00)	0.12 (0.01)
Share of decisions with monetary penalties	0.12 (0.01)	0.15 (0.01)
Share of decisions with behavioral remedies	0.33 (0.01)	0.19 (0.01)

Standard errors in parentheses

Appendix 3

Table 4 Interrelation of characteristics of judges

	Male	Female
Share of judges with economic education	0.01 (0.00)	0.02 (0.00)
Share of judges with PhD in Law	0.11 (0.01)	0.07 (0.01)
Average qualification class	2.24 (0.02)	2.20 (0.02)
Share of judges with awards	0.08 (0.01)	0.06 (0.01)

Table 5 General descriptive statistics of judges in the sample

	N of judges	econ	phd	awards	new_gen
abs	661	12	45	57	132
%	100	1.8	6.8	8.6	20.0

Appendix 4. Descriptive statistics

Case characteristics	Variable name	Mean (std.dev.)	Min	Max	Obs
Variable of annulment					
Annulment of the FAS infringement decision by the court of the first instance (yes=1. no=0). The fact of satisfying the company's claim as a result of the judicial process.	annul	0.34 (0.48)	0	1	3921
Characteristics of the time period					
Year of initiating of the antitrust investigation	year		2008	2012	3938
Penalty law period (from 2008 to 2010 = 0; 2011 and 2012 = 1). The period of case consideration according to the key changes of the Russian antitrust law	law_period	0.51 (0.50)	0	1	36938
Complexity of the case					
Article of the law "On protection of competition" (art.10=0. art.11=1) The fact of consideration the case under the article 11 (concerted practice) of the Russian antitrust law.	art11	0.19 (0.39)	0	1	3922
Proper antitrust case (PA = 1. NPA = 0)	pa	0.17 (0.38)	1	56	3937
Mentioning the expertise provided by either side of the trial (yes=1. no=0)	expertise	0.11 (0.31)	0	1	3938
Characteristics of the contested sanctions					
Conduct remedies are mentioned in the decision (yes=1. no=0)	remed	0.31 (0.46)	0	1	3936
Fact that monetary penalties are imposed (yes=1. no=0)	penal	0.12 (0.33)	0	1	3937
Penalty size (logarithm of penalty size in rubles)	ln_penal	0.68 (2.10)	-1.58	15.25	3938
Characteristics of the judge					
Gender (male=1. female=0)	male	0.34 (0.47)	0	1	3910
Economic education (yes=1. no=0)	econ	0.02 (0.13)	0	1	3460
PhD in Law (yes=1. no=0)	phd	0.08 (0.28)	0	1	3459

Appendix 5. Descriptive statistics

Qualification class	class_j	2.21 (0.84)	0	5	3752
Awards (yes=1. no=0)	awards	0.07 (0.25)	0	1	3815
Total work experience (log years)	lexp_j_tot	1.79 (0.82)	0	3.58	3703
Work experience is less than three years (yes=1. no=0)	first_3	0.23 (0.42)	0	1	3810
“New generation” judges which completed secondary school after 1992 (yes=1. no=0)	new_gen	0.20 (0.40)	0	1	37
Experience in judging antitrust cases (logarithm of the number of cases decided by the judge in whom FAS was involved in the past)	lexp_j_com	0.34 (0.53)	0	2.30	3938
Characteristics of the FAS subdivision					
Workload of the FAS subdivision (the number of decisions made during the year per capita)	work_fas	5.73 (3.67)	0.76	27.62	3931
Accusatory bias (the share of infringement decisions in all decision made)	accus_fas	0.77 (0.12)	0.21	1	3927
FAS experience (logarithm of the number of cases decided in the region in the past)	lexp_fas	1.89 (1.13)	0	4.45	3572
Characteristics of the region					
Regional domestic product per capita (logarithm of the RDP per capita)	lrdp_pc	12.24 (0.90)	7.06	15.12	3936
Rate of growth of regional domestic product	rdp_rate	0.13 (0.10)	-0.27	0.50	3936
Investment risk index	risk_reg	6.21 (3.25)	1	13	3936

Appendix 6. Marginal Effects

Factor variable	(1)	(2)	(3)	(4)	(5)
Characteristics of the time period					
Year					
2009	-0.6* (0.034)				
2010	-0.011*** (0.031)				
2011	-0.136*** (0.031)				
2012	-0.156*** (0.032)				
law_period		-0.027 (0.019)	-0.013 (0.020)	-0.055 (0.059)	-0.008 (0.021)
Complexity of the case					
art_11	0.087*** (0.020)	0.096*** (0.021)			
expertise			0.039 (0.027)	0.110 (0.076)	0.040 (0.028)
pa			0.104*** (0.022)	0.303*** (0.024)	0.123*** (0.024)
Characteristics of the contested sanctions					

Appendix 7. Marginal Effects

remed	0.087*** (0.020)	0.028 (0.018)	0.026 (0.017)	0.075 (0.051)	0.026 (0.018)
ln_penal			0.005 (0.004)	0.014 (0.011)	0.006 (0.004)
Penal	0.019 (0.024)	0.028 (0.024)			
Characteristics of the FAS subdivision					
work_fas		0.001 (0.002)	0.001 (0.002)	-0.001 (0.007)	-0.002 (0.002)
accus_fas		-0.143* (0.077)	-0.133* (0.077)	-0.421* (0.236)	-0.135* (0.085)
lexp_fas		-0.023*** (0.008)	-0.022*** (0.008)	-0.069*** (0.026)	-0.020*** (0.009)
Characteristics of the judge					
Male				0.101*(0.050)	0.036*(0.018)
Econ				0.220 (0.182)	0.106 (0.067)
Phd				-0.082 (0.085)	-0.033 (0.029)
class_j					
1				0.011 (0.789)	
2				-0.068 (0.786)	
3				-0.017 (0.781)	
4				0.071 (0.785)	
5				0.241 (1.268)	

Appendix 8. Marginal Effects

awards					0.034 (0.036)
first_3					-0.073 (0.077)
new_gen					0.081 (0.066)
exp_j_com					0.010 (0.017)
lexp_j_tot					0.005 (0.013)
Characteristics of the region					
lrdp_pc					-0.038*** (0.010)
rdp_rate					-0.032 (0.085)
risk_reg					-0.001 (0.003)
Number of obs	3128	3128	3128	3128	3128
AIC	5006.089	4496.451	4493.030	3936.331	3917.757
BIC	5056.280	4545.850	4548.605	4057.294	4026.624
Robust standard errors in parentheses *** p<0.01, ** p<0.05, * p<0.1					