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Excessive price enforcement: Russia

Disclaimer: Authors are independent experts; presentation reflects only personal opinions based on expert assessments

Svetlana Avdasheva, Applied Economics Department, NRU HSE

Dina Korneeva, Institute of Industrial and Market Studies, NRU HSE

Goal: to show similarities and differences in excessive price enforcement in Russia

- Legal definition
- Enforcement scale
- Enforcement targets
- Tests and evidence
- Enforcement remedies
- Outcomes of judicial review

Russian enforcement at glance: legal definition

Excessive is a price of dominant seller that satisfies two criteria:

(1) it exceeds price in comparable competitive market [with very extensive definition of comparability]

(2) it exceeds the sum of cost and profit necessary for production

If there is not comparable competitive market competition law allows to apply on 2nd criterion

Test presumed by law: 'price that increases when cost and other selling conditions [very extensively] *do not change'* or *'price that remains to be stable when cost and other selling conditions* [...] *allow for price decrease'*

Safe harbors: regulated price, price established in commodity market

Russian enforcement at glance: scale

Scope:

- At least 35 decisions annually during last decade (with clear cyclicity: number of investigations and decisions increases when RUR devaluates)
- Largest **monetary penalties** among other competition enforcement
  - **1 bln USD** on largest oil companies (2009-2011)
  - **0,3 bln USD** on cargo terminals
- **Most tough conduct remedies**
  - pricing formula for wholesale petrol price
  - pricing conduct remedies for suppliers of metals and chemicals

Russian enforcement: empirical tests (1)

Prices on comparable markets

(*"The Principles of Economic Analysis of Pricing Practices,* 2014*"*)

- Prices of the same supplier in export markets
- Prices of spot contracts in the commodity markets
- Margins of the same supplier in other markets

Russian enforcement: empirical tests (2)

Cost and profit necessary for production

("Commentary to the Federal Law "On Protection of Competition" (2015):))

- comparison of profit to cost margin over time;
- comparison with profit margin of other sellers of comparable markets, *even if they are not competitive markets* ;
- taking into account difference of productivity.

("Explanation of the Presidium of the FAS "Definition of monopolistically high and low price of goods" (2016)):

- taking into account cost not only in explicit but also in implicit form

Theories of harm are generally convincing… but empirical tests are not : most decisions are finally annuled by commercial courts

Targets	Relevant theory of harm	Observed indicators of consumer surplus loss	Companies under investigation (examples)	Empirical tests applied
Exporters of primary products	Third-degree price discrimination	Domestic prices exceeds export prices	Largest oil companies ('Big Four') Novolipetsky metallurgical plant (colled-rolled steel) Raspadskaya	Changes in unit cost over time Price of dominant sellers in other markets (abroad) Past price of dominant sellers in domestic market
Dominant companies in the markets after deregulation	Sustainability of natural monopoly	Substantial price increase after deregulation	Cargo terminals operators: from 2016 (after price deregulation in 2014) Megafon, BeeLine (2010-2012)	Changes in unit cost over time Price of (regulated) competitors in other markets Past price of dominant sellers (before deregulation)

Enforcement: intervention ex post vs ex ante

Ex-post (infringement decisions & penalties) vis-à-vis ex-ante (price remedies)

- **Excessive price investigations and decisions resulted in largest monetary penalties:** *Oil companies (~US$1 billion), stevedoring companies (~US$0.3 billion)*
- **Approach to calculating penalties**
  - *Turnover penalties (oil companies) vis-à-vis excessive profit expropriation*
  - *Shift to excessive profit expropriation is clearly motivated by Bageri, V., Katsoulacos, Y., & Spagnolo, G. (2013).*
- **Shift to extensive price remedies (as a part of decisions or settlements or ex ante pricing policy):**
- *for the sellers that dominate unilaterally (for Uralkali in the market of basic fertilizers, for RUSAL in the market of primary aluminum),*
- *for oligopoly markets (for LUKOil, Rosfent, Gazpromnetf in the markets of motor fuel)*

Excessive pricing in case law of other countries: perspective from Russian experience

Targets of enforcement of excessive price concept are similar as in other countries:

- exporters of primary products (*Mittal Steel South Africa Ltd; Sasol*)
- companies in deregulated industries (*Deutshe Post; Port of Helsingborg; Qualcomm*)

The outcomes of enforcement against excessive price are similar:

- decisions on excessive price have little chances to survive judicial review.
- decisions are sustainable only where there is no tradition of judicial revision (Svetlicinii, Botta, 2012)

Little enforcement success explains shift to remedies, as complementary to monetary penalties or substituting them

Conclusion (1)

- **Approach to enforcement against excessive prices in Russia is predicted by**
  - market structure in the sectors, which are the most important for international trade;
  - contradictory impact of exchange rate changes
  - historical circumstances of trends in price regulation and deregulation
- **Competing standards of evidence, with the efforts to develop both of them:**
  - comparable markets
  - cost plus
- **No unambiguous criterion for excessive prices**
- **Application of nearly all possible criteria mentioned in the literature and applied in other jurisdictions**

Conclusion (2)

- The similar targets and similar difficulties in other countries that apply provision on excessive price, including Member States in European Union and especially BRICS countries.

- **Non-satisfaction with the outcomes of enforcement against excessive price ⇒ recent shift to ex-ante behavioral remedies:**
  - high standards of establishing excessive price do not allow supporting conclusion on excessive price on satisfactory level of confidence. Thus, probability of detection as well as deterrence decreases.
  - low standards of establishing excessive price may result in the increase of probability of Type I error that is detrimental to deterrence as well.

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Thank you for your attention!

20, Myasnitskaya str., Moscow, Russia, 101000
Tel.: +7 (495) 628-8829, Fax: +7 (495) 628-7931
www.hse.ru