'Reactive' Model of Antitrust Enforcement: when private interests run the actions of executive authority (case of Russia)

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Abstract

Law enforcement by supervisory authority on the complaints may replicate not advantages but disadvantages of both public and private enforcement. In the Russian antitrust enforcement there are strong incentives to open investigation almost on every complaint. Increasing number of complaints and investigation decreases the resources per investigation and standards of proof, distorts the structure of enforcement, increases the probabilities of both wrongful convictions and wrongful acquittals and lowers deterrence.

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K21, K42.

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1. Introduction

Nowadays Russian competition authority is among the largest in the world. According to Global Competition Review 2012, in 2011 the number of officers in the Federal Antitrust Service of the Russian Federation (FAS hereafter[1]) was 3.000. This is higher than the number of officers in the Antitrust Division US Department of Justice and Federal Trade Commission in nearly half. In comparison to the next competition authority that is Australian the number of employees in the FAS is more than three times higher.

Scale of enforcement in the Russian competition agency is very high by international standards, and in some areas as extremely high. For instance, in 2011 FAS opened 3.199 investigations on abuse of dominance that is more than 30 times higher than the second authority in the world (Ireland). The number of merger filings in 2011 was 5.406, that exceeds the number of merger filings in the Antitrust Division US DOJ and FTC together for about twice.

Authority's statistics shows not only large but also growing scale of enforcement (fig. 1). Number of cases on illegal practice according to art. 10 (abuse of dominance) and art. 11 (collusion and concerted practices) steadily grows. The ratio of indictments to investigations also increases: in 2008 in every second case the market participants were found guilty by enforcement agency after investigation, in 2011 in every two from three cases companies under investigation were found guilty.

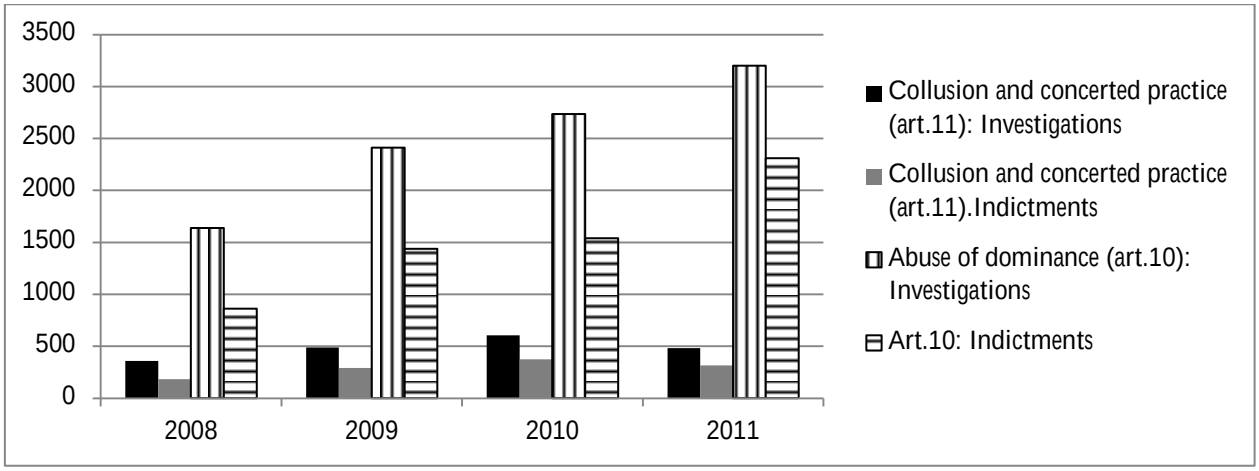

Fig. 1. Scale of enforcement of the Russian competition agency. *Source: Statistics of Federal Antitrust Service*

Scale of enforcement seems to be even higher if we keep in mind very broad area of responsibilities of the Russian competition agency. In addition to antitrust provisions (prohibition on collusion and concerted practice, abuse of dominance, and ex-ante merger approval), FAS is responsible for the public enforcement on the rules on unfair competition (about 1.000 cases annually), on restrictions of competition by public authorities (about 5.000 cases annually), on the Law On Advertising, on sector-specific regulatory provisions in such different industries as electricity and retailing, on the approval of the foreign investments in the strategic companies etc.

We cannot present 'direct evidence' on the efficiency of the antitrust enforcement in Russia. But expert estimates as well as general assessment of the investment climate in Russia, and even surveys of the enterprises

[1] Here and throughout the paper the data (especially statistical data) on Federal Antitrust Service Activity refer to the Federal Antitrust Service as a system containing the central and regional divisions of the Service (except in cases where otherwise is mentioned).

(Tsukhlo, 2012) suggest that competitive pressure ceased to grow last years. The survey result seems to be all the more strange if we keep in mind that antitrust enforcement in Russia became to be potentially effective recently, since 2007-2008. Before that very low level of administrative sanctions (about half of million RUR, less than 20 thousand USD at most) made the market participants non-sensitive to the threat of antitrust investigation and indictments by competition agency. Only after the introduction of turnover penalties in 2007 (up to 15% of the turnover of the violator on the market affected) deterrence effect of antitrust enforcement in Russia could be considered seriously. Simultaneous increase in strength of antitrust enforcement and weakening of competition in the Russian market may be a coincidence, but even in this case, paradox of very limited effects of large-scale and powerful enforcement needs an explanation.

One explanation traditional for Russian and international experts is low standards of evidence used by competition agency in the course of investigation. Many scholars (see, for instance, Girgenson and Numerova, 2012) consider three main weaknesses of the Russian antitrust enforcement and they are excessive level of enforcement, objective of the enforcement not related to the promotion of competition and the marginal role of economic analysis in the investigations of the competition authority. Not only international experts but also judges in the Russian commercial (*arbitrazh)* courts are dissatisfied with the level of analysis presented in the decisions of FAS: recently about 35-40% of the decisions of the authority are reversed by the commercial courts of the first instance.

However all these features are only symptoms but not the causes of the disease. There are different explanations for non-satisfactory state of affairs in the Russian competition policy, but for our mind none of them are sufficient. First is that the decisions of FAS are inspired by political reasons. It is not mystery that many high-profiled cases on the violations of the antitrust law were opened on the direct order of the prime-minister and/or president of the Russian Federation. One recent example is the case against 'Big Four' domestic oil companies – LUKOIL, Rosneft, TNK BP, Gazprom Neft (Avdasheva et al., 2012). However political order cannot explain more than 3 thousand decisions on the abuse of dominance annually. Moreover, FAS is guided by pure political agreements in lesser extend than many other authorities in Russia, partially because of very special position in the Russian system of executive power. FAS initiate the cases against federal and regional authorities for restrictions of competition, there are 3.000-5.000 cases annually under these specific provisions of the Russian competition law. Opposition of FAS for many actions of regional government and federal authorities, as well as extensive experience of legislative initiatives aimed at changes in regulations does not provide complete independence but at least limits the possibilities of direct lobbying by both public executives and the companies.

FAS is accused of corruption much less than many other executive authorities, and there is no any evidence that antitrust investigations were opened or closed for the corruption reasons. This distinguishes the question on weak positive effects of Russian competition policy from the traditional notion on public enforcement as a tool of coercion over the business (Gans-Morse, 2012). Indirect but important indicator of the fact that the activity of FAS is not driven by corruption is information openness of the authority and its' decisions, rare for the Russian executive authorities. Another potential explanation for the limited effects of antitrust enforcement is low qualification of the officers in the competition agency. However we consider the explanation is also not generally valid. The staff in the Russian competition agency is relatively young (33 years in average, with average tenure in the competition agency 4 years, according to the Global Competition Review). However it could be considered as an advantage taking into account that the people with modern economic education are almost absent among the staff of age above average. Again, indirect but important evidence is that FAS became the first public agency in Russia certified by ISO 9001-2008.

High ratio of doubtful decisions cannot be explained by weaknesses of antitrust legislation itself. Most provisions of the Russian competition law were borrowed from European rules on competition. Economic and legal scholars assess description of illegal activity in the law 'On competition' as very close to European. Most errors made are because of incorrect interpretation of internationally recognized provisions.

So, the question to be answered is how it happened that competition enforcement by large, incorrupt, qualified staff empowered by relatively harmonized definition of illegal practice and high standards of fines brings so doubtful outcomes.

This paper offers explanation of all the mentioned features of the Russian antitrust enforcement, and they are:

- large scale of enforcement;
- low level of deterrence;
- selection of cases for investigation not related to the restriction of competition;
- weak economic analysis and, as a consequence, large number of enforcement errors.

In the heart of explanation presented are the incentives created for the officers in the competition authority, companies in the market and potential law violator by the national rules of administrative regulations. These rules make refusal to open investigation on the complaint relatively risky for the officer in the executive authority. Created for authority responsible for control and supervision in the areas where evidence of non-compliance are easy to detect and being extended over antitrust, these rules induce enormous number of complaints by market participants, decreasing resources dedicated for every investigation, and distort the structure of the investigations towards cases where high individual damage is at stake (in contrast to welfare loss) induce the increase of the probabilities of both Type I and Type II errors and reduce deterrence effect. Giving priority to the complaints as a reason to initiate investigation, Russian competition enforcement combines the weaknesses of both public and private models of enforcement.

In contrast to many papers devoted to the weaknesses and adverse effects of the law enforcement in Russia (see for instance Gans-Morse, 2012) we show that the structure of incentives in the decision-making is sufficient to explain relatively poor results of the law enforcement, without taking into consideration corruption or low level of skills of the officers in the executive authority.

The paper is organized as follows. Section 2 is devoted to the brief review of comparative advantage of public and private enforcement and a discussion on the nature of public enforcement in the Russian competition agency. Section 3 explains administrative rules regulating antitrust enforcement in Russian and develops theoretical framework explaining the errors under specific model of public enforcement (we called in this paper *reactive* public enforcement) and argue that most types of the enforcement errors by Russian competition agency are made in favour of the authors of the complaints, including law abusing complaints. Section 4 provides recent examples of the cases on the main areas of antitrust enforcement initiated on the complaints and highlights their common features. Section 5 discusses the reverse impact of the enforcement model on the development of the Russian competition law. The main findings are repeated in the conclusion.

2. Wrongful convictions under private and public antitrust enforcement

The literature on public versus private enforcement starts with Becker and Stigler (1974) who argue that private enforcement could achieve deterrence as efficiently as optimal public enforcement. General conclusion of the discussion is that both private and public enforcement can exhibit comparative advantages in different settings. (Polinsky, 1980; Polinsky and Shavell, 2000).

However, in our opinion, from the perspectives of comparative law the literature on private and public enforcement is missing one important aspect and this is the artificial limitation placed on the models of enforcement under comparison. An insufficient attention is paid to the model when public authorities select cases for investigation and enforcement on the complaints of the victims, as a distinct type of enforcement. In some legal systems and fields of legislation this type of enforcement plays an important role. Today in Russia this enforcement model is considered as a desirable direction of the reform of public control and supervision. In the paper we call it *reactive* public enforcement, trying to stress that targets for investigation and prosecution are chosen not by any risk-based principle nor randomly but under the complaints of actual or alleged victims. It is unclear however if this type of enforcement system is preferable from a social point of view or from the point of view of a given group of participants in the enforcement system. In contrast to the perspective advanced by McAffee et al (2008) that public enforcement on complaints can replicate the advantages of both private and public enforcement, we concentrate on the conditions where it replicates the shortcomings of both models.

Comparison of private and public enforcement for antitrust attracts special attention in the literature (see Segal and Whinston, 2006 for survey). Taking into consideration deterrent effect of fines, if punitive penalties in private suits are applied, private enforcement is able to overperform public one because they are connected to the gains from violations closer. Higher penalties which provide stronger deterrent effect in comparison with public enforcement, were found in the enforcement against international cartels (Connor, 2006) as well as in a large number of cases of private antitrust litigations in the US (Davies and Lande, 2012).

However there is a widespread view that private enforcement exhibits significant drawbacks in comparison to public because of the specific sources of Type I errors, or overenforcement (Rajabiun, 2012). There are at least two sources of overenforcement. The first one is that litigant can be law abusing, suing only in order to impose additional cost on the defendant and thus affect it's behaviour (McAffee and Vakkur, 2004). The second determinant of Type I errors is that litigant makes decision assessing only her own cost and benefits but not the effects of practice in question on welfare. The second explanation does not imply opportunistic litigations, in contrast to the 'self-serving' nature of the claim. Underestimation of welfare effect of practice may cause wrongful convictions in the cases where positive effects on welfare are combined with redistribution of gains among market participants.

Attention to Type I errors (*wrongful convictions*) in antitrust litigation is explained by the effects of the enforcement errors, which many be extremely strong by several reasons. In addition to ethical cost of wrongful conviction, direct additional cost imposed on person convicted, and lower deterrence (Garoupa and Rizzoli, 2012) wrongful convictions in antitrust enforcement imply that welfare-improving practice is considered as illegal, narrowing the business opportunities and probably suppressing upgrading. Negative impact of the ban on welfare-improving practice could be very high.

In this framework determinants of enforcement errors are important. Probabilities of the enforcement errors may be considered as exogenous as a result of limited cognitive ability. However they could be considered as an endogenous explained for instance by the standards of evidence (Rizzoli and Saraceno, 2011). Specific approach of this paper is the focus on how the probability of Type I errors depends on the enforcement model. Another important difference between our framework and existing literature is an explanation of the origin of the enforcement errors, taking into consideration the mistakes of the executive authority, and related conclusion on the interplay between the probabilities of the Type I and Type II errors. Errors are endogenous, and they are predicted simply by the exogenous budget constraints of the authorities, responsible for control and supervision. Assumption on the exogenous budget allocated between investigation and prosecution cases

(which are the predicted by independent choices of the victims, actual or alleged) corresponds well to the reality of civil law enforced by the means of public control. One important outcome of this assumption is that the main prediction of both Type I and Type II error probabilities is the number of complaints. Under given legal rules and prescribed standards of evidence increasing pressure of complaints induces the increase of both type of errors and corresponding lowering of deterrence effects. Moreover, in this setting the increase of penalties may provide the effect just opposite to the expected one: expected gains from filing a complaint increase, the number of complaints and cases under investigation is increasing, as well as probabilities of errors and deterrence effect is decreasing respectively.

3. Reactive Model of Public Enforcement as a Source of Enforcement Errors

3.1. Enforcement of Antitrust Legislation in Russia: Legal Framework

Enforcement of antitrust legislation (law 'On protection of competition') in Russia is organized within the universal model of control and monitoring (*kontrol'no-nadzornaya deyatel'nost)*. In this framework authorities inspect the compliance with the legal requirements either on their own initiative or on the basis of complaints received. Recent concept of the development of control and monitoring in Russia attaches great importance to the response of the complaints. Official strategic documents consider re-orientation of the control and supervision from the discretionary action on the investigations opened by the complaints as a desired direction of the reform of administrative law enforcement. Special law 'On the procedure of consideration of the Russian Federation citizens' complaints' (2006) requires from the responsible authority to consider every complaint and during thirty days either to open an investigation on a complaint or to provide motivated refusal to do that. Administrative regulations of FAS allow to extend the period necessary to make a decision for not more than three months.

Authority and officers in the authority are responsible both for the delay in decision-making and unjustified refusal to open an investigation on a complaint. Citizens as well as companies can sue authorities and officials for harm as a result of inaction. The number of court cases against government agencies decided for plaintiffs in Russia is high and growing [Trochev, 2012]. Remunerations and promotions of the civil servants on every level, including the heads of the authorities, negatively depend on the number of the accusatory court decisions where inaction causing damage is in question. Officer's compensation depends on the delays in the proceedings and 'unjustified refusal to open inspection' in the very strict way: it reduces quarterly bonuses which are the great part of the total salary of civil servants. On the contrary, the decision to open investigation never leads to any sanctions against the officer or agency. The system of incentives does not seriously take into account any credence to allegations put forward in the complaints, nor the subsequent costs of the investigation, nor the level of the standard of proof. In other words, if there is any positive probability that court can qualify the subject of the complaint as a law violation and the refusal to investigate bringing harm, the expected payoff of the officer is always higher opening investigation. Among other fields of control and monitoring of administrative law in Russia antitrust enforcement is most likely to suffer from the design of incentives, because of complexity of cases as well as lack of legal certainty in the sense of predictability of the court's decision.

Rules on considering complaints together with legal uncertainty almost guarantee that investigation will be opened on the complaint. According to the FAS data, at least 10 thousands cases are opened annually on the complaints, and this number is growing. In turn, in comparison to many other fields of control and monitoring in Russia, the complaints are motivated by large expected sanctions on the law violator. Both

companies as legal persons and their managers are responsible for the violation of the antitrust law. FAS by it's decision can impose a fine on a company. Since 2007 penalties up to 15% of turnover of the company on the market affected by the violation are applied. Staring from 2008, total amount of fines collected by FAS triples every year. In addition to fines, companies can be subject to remedies. The most part of remedies imposed by the Russian competition agency is behavioural: companies are prescribed to follow certain rules of price-making, contracting the suppliers and customers (dealers) or allocation of output across different markets (for instance, export and domestic markets). Remedies on companies found guilty are applied more and more often, and sometimes they are considered as a greater threat than a fine itself. The credibility of sanctions against the managers of the company as physical persons also increases. The sanctions for company managers are dual: the liability is administrative and criminal. Administrative liability can include a fine or disqualification of a manger. Criminal liability can also include a fine (much larger than administrative one) but also imprisonment (up to seven years) with or without further disqualification.

Increasing standards of sanctions together with legal uncertainty in the sense of relatively low predictability of both FAS and court's decisions increase the incentives to complaint by several groups. First group consists of persons both physical and legal considering themselves suffering harm by antitrust law violations. Subjects of their complaints are not necessarily law violations in fact and practice in questions may not be harmful. Provisions of the abuse of dominance in the Russian law 'On protection of competition' (art. 10) prohibit both actions of dominant seller restricting competition and imposing individual harm. In the latter case claimant can easily consider as abusing actions which are both socially beneficial and cannot be recognized as illegal according to the legal rules in force. One typical example is price discrimination: in spite of the fact that commercial courts many times confirmed that quantity discounts is not discrimination as an abuse of dominance, small buyers continue to claim. From the social welfare point of view, their claims are driven by individual effects of actions while social effects are not taken into account. This is typical source of Type I errors under private antitrust enforcement [Rajabuin, 2012], but in Russia they induce enforcement by the agency. There is however another group of claimants who perfectly realize that there is no violation of antitrust legislation, but in the presence of agency's enforcement errors complaints could induce additional burden on counterparties or competitors. Antitrust enforcement, including investigation and possible sanctions due to agency's errors serves as a tool in strategic interaction [MacAffee, Vakkur, 2004], strengthening the bargaining power of claimant.

Decisions of FAS can be challenged in the commercial (*arbitrazh)* court. The number of lawsuits against FAS decisions increases along with the number of indictments (see fig.1 above): it has risen by two-thirds only in two years, from 2009 (2657 lawsuits against the decisions of FAS) to 2011 (4434 lawsuits). Suits against FAS are often successful for the plaintiffs: for three years from 2009 to 2011 commercial courts of first instance reversed about 38-40% of FAS decisions appealed by the companies. Of course courts also can make errors. However analysis of specific cases (including presented below, in section 4) shows that the decisions made by FAS does not comply with the standards of proof already developed and applied by the agency and courts. Increasing scale of enforcement is combined with not only low but declining standards of economic analysis [Girgenson, Numerova, 2012]. Our explanation provided in the next section is based on the negative dependence of probability of enforcement errors on the resources dedicated for one investigation.

3.2. Incentives of the parties in the enforcement of antitrust legislation

In this section we briefly describe the framework in which we explain the enforcement errors in the 'reactive' enforcement as a special type of public enforcement.

Competition Agency. Competition agency receiving the complaint makes the choice between two options: to open the investigation and to prepare motivated refusal for opening the investigation. There are no other options by the Russian administrative law: 'no reaction' option is considered as violation of the administrative procedure and the authority and/or given officer can be charged for no reaction on the complaint.

Choice between two options depends on the comparison of expected net gains from motivated refusal and opening the investigation. Key performance indicators of the Russian competition authority are based on the number of cases closed and do not take into account the welfare effects of the decision. There is no any 'penalty' neither for the case opened without the evidence of potential welfare improvement nor for the case closed for the absence of satisfactory evidence, nor for the wrongful conviction. However the 'penalty' is possible for refusal to take the case if the motivation reveals to be unsatisfactory. Therefore, the cost of the analysis on the initial stage of case investigation is higher for 'motivated refusal' option in comparison with 'opening the case' option. Without being strictly compelled to open the investigation on every complaint an officer in the competition agency prefers to do that.

As a result, in the case of increasing number of complaints limited resources of the agency (including financial, human and time resources) are allocated among growing number of cases. Decline of the resources dedicated to the given investigation together with the growth of ratio of the cases opened by the complaints increases the probabilities of both Type I (wrongful conviction) and Type II (wrongful acquittal) enforcement errors.

Probability of wrongful conviction increases because of two reasons, which can be separated for 'genuine' or 'non-abusing' and 'abusing' complainants.

The first group of complaints is inspired by the desire to change the business practice of the offender. Even 'genuine' complainant however cannot assess if his complaint is reasonable in the sense that there is antitrust violation. But in any case the assumption of the complainant that violation takes place is based on the overestimation of individual effects in comparison with social welfare. The second group of complaints is inspired by the intention to induce additional cost on the offender. Complainant presumably knows that there is no antitrust violation but expects that there is a probability of wrongful conviction by competition authority.

The Complainants. Both groups of the complainants make the decision to file a complaint by comparing expected gains and cost of filing. Cost of filing can be considered as minor. Expected gains differ: for the first group these are gains from the change of the business practice of the offender, the second group expects the gains from the wrongful conviction of the offender. The number of the complaints of the first group generally increases with the decrease of deterrence. The number of the second group of complaints increases with the growing probability of Type I errors.

The Potential Offender

Potential offender makes the decision to follow or violate antitrust rules comparing the gains from two options (Becker, 1968). The increase in probability of wrongful conviction decreases the gains from behaving legally. The increase in probability of wrongful acquittal increases the gains from violations. Therefore, increasing number of complaints, decreasing resources per investigation and corresponding increase of the number of wrongful decisions distort deterrence.

The logic of the interaction between the main actors in the model of 'reactive' public enforcement is presented in the figure 2. Both non-abusing and abusing complaints increase number of investigations and shift the structure of investigation of competition authority towards cases on 'exploitation' in contrast to 'competition restrictions'. The latter increases the probability of Type I enforcement errors. Growing number of investigations decreases the resource for one investigation, and decreases resources increase the probabilities of both types of enforcement errors. Type I enforcement errors make abusing complaints more profitable. Both types of errors lower deterrence, law violations became more probable, creating the causes for complaints (non-abusing).

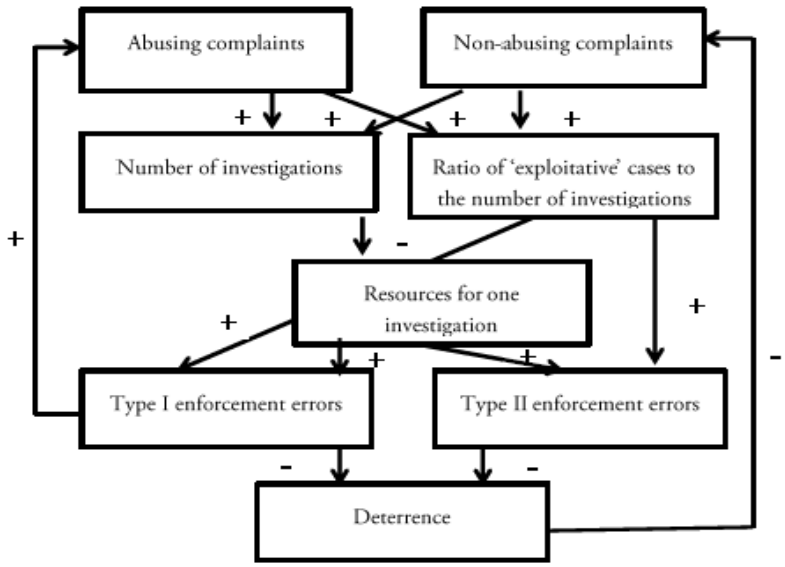

Fig. 2. Determinants of enforcement errors under *'reactive'* model of public enforcement

Under 'reactive' public antitrust enforcement the increase in standard of penalties imposed by competition agency provides the effect just opposite to the expected one: expected gains from filing a complaint increase, the number of complaints and cases under investigation is increasing, as well as probabilities of errors and deterrence effect is decreasing respectively. Framework developed allows to explain the ambiguous outcomes of the efforts aimed at expanding the power of FAS and increasing sanctions for violations of competition law.

4. Complaints in the main areas of the Russian antitrust enforcement

In the section we provide several recent examples of the enforcement of the Russian antitrust legislation where the cases were initiated on the complaints. We discuss neither the standards of evidence applied nor the compliance of the decisions made with the antitrust legislation. Also we are not able to detect if the claimants were 'abusing' (in the sense presented above) or not. However all the cases presented have the common feature: the violation alleged provides large individual effects and therefore high incentives to complain. The

cases presented are considered to be among the most important and influential by FAS as well as by Russian legal community.

4.1. Collusion and concerted practice

One of the largest recent collusion cases considered by FAS is the case against the Russian producers of sodium hydrate ('United Trading Company' case, currently under appeal). The investigation was open by the complaint of aluminium producer 'RUSAL'. According to publicly available information, complaint did not contain any evidence on the collusion; the only information was suspicious concentration of the large amount of sodium hydrate in the trading company and unwilling of some Russian producer to sign direct supply contract with the RUSAL.

One of the high-profiled decisions on the concerted actions in 2011-2012 was the case against largest retailers of computers and home electronics in Russia ('Media Markt', 'Auchan' and 'Eldorado' together with it's subsidiary 'Beringov Proliv') for the unifications of contract terms with the supplier of home electronics opened by Kazan regional division. The case was opened by the complaint of one of the domestic supplier of home electronics with the motivation that Russian retail chains refuse to buy products from the supplier under profitable conditions, instead the proposed contract terms are unprofitable because of wholesale discounts, up-front and after-sales fee payments. The case resulted by the indictment, recently reversed by the commercial court of first instance.

In both cases claims were inspired by high perceived individual effects of practice in question in contrast to effects of social welfare. Analyzing concerted practice in the case of retailers of computer and home electronics almost no competition consideration were taken into account. Line of reasoning by FAS was concentrated on the impact of suppliers' fees and discounts on the performance of suppliers.

4.2. Vertical Agreements and Selection of Distributors

The case of Kaspersky Laboratory (largest antivirus developer in Russia) in 2009 was opened in Chelyabinsk regional division by the complaint of one of the distributor for the provision on cancellation of distribution contract in the case of selling antivirus under recommended price (minimum resale price maintenance). The case was completed only by settlement with the remedy on changes in contract terms with the distributors. Conclusion on the illegality of minimum resale price maintenance was supported mainly by the reasons on the effects on the performance of dealers in the sense that resale price maintenance prevents dealer from price competition which allows to receive extra profit. Neither effects of resale price maintenance on the total profit of supplier and dealers nor impact on competition were discussed.

Another example is the case against the Novo Nordisk subsidiary in Russia (2010) initiated by the complaint of the distributors of pharmaceutical products that were denied authorised distributor status. The case was closed by settlement with the remedy for Novo Nordisk to work out so called 'trade policy' with the complete set of criteria to select authorised distributors and essential contract terms which should be applied among all the distributors on non-discriminatory basis. In both cases no evidence of impact on competition in contrast to the effects on the gains of given counterparty (group of distributors) were presented.

4.3. Abuse of Dominance

Rapid growth in the number of cases initiated under art. 10 (dominance abuse), where it is easier to present conflicts between counterparties in the context of violating antimonopoly legislation, after the turnover penalties introduction (fig.1) for our mind is the best illustration of the outcomes of the 'reactive' enforcement model (Avdasheva and Shastitko, 2011).

Almost all the cases on the abuse of dominance are initiated under complaints, including the case against 'Big Four' oil companies (Avdasheva et al., 2012) resulting in the largest penalties for all the history of Russian antitrust enforcement, even after the settlement. Indictment statement of FAS included three pages of list of the complaints on the high prices of oil products by companies, associations and authorities. Only the evidence price itself as an excessive was presented as a proof.

The cases on abuse of dominance initiated by the complaints of counterparty are very different. Among them is the famous Pikalevo case, where the reluctance of 'BazelCement-Pikalevo', a member of the RUSAL Group (aluminium producers), to continue loss-making production to supply counterparties with its by-products was qualified as an abuse of dominant position (2009). There are also number of cases initiated by Rostelecom (largest nation-wide telecom company) against very small operators of local telephone networks claiming dominance abuse by the latter, as manifested in monopolistically high (excessive) prices of interconnection services (2010-2011).

Recent case against the largest independent gas supplier in Russia 'Novatek' (2012, not yet resolved) is opened by Chelyabinsk regional division on the complaint of small company buying gas. Two questions raised in the case are 'high monopolistic price' in spite of retail prices of 'Novatek' for any industrial buyer are lower than the regulated tariffs on the gas of 'Gazprom' and discrimination of buyers, in spite that the only supportive evidence is quantity discounts and discounts for long-term contracts.

However all of these cases, as well as many others, have one thing in common and this is that the issue admittedly did not concern any restriction of competition. Evidence is concentrated on the impact of practice on the surplus of buyers and even on the gains of individual buyer in contrast to the surplus of all the consumers.

5. The Reverse Effect of Enforcement Model on Legislation

Outcomes of the 'reactive' model of antitrust enforcement provide significant reverse effect on the development of the Russian competition law. Initially radical reform of the Russian antitrust legislation by adoption of the new law 'On protection of competition' (2006) which replaced the law 'On competition and restriction on monopolistic activity in the commodity market' (1991) was inspired by the intention to harmonize the Russian competition rules with European ones. The text of the law before all changes and amendments made to date contained clear signs of this intention. Main concepts of the illegal practice are borrowed from European competition law and enforcement, including, for instance, division between anticompetitive agreements and concerted practice as explicit collusion and coordination, definition of the dominant position, description of the types of the abuse of dominance etc. In the case when origin of the concept is not European competition law, it is the law of the member state. For instance, basic definition of the collective dominance is borrowed from German competition law (see Avdasheva et al., 2012).

However the subsequent changes and amendments in the law made the gap between Russian and European competition law deeper. Not discussing every amendment mentioned, we can explain the way the legal rules

changed by the burden of enforcement errors. Both business and legislator understand the detrimental effects of wrongful convictions and all amendments to the law, adopted or discussed, are intended to reduce likelihood of the mistakes or the cost of the market participants convicted by a mistake.

In many areas of competition law we can give the examples of both types of changes. For concerted actions as coordination without explicit agreement one source of wrongful conviction was confusion of pure price parallelism (or even 'price umbrella') with conscious coordination. The burden of wrongful conviction was extremely high because of the possibility of criminal sanction (including imprisonment) for the concerted actions. Recent changes of the legal rules limited the probabilities of errors by the amendment that concerted actions should involve not only pure parallelism but also 'explicit announcement of prices' in advance, and also decreased the cost of wrongful conviction by abolishing of criminal penalties for concerted practice.

Most of changes and amendments to competition law are concentrated around the definition of 'exploitative' types of practice in contrast to 'exclusionary' ones. The explanation is rather simple in the framework presented above: public enforcement as a reaction on the complaints induces higher number of errors exactly in the applications of the rules on 'exploitative' practice, because companies are complaining exactly on the actions which lead to the redistribution of welfare. Two recent examples are standards of evidence on 'high monopolistic price' and 'discrimination'.

There are several dozens of cases on high monopolistic prices in the Russian competition policy annually. Concept of 'high monopolistic price' survived several reincarnations in the Russian competition law. Initially 'high monopolistic price' was defined as price exceeding the price on comparable competitive market. Then the criteria to consider market as a comparable were narrowed and the alternative definition became to be applied –'price exceeding the sum of cost and profit necessary for the production'. This definition in the disputed raised very difficult (and essentially unresolvable) question on the calculation profit necessary for production as a component of 'economic cost'. To avoid this problem, in many cases, including the cases against 'Big Four' oil companies accused in the abuse of collective dominance (Avdasheva et al., 2012), the evidence of 'high monopolistic price' included increase of price that is greater than the increase in the cost of production (according to the accounting profit and loss statement) or, as an alternative for the exporting companies, 'asymmetry' of price dynamics (when price in the external market increases, the domestic price increase at the same rate, when price fell on the external market, domestic price fell at lower rate). It is difficult to assess the ratio of the cases on 'high monopolistic price' where Type I errors were made, but the criteria applied guarantee that this ratio is very high. Recently competition agency considers to work our 'criteria of fair prices assessment' which use the comparison of domestic prices with the prices in the world markets as possible solution of the problem. Not discussing the correspondence of this rule to the 'right' concept of high monopolistic price (which is doubtful as every attempt to define excessive price, see Evans and Padilla, 2005) we should only mention that the application of such a rule restores a kind of price regulation with many negative externalities hardly predictable in every given market.

Discrimination is a typical reason for complaining according to Russian competition law. In the cases involving discrimination FAS (several hundred cases annually) tends to consider as a discrimination pure variation of contract terms for different buyers and/or suppliers (Avdasheva, Shastitko, 2012). Another occasion to complain on discrimination is any reason for refusal to contract the counterparty contracting another one. The most part of the indictments contain at least elements of Type I errors. During last four years there are heated discussions among competition authority, lawyers and economists on the 'justified' reasons for contract term variation and/or for selection of counterparty. For now, the approach suggested by competition authority for the companies is to elaborate formalized 'trade practices' or 'trade policies' as a

document which should contain complete set of criteria for the eligibility of business partners, procedures of signing contracts and choosing the contract terms including price variation as well as conflict resolution. Not discussing the comparative advantages of this approach we should at least mention that it imposes an additional burden on many sellers and buyers and is capable to unduly restrict business practice applied.

In both cases the subjects of discussions seem very strange for international experts in competition law. Prosecution for 'high monopolistic' (in terms of European competition law – 'excessive') price or for discrimination (especially outside the regulated industries) are very rare in most jurisdictions, and even if they attract a lot of attention by economists and lawyers, probability to be accused of this practice is very low almost for every company. It is not the case in Russia, however. An explanation is not only underdeveloped competition in the Russian market that gives 'extra' market power for the most sellers. An important explanation is that every variation of contract terms among counterparties (for instance, quantity discounts) creates disadvantage for somebody (in contrast to purely uniform contract terms) and therefore induces incentives to complain.

Another dark side of this trajectory of competition law and practice improvement is that the most important problems of competition protection – protection from collusion and entry prevention – are evidently underestimated. In contrast to 'exploitative' practice when gains of certain market participants are at stake, entry prevention affects those who have an option just not to enter into the market.

To sum up, patterns of 'reactive' enforcement of competition law is not neutral for the development of legislation. Changes and amendments of competition law are concentrated around 'exploitative' practice, the main purpose of them are to reduce the probabilities of wrongful convictions. At the same time this track of changes inevitably diverts attention from the main objective of antitrust enforcement that is to prevent restrictions of competition. The purpose of many recent amendments of Russian competition law would be achieved not by the changes in the legal rules but by the changes of criteria of assessment of antitrust enforcement effects. Application of the criteria of the impact on total welfare (even imprecise and incomplete) would prevent competition agency from opening many investigations where only individual effects are at stake.

6. Conclusions

The paper attracts attention to the outcomes of antitrust enforcement organized within the logic of 'control and monitoring' with very important role of the complaints as a driver of investigations. Specific model of 'reactive' antitrust enforcement induces large-scale enforcement as well as low deterrence, because the probabilities of enforcement errors increase together with the number of cases under investigations. Increasing the probability of Type I errors induces incentives to complain for 'law-abusers', especially under growing fines for law violations. Another negative effect of the 'reactive' model is distortion of the cases under investigation of competition authority towards [presumed] violations with high individual effects in contrast to the effects on social welfare. As a result 'over-enforcement' emerges that is typically considered as a weakness of private but not public enforcement of antitrust law.

Suggested approach explains distortions not only on the level of enforcement but also on the stage of rule-making. Recent changes and amendments of competition law of the Russian Federation are inspired by the desire of market participants to avoid the burden of wrongful convictions.

The paper highlights the importance of effect-based public enforcement, and of the impact that incentives of the authorized agency provide on the outcomes of the enforcement, and on motivation of the market

participants. Generally fruitful idea of the involvement of market participants in the absence of motivation of competition agency on the welfare effect of enforcement can degenerate easily, especially in the countries with weak traditions of competition law enforcement. Distorted incentives lead to over-enforcement and lower deterrence even with non-corrupted and high-skilled officers in the agency.

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