

Discovering the miracle of large numbers of antitrust investigations in Russia: the role of competition authority incentives¹

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Many antitrust investigations in Russia continue to present a challenge for the assessment of competition policy and international enforcement ratings. On the one hand, many infringement decisions may be interpreted as an indicator of high enforcement efforts in the context of rigid competition restrictions and the significant related harm to social welfare. On the other hand, many investigations proceed under poor legal and economic standards; therefore, the impact of decisions and remedies on competition is questionable. In fact, many investigations may indicate the ineffectiveness of antitrust enforcement.

The article explains the possible effects of antitrust enforcement in Russia. Using a unique dataset of the appeals of infringement decisions from 2008-2012, we classify the investigated cases according to their potential impact on competition. A case-level 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. There are diverse explanations for the distorted structure of enforcement, including the incompleteness and imperfection of sector-specific regulations, rules concerning citizen complaints against the executive authorities and the incentives of competition authorities. Our analysis shows that competition agencies tend to pay more attention to the investigation of cases, which requires less input and, at the same time, results in infringement decisions with a lower probability of being annulled.

Key words:

antitrust enforcement, authorities' incentives, harm, Russia

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Introduction

Many antitrust investigations and infringement decisions continue to be a specific feature of Russian competition policy. 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 Russian competition authority, the Federal Antitrust Service (FAS, hereafter), investigates more abuse of dominance cases than all other competition authorities in the world; in 2013 alone, 2,635 investigations were opened, and 2,212 were cleared. The number of abuse of dominance cases is the most impressive example; however, the FAS also leads in other quantitative dimensions, for example, by the number of dawn raids.

The contradiction between the extremely 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 very high standards of economic analysis, on the other hand, has been discussed many times (Girgenson and 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). The large number of cases is the most important obstacle to improving the efficiency of Russian competition policy.

This problem has been described many times, and several ways to resolve it have been discussed. Currently, several proposed solutions are being implemented. For example, one recent change in the Russian law ‘On protection of competition’ (Law on competition hereafter) that should take effect in the near future narrows the definition of abuse of dominance. The Law on competition specifies that only harm on a large share of certain market participants should be considered evidence of abuse of dominance; harm on a very narrow group of consumers should not be considered a violation of the Law on competition.

Among different explanations for the tendencies of the case law development, there is a standard reference to the lack of experience of competition law enforcement by competition agencies and arbitration courts that causes the misuse of antitrust legislation. Another explanation is that there is a significant demand for antitrust enforcement to support specific target groups, not to protect competition. Antitrust legislation is applied as industrial or even social policy. Examples of antitrust legislation as social policy are litigation and turnover penalties on large Russian oil companies for excessive prices of gasoline, diesel and aviation fuel under circumstances where the prices of all of these products are apparently lowest in Russia compared with other countries (Avdasheva et al, 2012). 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 and 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). This focus occurs at the expense of cases with a high negative impact on competition but a limited impact on one certain consumer. Another group of experts emphasizes the distorted incentives of officers at the FAS that involve a high importance on quantitative performance indicators (the number of investigations, number of infringement decisions, etc.).

However, it is still not clear how different factors that explain the combination of large quantities with the modest quality of decisions. All the mentioned explanations are relevant, but they cannot provide answers to the questions, i.e., what changes and amendments should be made to substantive and procedural rules and the motivation of FAS officers and what combination of measures could improve the effectiveness of antitrust enforcement.

The goal of this paper is to explain the impact of the legal framework and interpret the legal rules of competition and the incentives of authorities concerning antitrust enforcement in Russia using case-level evidence. We use the unique dataset of the claims to arbitration 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, Institution of Industrial and Market Studies, LCAL dataset hereafter). We also combine quantitative and qualitative analyses to restore the understanding of the prohibition of antitrust legislation. 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 non-satisfaction of the counterparty to the dominant supplier as evidence of harm. Important complementary legal factors are the absence of industry-specific enforcement of the rules of the final service provision by natural monopolies and transformation of this type of enforcement into antitrust enforcement.

The content of the cases shows that harm is sufficient evidence of a competition law violation and is important not only for complainants competition agencies but also for judges. 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 consider the lessons of Russian competition policy to be important to many countries with newly established antitrust legislation. The Russian experience shows the danger of emphasizing harm, irrespective of competition restriction, as evidence of a competition law violation. Another important lesson is the necessity to carefully consider competition issues and compliance with sector-specific rules in the regulated industries and the industries under deregulation.

Positive analysis of antitrust enforcement using case-level evidence

Different approaches to the analysis of antitrust enforcement are based on case-level evidence.

The first approach is the assessment of the use of economic analysis in court decisions. In particular, it is investigated whether components of economic analysis are more likely to

influence the decision. In advanced court systems, specialized courts increasingly use economic analysis. This tendency to include economics in antitrust analysis was not sudden (Kaplow, 1987). Posner (2001) emphasizes the increased demand for economic evidence concerning the competitive effects of business practices. Geradin and Petit (2010) provide quantitative and qualitative analyses of the functions attributed to judicial review. They find that the General Court (GC) has applied a demanding standard of review to Commission decisions, including issues of complex economic appraisals. Empirical data show that, despite Article 102 cases, the GC struck down a significant number of Article 101 and merger control decisions. Moreover, the qualitative analysis shows that concerning Article 101 and merger decisions, the GC has often followed an “effects-based approach”. However, in Article 102 decisions, the GC has implemented conservative treatment that relies on formalistic legal standards without considering the economic effects.

The second approach to assessing enforcement quality is to analyze the incentives to appeal decisions. In this approach, some of the literature investigates the influence of decision-making on its outcomes. A good example is the paper (Baye, Wright, 2011) investigating the effects of economic complexity or generalist judges’ economic training on judicial decision-making. Using data on antitrust litigation in the federal district and administrative courts from 1996-2006, these authors examine the influence of economic complexity on antitrust decisions. A decision is assumed to be “complex” if it includes one or more terms such as econometrics, economic analysis, expert report, regression, statistics, etc. The authors use two measures of the quality of an initial court’s decision: the party’s decision to appeal and a reversal by the appellate court. The authors find that decisions are 10% more frequently appealed in complex cases, and the decisions of judges who have basic economic training are less likely to be appealed.

Other papers analyze the influence of individual characteristics on the incentives for appeal and the success rate of appellate proceedings. Huschelrath and Smuda (2014) use data from 467 firms that participated in 88 cartels convicted by the European Commission between 2000 and 2012. First, they determine that a firm’s financial conditions influence the probability to appeal because firms in financial trouble are more likely to file an appeal². The influence of a firm’s size is controversial – larger firms have less incentives to appeal a cartel decision by the EC. Carree et al. (2010) identify determinants of appealing EC decisions on the case and firm level using a similar dataset. They show that the level of fine, the decision length and the number of parties to which the decision is addressed are persuasive factors to file an appeal. Based on the data from European appellate courts from 1995 to 2004, Harding and Gibbs (2005) suggest that there are two groups of arguments for appeal. The first argument is that the Commission’s evidence is insufficient to establish the alleged activities; the second argument involves the legal and/or procedural defects in handling the case.

Concerning the characteristics of successful appellants, Huschelrath and Smuda (2014) find that ‘substantive reasons’ and ‘errors in the calculation of the basic amount of the fine’ lead to the largest fine reductions. The level of success increases with the size of the final fine imposed. Repeat offenders are encouraged to file an appeal because, in the case of success, they can expect larger fine reductions. Günster et al. (2010) empirically investigate all Commission decisions under Articles 81, 82, and 86 of the European Community Treaty between 1957 and 2004. They find that the length of the Commission decision, the number of accepted complaints, the number of judges and whether the case is grouped into one case are important factors for the

² Companies that have financial difficulties are more likely to obtain a fine reduction (Geradin, Henry, 2005).

likelihood of filing an appeal. In our paper, we use a similar approach to combine qualitative and quantitative analyses of enforcement.

Despite the significant variety of research questions analyzed, we remain aware of no evidence for the role of case selection for antitrust investigations and the influence of case structure on the approach of antitrust enforcement. However, it is especially important to the enforcement of antitrust provisions that the executive authority choose the cases to be investigated to achieve deterrence and improve the general welfare.

Data and methodology

Data on commercial (arbitration) court decisions

The following are the two sources of data for the decisions in antitrust cases in the Russian Federation:

- Decisions of the antitrust authorities, including the central office and regional sub-departments of the Federal Antitrust Service RF; and
- Decisions of the arbitration (commercial) courts RF (from the first instance onward to the decisions of the Supreme Arbitration Court), on the claims to annul the infringement decisions of the FAS.

Both sources of data have their own comparative advantages. On the one hand, the decisions of the FAS should contain more information regarding the standards of evidence that are applied during investigations and decision-making. However, an important drawback of the FAS decisions for statistical analysis and comparison is that they are not uniformly structured in contrast with court decisions, and this makes processing the information more difficult. In addition, the compliance of competition authorities to make the decisions publicly available is still imperfect in contrast with information concerning commercial court decisions. An analysis of all cases is impossible, and it is difficult to estimate the magnitude of the bias of the sample. Decisions of the Russian commercial courts are not only publicly available but also presented in a unified manner.

Data coverage

Our sample covers apparently all the decisions made by arbitration courts in the Russian Federation. Compared with all the decisions of competition authorities, there is a systemic bias in the sample of cases collected from arbitration court decisions. First, this bias favors infringement decisions. Second, the sample is skewed in favor of cases where a party whose infringement is found considers the decision imperfect, and an appeal is potentially successful. In this respect, the average case in our sample may represent a lower quality than the average FAS decision because it increases the chances that the infringer will appeal the decision. However, we can expect that the second type of bias will not be extremely high in magnitude. Because of the extremely low cost of appeal, the trial cost indemnification rule and the relatively high rate of successful appeals of the decisions of antitrust authorities, it is reasonable that most decisions are appealed. Because most decisions are appealed, 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 and appeals in the arbitration courts					
Infringement decisions made ⁽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 submitted in the arbitration courts of the first instance	337	648	962	1187	796
- on abuse of dominance (art. 10)	285	499	753	959	695
- on horizontal or vertical agreements, concerted practice (art. 11)	53	150	209	228	101
Structure of the infringement found (art. 10)					
Natural monopolies (companies in regulated industries), %	79,65	64,93	76,49	49,74	62,16
- cases on interconnection and access of competitors, %	10,53	4,81	10,49	8,45	8,92
- cases on non-compliance with the rules of final service provision, %	69,47	60,12	66,80	41,29	53,24
Cases on interconnection with sub-subscribers, %	11,93	17,64	13,41	9,80	9,93
Role of third parties in litigation					
Hearings where third parties appear in person, %	61,72	55,09	56,55	50,88	43,47
Decisions of the arbitration (commercial) courts of the first instance					
Infringement decisions annulled (completely or partially) in the courts of the first instance (%)	51,34	42,75	41,27	37,91	32,91
Appeals of the decisions of the courts of the 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
Average time final decision takes (in months, mean, standard deviation in parentheses)	9,36 (7,05)	9,83 (7,4)	9,78 (6,8)	10,76 (6,85)	10,21 (6,54)

Source: LCAP database, data of the Federal Antitrust Service RF ⁽¹⁾.

A large number of infringement decisions have a high ratio of claims to annul them in the arbitration courts of the first instance and then to the higher courts (more than $\frac{3}{4}$ of the decisions 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 arbitration courts. During the entire period, Russia's arbitration courts provide us with rapid decisions; on average, it takes less than one year on the case to obtain the final decision of the Supreme arbitration court of the Russian Federation. However, this duration is much longer than the time necessary for the FAS to decide the case (the average duration of abuse of dominance investigations is only 3 months). Table 1 demonstrates 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 arbitration courts; in turn, the higher courts reversed the lowest share of decisions of the first instance courts.

Research strategy

To describe and explain the essential features of the standards of proof of competition investigations, we combine qualitative and quantitative analyses. Using the decisions of the arbitration 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 competition, 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 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 made³;
- 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. The second group of qualitative characteristics 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; and
- there is additional information in the dataset (for example, the characteristics of the competition authority and arbitration court in a given region), but we do not address this information because it is not relevant to the purposes of the paper.

We begin with a quantitative description of the structure of infringement decisions to show a ‘typical’ or ‘average’ decision in Russian arbitration. For every group, we describe typical

³ The litigation on the annulment of decisions of administrative authorities allows us to consider the duration of litigation as a relevant indicator of efforts. The Russian arbitration courts are limited by rigorous procedural rules of hearings and are incentivized for minimum backlogs. The only reason to postpone a hearing is on application by either party. In turn, there are only two reasons for an application for postponement: the necessity to become familiar with the evidence presented by the other party or the necessity to present additional evidence (including specialized expertise requested by the party or judge). Longer court proceedings mean greater efforts to collect, present, and discuss the evidence.

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 empirical hypothesis is that *alleged violations that dominate in the structure of antitrust investigations require less resources from the competition agency and provide higher performance indicators.*

Structure of cases: restrictions on competition compared with the harm imposed

Abuse of dominance: alleged non-compliance with the rules of service provisions by natural monopolies

Table 1 shows that the largest portion of cases considered by arbitration courts involve alleged violations by natural monopolies⁴. The evidence corresponds well to the data of the FAS; according to the annual reports ‘On Competition and Competition policy in the Russian Federation’, 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).

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. Typical examples follow⁵.

Case A35-6556/2012⁶

In 2011, an antitrust investigation against OJSC "Samaraenergo" was initiated. The investigation was based on the complaint of G, and the company was suspected of violating the antitrust laws by non-use of the reduction coefficient of 0.7 in calculations of the price for electric energy consumed by each household. The FAS found the company guilty of abusing a dominant position (part 1 of article 10 of the Law in competition) by imposing a harm on the consumer.

Case A32-5081/2012

In 2012, an antitrust investigation against OJSC "NESK-elektroseti" was initiated. The investigation was based on the complaint of T, A, H and P for the company’s delay in providing conditions and specifications for the technological interconnection of power receivers that belonged to the group of households. In the court decision, it is clearly mentioned that this delay

⁴ The Russian law ‘On natural monopolies’ includes a list of activities with the relevant legal status. However, we also include in this group cases against the participants of the industries that are subject to direct price (or mark-up) regulations (for example, wholesale and retail trade of pharmaceuticals). Here, we use the similarity of the alleged violation.

⁵ The names of the complainants in the following paragraphs are indicated by first letters.

⁶ This is the identification number of the case in the arbitration court of the Russian Federation. This number indicates the arbitration court of the first instance, a two-digit number – subject of the Russian Federation (for example, 35 – Samara) – then, the number of claims to the arbitration court and year.

does not comply with the “Rules of technological connections of the power receiving devices of electricity consumers” that was approved by Government Resolution dated December 27, 2004 No 861. The regional sub-department of the FAS found the company guilty of abusing a dominant position in the form of infringement on personal interests. The company was ordered to stop the violation, perform actions according to the Rules (to provide the interconnection) and inform the antitrust authority regarding these actions.

Case № A76-8002/2012 and case № A76-3247/2012

Two antitrust investigations against "Gazprom Mezhhregiongas Chelyabinsk", LLC (a regional supplier of gas and a Gazprom subsidiary) occurred in 2011-2012. The Chelyabinsk OFAS Russia considered it a violation of antitrust law to use the take-or-pay principle that includes penalties for undertaken (case № A76-8002/2012) and overtaken volumes of gas (case № A76-3247/2012) in long-term gas supply contracts with industrial customers. The antitrust authority argued that these terms cause losses to gas consumers and can be classified as a violation of paragraph 10 of part 1 of article 10 of the Law on competition. In both cases, the company was ordered to stop the violation of the antitrust law and correct the terms of the contracts. Interestingly, during the period when the alleged violation occurred, the law ‘On gas’ prescribed certain penalties for under- and overtake, and there was no information that the regional supplier’s rates exceeded the tariffs established by the regulator.

The common features of the described example and all similar decisions of the FAS is that, first, 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 dominant position 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. Sometimes the alleged violation may be a technical mistake in a contract term (A35-6556/2012), and sometimes it may be a sign of a low quality of service (A32-5081/2012). Sometimes the alleged violation represents contract terms implied by the current law to discipline consumers (A76-8002/2012, A76-3247/2012) in planning demand.

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 contract terms. In this context, the advantage of antitrust legislation is fairly large turnover 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 fined.

Abuse of dominance: conflicts on interconnections with sub-subscribers

It is a common situation when one organization (A) connects to a network through a device located at the premises owned by another organization (B). 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).

Here, we present several typical cases where one side of this conflict (A) appeals to the antitrust law to strengthen its position. The base contains 400 cases of this type, including interconnection of electric power lines, heating networks, water supplies and sanitation networks. These cases are considered by the FAS as antitrust cases involving a dominant position (in the form of a restriction of access to a network, by charging excessive prices, etc.). The dominant position of the accused organization (B) is usually reached by a narrow definition of the market. In these cases, it appears that the essential facilities doctrine is applied to non-antitrust cases.

Case A53-1656/11

The business of M is supplied with electric energy by LLC “Donelektrosbyt”. The power receiving devices of the entrepreneur are connected to the electric network through the transforming substation located on the property of CJSC "Azovobuv" (shoe factory) and with the use of the local power network owned by this company. One day, the company suddenly disconnected the entrepreneur without any prior notification. In this regard, M initiated an antitrust investigation against CJSC "Azovobuv".

The competition authority concluded that the company "Azovobuv" was the only supplier of electricity on the market within the boundaries of the area covered by its network. Thus, the dominant position of the company was recognized. Moreover, the company was considered a “natural monopoly” on the market. The FAS concluded that "Azovobuv" violated part 1, article 10 of the Law "On protection of competition". The company was ordered to restore the connection within five days from the receipt of the remedy and to resume the supply of electrical energy.

Case A13-3603/2011

This antitrust case was initiated against LLC "Factory "Krasnij tkach" (textile factory). The facilities of the individual entrepreneur S are connected to heating and electric supply systems through the local network owned by the Factory. The company and S concluded a contract for the transit of heat and electricity. The company charged S the costs for transit of thermal and electrical energy. However, the rates were different from the regulated tariffs established by the authorized state body for the supply of energy by a local provider, and this difference led to conflict.

The antitrust authority defined the geographic markets in boundaries within the territory covered by the networks owned by LLC "Factory "Krasnij tkach" because rates of alternative suppliers were higher by more than 10% (this difference explains why S continues to use the intermediation of the factory). The FAS concluded that the Factory had a dominant position on the market and that it violated part 1 of article 10 of the Law “On protection of competition”. The FAS issued a remedy and ordered LLC "Factory "Krasnij tkach" to transfer the ‘income received from illegal monopolistic activity’ to the state budget. Therefore, monetary sanctions were applied to the supply of a sub-subscriber by the rates, which historically were lower than those in the region.

The common feature of this group of cases is that local networks were defined as relevant antitrust markets. Automatically, the owner of a local network becomes ‘dominant’ with his own

facilities. Then, the approach described in the previous section is applied: any broadly defined harm is considered an abuse of dominance.

Concept of harm in the antitrust cases

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 Federal Antitrust Service. Harm is an independent proof of violation (without any evidence concerning actions that restrict competition) in more than $\frac{3}{4}$ of the claims submitted (more precisely, in 77,55%). From this group, in 85,28% 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 assessment of 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 competition law.

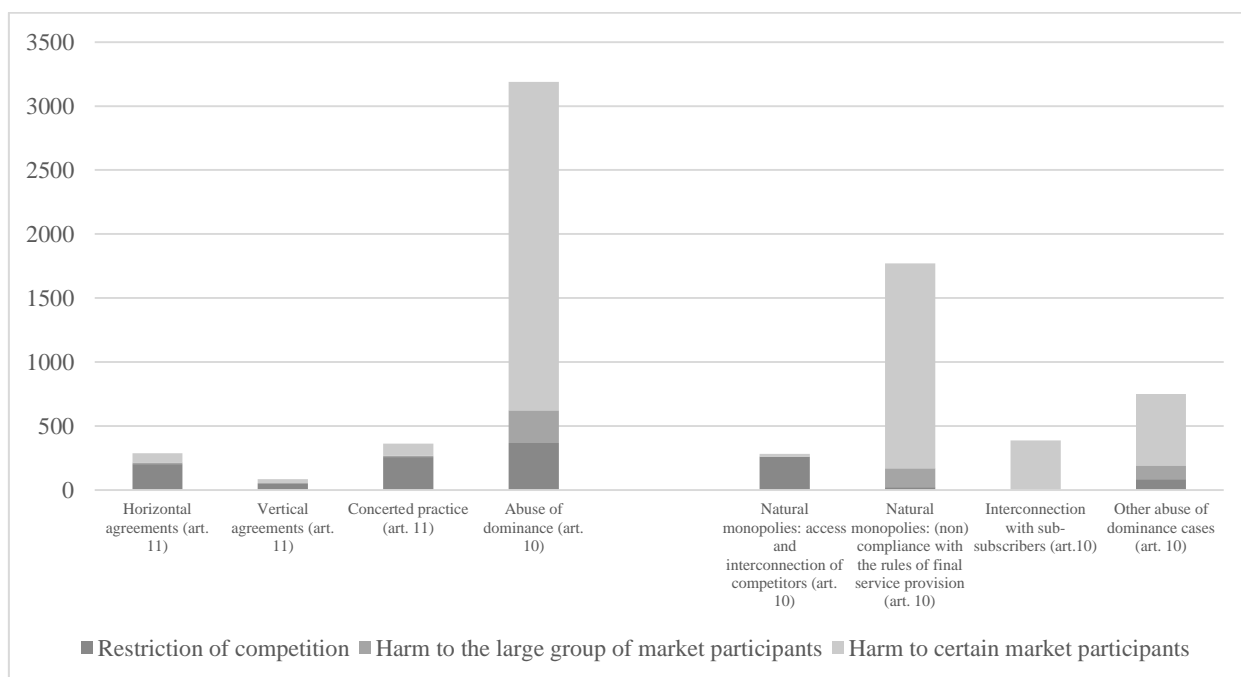


Fig. 1. Structure of decisions by the primary infringement evidence across presumed violations

Source: LCAP database

The structure of infringement decisions by the Russian antitrust authority explains the limited positive effects of enforcement. Most cases have little in common with restrictions of competition. Without exaggeration, we can say that a large part of the investigations would never be opened under a conventional understanding of the objectives and methods of antitrust

legislation. The many investigations that are devoted to these cases, which do not concern competition, create several negative spillovers. First, these standards of proof of violation of antitrust legislation consider harm to a certain group of market participants as a *sine qua non* requirement. As a result, it could be much more difficult to prove a violation of antitrust legislation in the case where harm cannot be proved with the testimony of a given victim. Ironically, it makes it much more difficult to prove a violation in the form of collusion if dispersed consumers do not realize the harm imposed on them. Second, because of the scarce resources of the competition authorities, a large number of antitrust investigations limits the depth of economic analysis in each investigation and contributes to the decrease of standards of evidence not only in the authorities but also in the arbitration courts.

To improve the effectiveness of competition enforcement, it is necessary to explain the incentives for competition authorities to investigate the cases, which evidently have no impact on competition (in addition, we will refer to ‘non-competition’ cases compared with ‘competition’ cases). One explanation is the importance of complaints in Russian administrative legislation. The Law ‘On the rules of working with citizens’ complaints’ (2006) makes it obligatory for any civil servant to react on a complaint (in the form of investigating the alleged infringement or writing a motivated refusal to investigate). The Law has credible sanctions for non-compliance. The procedural rules of addressing complaints explain why Russian competition authorities investigate complaints more often than other competition authorities in the world⁷. The procedural rules explain the large number of complaints because the probability of obtaining an infringement decision with a remedy that almost guarantees the favorable change of contract terms is sufficiently high. Therefore, the expected gains from a complaint are high.

Data on the litigation under claims to annul infringement decisions confirm the importance of complainants. In more than half of the cases, a third party (that is, typically, the complainant) participates in court hearings in person (despite the fact that procedural rules allow the consideration of a case without the personal involvement of the third party). Complainants more often participate in cases when the harm to an individual (in contrast with harm to a group) is in question (53,5% with participation of the third party in contrast with 39,58 with no participation of the third party).

A limited number of claims submitted to annul FAS decisions ask to reject complaints; this small number stresses the importance of this group in enforcement. The refusals to investigate are motivated by the absence of evidence of antitrust violations according to the results of the FAS preliminary assessment. After reviewing the texts of the decisions, we find this position reasonable because in the majority of cases, violations of the terms of contracts or specific guidelines in regulated industries are claimed. The typical example is **case №A60-783/2011** in which a housing cooperative addressed the FAS with a complaint against a thermal power generating company that limited its supply of hot water to certain houses. The antitrust authority refused to investigate and reasonably argued that there was no evidence of any restrictions of competition and/or imposing harm because of the restrictions of competition in the case.

Cases of this type are rare in our sample, and the dynamics of their appearance is not optimistic. There are 88 cases that claim the FAS refused to investigate a complaint. The number of claims substantially increased from 14 in 2008 to 41 in 2010 and then decreased to 5 in 2011 and 2 in

⁷ According to FAS statistics, from 2008-2012, approximately 96 thousand complaints were submitted to FAS regional sub-departments, and 25 thousand investigations were opened. These results mean that every 4th complaint is investigated in Russia compared with every 10th complaint investigated by the European Commission (Gual, Mas, 2011, p.220).

2012. However, the fact that a complainant can support its complaint by the court decision increases the importance of complainants and their incentives in antitrust investigations. The majority of the claims (72 of 88) were rejected in the first instance. However, 40 of these decisions were appealed, and in 6 cases, the decision of the first instance court was reversed by the higher court. The rights of complainants are supported by the Russian arbitration courts.

Impact of ‘competition’ and ‘non-competition’ cases on the cost and performance indicators of competition authorities

A statement that most of the investigations of infringement in Russian competition policy would never be initiated under the conventional understanding of the objectives and methods of competition policy is important but insufficient. The explanation of the role of complainants (Avdasheva, Kryuchkova, 2014) is also incomplete though important; obligations to respond to complaints do not limit the ability of competition authorities to initiate investigations and make decisions *ex officio*. Scarce resources, which are also limited by the necessity of analyzing complaints, may explain weak standards of analysis but not the prevalence of cases on harm in the overall population of investigations. An important part of the explanation lies in the incentives of the officers in competition agencies.

Many experts mentioned that officers in competition agencies are incentivized by the quantitative indicators of their activity, more precisely, on the number of decisions made and especially on the amount of decisions that were not challenged by the arbitration court (Paneiakh, Novikov, 2014). Under performance indicators of this type, agencies 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 arbitration 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 arbitration 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 of a Law on competition violation 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 of a Law on competition violation.

H2. Infringement decisions where harm is independent evidence of a Law on competition violation require less evidence and make it easier to prepare ‘economic analysis input’.

The evidence confirms H1 fully. We can observe that:

- (1) decisions on abuse of dominance (art. 10) are less frequently annulled compared with the decisions on agreements or concerted practice (art. 11) (fig. 2a);
- (2) among the decisions on abuse of dominance (art. 10), those that consider conflicts with sub-subscribers and non-compliance with the standards of service provision with final customers are less frequently annulled compared with the decisions on the interconnection of competitors and other infringement decisions under art. 10 (fig. 2b); and

(3) among other decisions on abuse of dominance, those that consider the harm as independent evidence of a violation are annulled less frequently (fig. 2c).

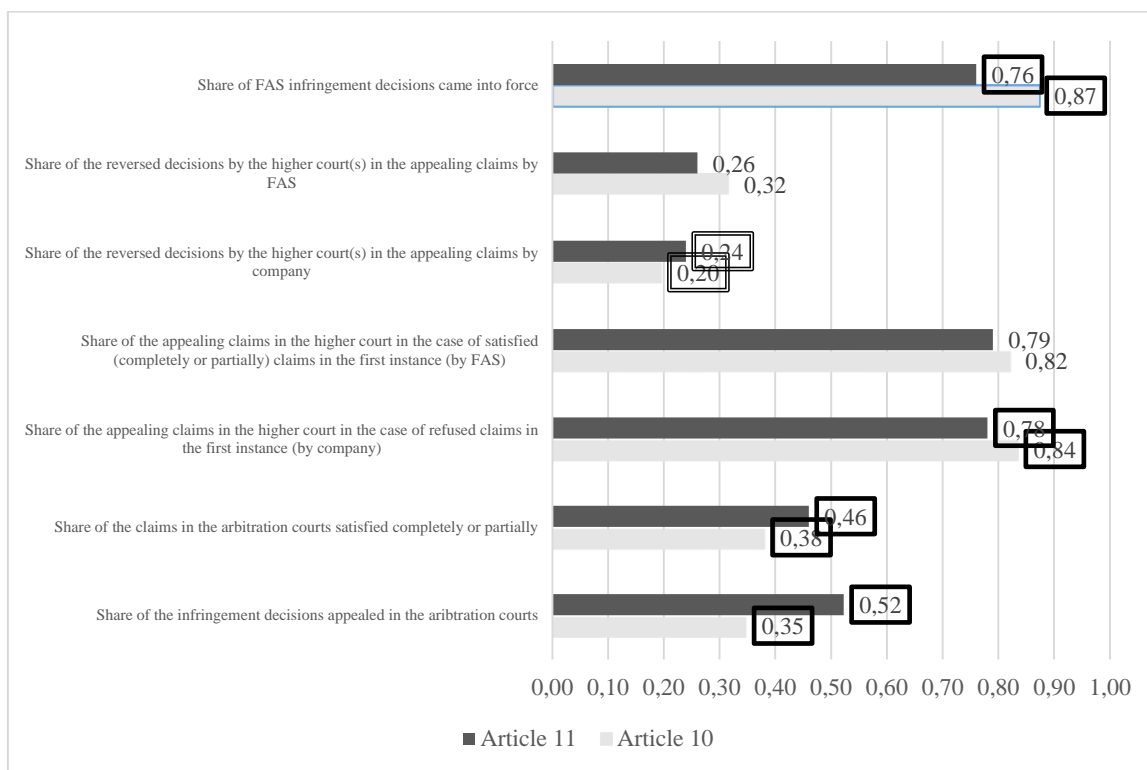


Figure 2a. Determinants of the probabilities for the infringement decision to take effect: articles 10 and 11 compared

Bold frame indicates significance at the 1% level, double frame indicates significance at the 10% level (according to χ^2)

Source: LCAP database

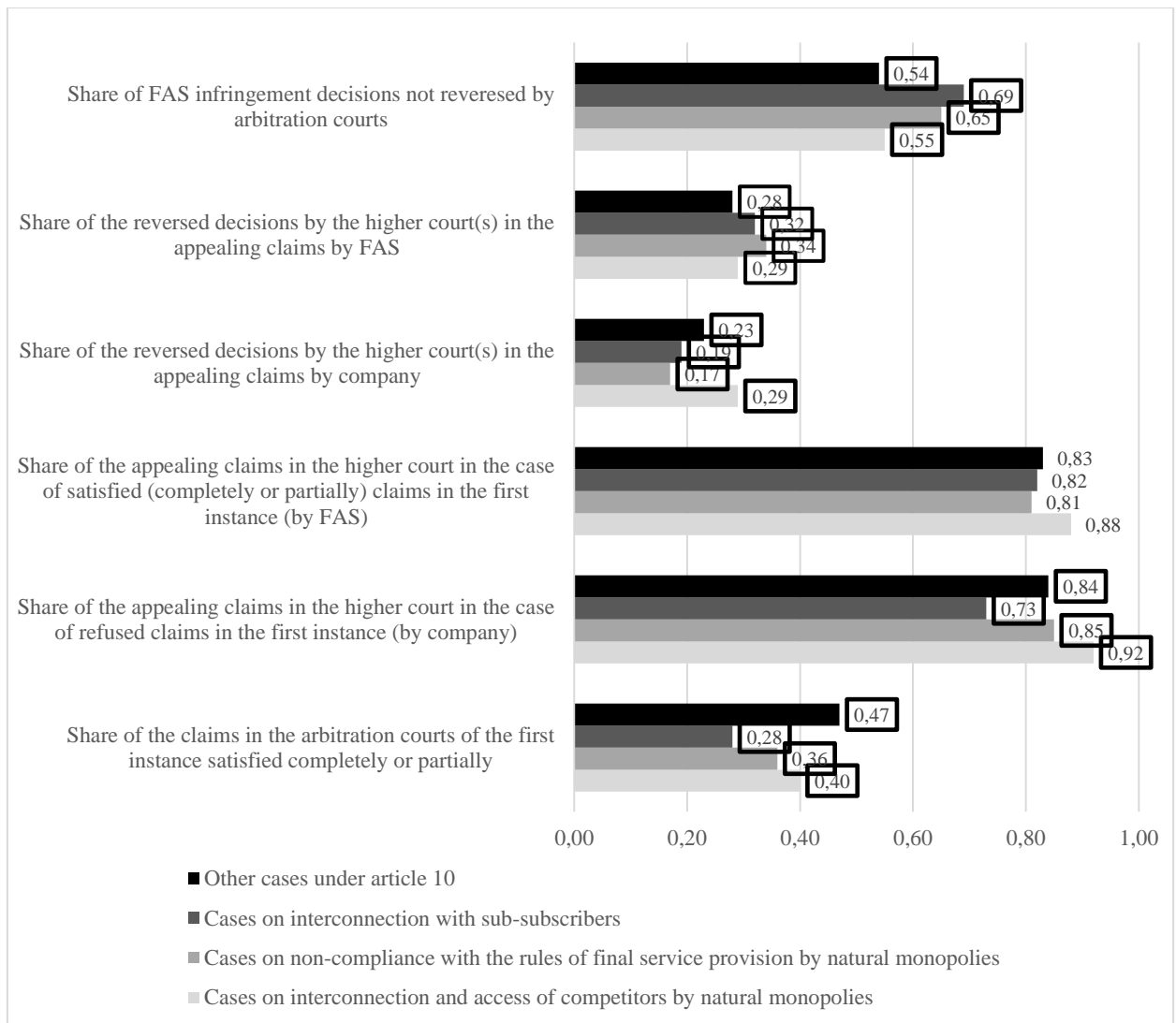


Figure 2b. Determinants of the probabilities of the infringement decision under art. 10 to be reversed by the arbitration courts: content of decisions compared

Bold frame indicates a difference significant at the 1% level (according to χ^2)

Source: LCAP database

The difference occurs because of the decisions of companies to appeal (for art. 10 vis-à-vis art. 11) and the decisions of the arbitration courts of the first instance and the higher courts (for all groups compared). In addition, for infringement decisions on conflicts in sub-subscribers' cases, companies also less frequently appeal the unfavorable decisions of the first instance. The explanation for this regularity would not be obvious under a conventional understanding of the objectives of competition law. The regularity becomes clearer considering the significant importance of harm as evidence of violation, without causal links between restrictions of competition and the harm imposed, and with the testimony of the alleged victim as the main evidence of violation.

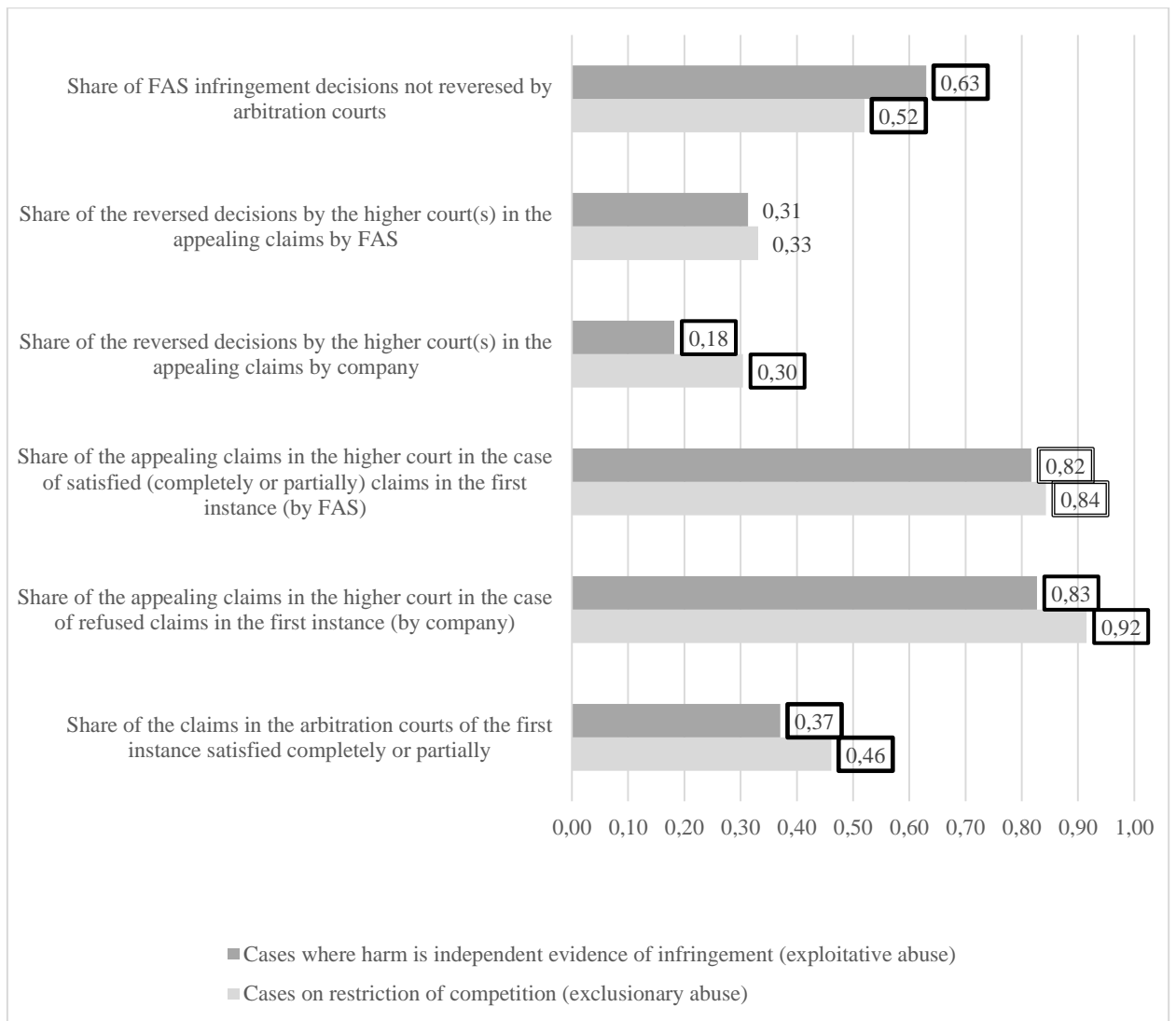


Figure 2c. Determinants of the probabilities of the infringement decision under art. 10 (infringers are not natural monopolies and/or companies in conflict with sub-subscribers) to be reversed by the arbitration courts: content of decisions compared

Bold frame indicates difference at the 1% level, double frame indicates difference at the 10% level (according to χ^2)

Source: LCAP database

For the judge, the concept of competition and protection of competition is less understandable than the concept of harm. 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 so easy with the concept of harm as independent evidence. Judges consider norms of the Law on competition 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).

At first glance, the results of H2 testing are mixed (see Table 2). On the one hand, time spent to obtain a final decision generally negatively correlates with the share of the decisions annulled across types of violations. The consideration of a typical abuse of dominance case 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 on interconnection and access for competitors and service provisions to final customers. This result holds for all cases and for the sub-population of cases, where either party appealed the decision of the first instance.

Interestingly, the indicator of number of pages in the decision (despite the overall ambiguity of the indicator, both technically – the design of the text is specific to the regional court – and substantively – the length of the text poorly captures the cost to obtain a decision) also correlates with both the time necessary to obtain the final decision (positively) and the probability the decision will be reversed (negatively).

On the other hand, there is no evidence that cases that concentrate on harm systematically require less input in terms of evidence. There is no reason to comment on the share of cases where specialized expertise is involved; it is extremely low across different types of alleged violations. Only two indicators seem to be informative: the application of the Guidelines for market analysis and competition assessment and the calculation of market share. The Guidelines were developed by the FAS, and their application is necessary by law for all investigations of abuse of dominance. The Guidelines generally follow ‘structure-conduct-performance’ logic; most attention is given to the delineation of market boundaries, both product and geographical, to the calculation of market shares and concentration indexes and then, to entry barriers. The Guidelines are important for not only competition officers but also the companies requesting the annulment of infringement decisions, especially the qualification of dominance. Recently, the development of economic analysis in Russian arbitration courts has been concentrated on the application of the Guidelines. However, we can observe that the Guidelines are applied more often in the cases concerning agreements (especially vertical agreements) rather than in cases of abuse of dominance. One explanation is that according to the rules, the application of the Guidelines is not obligatory for investigations against natural monopolies. At the same time, we consider the wide application of the Guidelines an important sign that economic evidence from both sides of the litigation is concentrated on the structural features of the market. In this respect, market analysis is ‘old-fashioned’ both in the FAS and the courts. Finally, in explaining the ‘excessive’ use of the Guidelines and relevant market analysis in the FAS decisions, we should mention one more important feature. For the group of cases with weak or no links to competition restriction, market analysis is simple. 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.

To conclude, the results of our analysis confirm the hypothesis 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 conventional 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.

Table 2. Indicators of resources spent under different groups of infringements

	Time of proceedings in the arbitration court, months (mean, st. dev in parentheses)		Pages in text of the first instance decisions*	Share of the decisions where guidelines for market analysis and competition assessment applied by either party are mentioned, %**	Share of the decisions where market share calculated by FAS is mentioned, %	Market share calculated (mean, st. deviation in parentheses) ¹	Share of the decisions where specialized expertise provided to FAS is mentioned, %	Share of the decisions where expert provided by the claimant 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)	11,04 (6,68)	11,34	4,47	63,70 (32,83)	5,15	1,72	1,37	0,00
Vertical agreements (art. 11)	9,37 (4,74)	10,61 (3,86)	10,06 (4,68)	13,95	10,47	80,45 (25,03)	3,49	3,49	1,16	0,00
Concerted practice (art.11)	11,81 (7,45)	12,88 (6,74)	11,93 (6,04)	25,00	4,95	63,36 (24,28)	5,77	1,10	0,55	1,37
Abuse of dominance (art. 10)	9,96 (6,03)	11,09 (5,77)	9,98 (4,87)	16,55	14,29	85,65 (22,78)	2,98	0,91	1,35	1,32
<i>Including</i>										
Natural monopolies: access and interconnection for competitors	11, 81 (6,02)	12,65 (5,64)	10,26 (4,87)	15,96	14,89	84,99 (24,10)	1,42	1,77	1,42	2,13
Natural monopolies: (non) compliance with the rules on final service provision	9,43 (5,76)	10,45 (5,53)	9,75 (4,56)	9,43	9,48	84,62 (22,39)	2,81	0,72	0,83	1,05
Interconnection with sub-subscribers	9,13 (5,93)	10,81 (5,93)	9,45 (4,48)	13,70	15,76	95,39 (15,08)	1,55	1,55	1,29	0,26
Other abuse of dominance cases	11,09 (6,22)	12,61 (5,89)	11,23 (5,63)	12,06	4,28	68,92 (24,95)	5,84	1,56	1,56	0,00

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

¹ Calculated market share refers to the dominant company in the cases of abuse of dominance and also can refer to the share of the largest market participants in vertical agreement cases; otherwise, market share refers to the overall share of the group of infringers (in horizontal agreements, concerted practice and likely vertical agreement cases).

Conclusions and policy implications

The analysis of the Russian competition authorities' decisions appealed in the arbitration 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.

In most of the abuse of dominance cases, violators are public utilities, and the alleged violation is non-compliance with the rules of retail service provisions. Incompleteness of the system of conflict resolution concerning service provisions by public utilities creates a demand for any rules that can help. Concerning antitrust legislation, two important sources of inappropriate application are the following:

- (1) the presumption that any harm imposed by a dominant company on its counterparty represents abuse of dominance; and
- (2) the interpretation of the harm to any number of counterparties (to one customer in extremis) as evidence of abuse of dominance.

Many cases on public utilities' service provisions and the evidence that this group of cases attracts generally the same amount of resources explain very limited and superficial economic analysis across all cases. However, under a perceived interpretation of antitrust law, a concentration on the interpretation of structural features of the market should be the best approach.

The same understanding of harm and abuse of dominance is employed in the second specific group of cases on 'abuse of dominance' as conflicts between sub-subscribers and subscribers of the services of utilities. The conflicts concerning the owner of a network in a single building and his (her) sub-subscribers are considered interconnection issues that involve abuse of dominance. This interpretation of these conflicts is based on the idea that every operator of a network (no matter how small the network is) dominates the network.

The prevalence of cases with evidence of harm as sufficient evidence of abuse of dominance, including harm to very small groups of counterparties, also affects the enforcement outside natural monopolies and networks. Cases on abuse of dominance, where utilities and/or owners of a local network are involved, generally attract the same amount of resources and employ the same approach to prove the infringement. Infringement decisions in the 'normal' markets are often based on a very formal understanding of harm. In contrast, harm to *any part of the customers and/or suppliers* is considered sufficient proof of the abuse of dominance. This approach opens the door for numerous false convictions and the erosion of the standards of economic analysis.

The statistics of enforcement allow reconstructing the incentives of competition agencies and partially those of judges. First, there is no indication of a cost-benefit analysis at the stage of case selection for investigation. Considering a case for investigation and potential infringement, decision officers in competition agencies consider individual expected costs and benefits. Procedural rules regarding reactions to citizen complaints explains the high number of opening complaints. The orientation on this performance indicator 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 arbitration 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 incentives of competition officers, large-scale antitrust enforcement in Russia may coexist with difficult competition restrictions and relevant harm to the consumer. In addition, antitrust enforcement in Russia may have a very low deterrence effect that causes substantial harm to consumers and social welfare.

There is no magic key to improve antitrust enforcement. Several steps are important and concentrate on the phase of *case selection* for antitrust investigation. Only by changing the principles of case selection, it is possible to avoid excessive enforcement and improve the standards of analysis by competition agencies.

The first and most important changes should be connected with the legal framework of the incentives for the competition agencies and the complainants to competition agencies. Discretion of the agencies should be extended and penalties for not opening investigations should be removed. Without discussing whether the strict rules on the liability of public servants for their non-reaction to complaints are useful in other fields of public control and supervision, we recommend removing them from the procedures of antitrust enforcement. Any indicators based on the number of investigations should also be removed from performance indicators of competition agencies. The enforcement by competition agencies should use quantitative indicators carefully, but possible indicators should estimate antitrust effects in terms of welfare gains (welfare losses avoided).

Concerning the incentives of the complainants, opportunities for private enforcement can compensate for the limited opportunities of complainants in the framework of public enforcement. Russian legislation excludes and even allows private enforcement of antitrust legislation without any reference to competition agencies.

At the same time, the typical authors of complaints under the structure of investigation by competition agencies do not need any compensation for the limitation of their rights in the framework of antitrust legislation. The most important incentive for the majority of complainants is the possibility to obtain goods and services of public utilities according to established standards. Monitoring and conflict resolution of the service provisions of public utilities should be removed from antitrust enforcement. One option is to allow special agencies in the regions or municipalities to monitor the quality of the provision for regulated services, including collection of and reaction to complaints.

Other complainants who do not need any compensatory measures are the parties to the conflicts concerning the interconnection to limited networks. These complainants only need to better arrange their contractual relations and enforce them in the framework of the civil process, not in antitrust legislation.

The other measures, which have been partially undertaken by Russian legislators, is the improvement of the legal definition of harm as evidence of abusive behavior. Recent changes (developed at the beginning of 2015 and not yet adopted) in the Law on competition are intended to clarify that only harm to the customers that represent a sufficiently large portion of the demand constitutes evidence of abusive behavior.

Merely changing the law cannot substantially improve the legal approach, but expected amendments lead to development in the right direction.

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