Models of Monopoly in the Quarter-Century Development of Russian Competition Policy: Understanding Competition Analysis in the Abuse of Dominance Investigations

Svetlana Avdasheva

Abstract The article explains an approach to the economic analysis in antitrust enforcement in Russia during 25 years of development. Based on adoption of European-style competition rules it is worth seeing how the industrial organization and competition economic models are applied during transition from socialist to market economy. The most specific feature, among the standards of enforcement, is the prevalence of enforcement against unilateral exploitative conduct of a large company that is not directly related to the restrictions of competition. Not only harm but individual harm is central and often sufficient evidence of competition legislation violation. Both the intellectual and technological legacies of transition, industrial structure of the economy and supportive institutions explain the unique application of theoretical models as a background for the actions of Russian antitrust authority.

Keywords Competition enforcement • Abuse of dominance • Exclusion • Exploitation • Russia

1 Introduction

In 2015, the Federal Antitrust Service (FAS) celebrates the 25-year anniversary of the adoption of the Russian Federation's first antitrust law and the establishment of an authority. Competition protection by the FAS has substantially advanced for the last quarter of a century. Today, the FAS is among the world's largest competition authorities with vast responsibilities in different areas of competition policy, which expand constantly. One step further has been done by State Duma (Russian

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S. Avdasheva (✉)
National Research University, Higher School of Economics, Moscow, Russia
e-mail: avdash@hse.ru

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Parliament) in summer 2015 by subordinating responsibility for tariff regulation to FAS from the Federal Tariff Service. The reorganization of tariff regulation reflects the belief in superiority of antitrust authority performing that task in addition to other responsibilities.

Simultaneously, the enforcement of Russian antitrust law 'On protection of competition' is very specific. The European provisions are blueprint for Russian competition legislation. The content of central articles in competition law is nearly a precise translation of the relevant rules of the Treaty of Rome. Article 10 of the law prohibits the abuse of a dominant position in the same way as article 102 of the Treaty on the Functioning of the European Union (TFEU), whereas articles 11 prohibits horizontal and vertical agreements and concerted practice, as art. 101 TFEU does. There are however major differences in the implementation.

First of all, according to the Rating Enforcement, Global Competition Review, FAS investigates more cases on abuse of dominance than all other competition authorities in the world together. In 2013 alone, 2635 investigations were opened, and 2212 investigations were cleared. The scale of enforcement is very large.

Second, the enforcement structure is skewed, in a four time proportion, towards investigations and decisions on the abuse of dominance in contrast to agreements. A ban on exploitative abuses, which is a specific feature of European competition rules (Vickers 2008), is applied very often in Russia. In the predominant part of decisions on art. 10 harm to the consumers or counterparties is sufficient evidence of law violation. Moreover, enforcement against an abuse of dominance tends to substitute relevant analysis of horizontal and vertical agreements. For example, the competition authority treats coordination among large sellers as an abuse of collective dominance in the form of excessive prices (Avdasheva et al 2012).

In general, Russian competition policy considers the antitrust enforcement to work as a tool preventing effects of exploitative conduct of dominant company. Furthermore the most important enforcement targets are not related to competition restrictions.

The peculiarity of enforcement, as well as demand of enforcement on economic analysis, deserves explanation. One basic factor is that competition law was imported or 'transplanted' to post-Soviet Russia within the package of liberalization reforms. Import of institutions often results in unexpected outcomes, mainly because it presumes the introduction of not only a new system of rules but also supportive enforcements that might be quite difficult or even impossible (North 1990). Human history provides many examples of failed attempts to import specific institution. Moreover, institution may be substantially transformed during the process of import (North et al. 2009). Russian competition legislation is an example. This chapter attempts to explain the specific path of transformation of provisions on abuse of dominance and anti-competitive agreements in the Russian antitrust.

The success of legal transplants depends on whether they are receptive (Berkowitz et al. 2003). A transplant is receptive when the importing country is able to fill the general legal framework taking into account domestic environment and developing effective domestic enforcement institutions. The question that

deserves an answer is comparative contribution of the demand for enforcement, on the one hand, and supportive institutions, on the other, in the explanation of legal rules evolution. This chapter also attempts to fulfill this task.

Analyzing different explanations of demand for antitrust enforcement and the underlying economic concepts, I distinguish three groups of factors. The first group comprises factors that are specific for Russia as an economy in transition, with the legacy of resource allocation under central planning and a difficult transition period. The second group consists of factors that are specific for Russia as a BRICS member and therefore as a large economy with a relatively high level of industrialization; economy that participates in the international division of labor with low-processed raw materials. The third group comprises factors that are country-specific in different dimensions, including the underlying administrative legislation and public policy organization.

This chapter is organized in the following way. Section 2 is devoted to different groups of factors that affect the understanding of the objectives and instruments of antitrust enforcement against the abuse of dominance and anticompetitive coordination. Section 3 summarizes the effects of specific economic and institutional environment on the standards of economic evidence under the enforcement against abuse of dominance and coordination. Section 4 contains examples of the groups of investigations and decisions, which have been affected by specific approaches to competition analysis during the last 25 years. Section 5 compares the conventional application of economic theory (particularly as implications of industrial organization, transaction cost economics and law and economics) with an application of economic theory in Russian antitrust enforcement. Section 6 provides a conclusion.

2 Economic and Institutional Environment of Antitrust Enforcement Development in Russia

2.1 Concept of Welfare Losses Due to Monopoly vs. Welfare Losses Due to Restrictions of Competition

Antitrust enforcement in Russia has historically faced several types of challenges. The first group of challenges is common for young competition jurisdictions that have imported legal rules originally developed within another institutional environment, and especially for transition countries in which competition legislation developed in conjunction with a radical transformation of economic system in the transition from a planned to market economy.

In a transition country, the introduction of competition as a policy target extends far beyond the relatively limited scope of responsibilities of antitrust agencies. Although this problem has been understood from the very beginning, Russian antitrust authority has been criticized for its passive role in competition promotion aimed to remove *monopolism* as an impediment to economic recovery and growth

(see, for example, Yakovlev 1994). The concepts of monopoly and welfare losses caused by monopolies were highly demanded by the government and society.

Simultaneously, from the initial years of competition enforcement, a stark difference between the understanding of the goals of antitrust enforcement begins to develop, mainly because in transitional Russia, in contrast to developed market economies, there was no clear distinction between the few monopolized sectors in which companies are regulated ex ante and other competitive sectors in which competition requires only protection from potential restrictions. As a result, an exploitative monopoly was considered to be a main enforcement target in contrast to restrictions of competition. Almost all market participants faced problems, which were perceived as an exploitative conduct of the only supplier of necessary resources, or the rudiment of an old regulatory system.

There are several outcomes of the simple fact that antitrust enforcement emerged prior to market competition development. The first is the initial orientation on the deterrence of the exploitative conduct of dominant company in contrast to the restriction of competition that survived to date. The second is the very wide scope of competition authority responsibilities, which reflect specific demands of competition promotion during the initial years of liberalization. Only one example is the presence in the competition law banning the restriction of competition by executive authorities. Despite the unusual setting, antitrust legislation in this respect can be effective as an instrument to achieve the second-best option in specific circumstances (Reynolds 2004). There is evidence that restrictions imposed on competition by regional governments became an important problem not only for Russia but also for other countries in transition. Competition policy in People's Republic of China now faces the same challenge. Both countries have strong traditions of political and executive authority that have served as important elements in transaction governance in the economic system. The phenomenon of an administrative monopoly in both China and Russia cannot be reduced to a 'pure' regional protectionism (despite its importance), 'pure' favoritism (despite the fact that favoritism also occurs), or 'pure' adaptation problem (despite the fact that slow and imperfect adaptation is likely the most important factor) (Owen et al. 2008; Wu and Liu 2012; Wei 2013).

Antitrust authority gradually became responsible for a substantial number of policies that are related, even indirectly, to the objectives of competition promotion. At some stage, it is inevitable that widening the scope of competition policy erodes conventional understanding of antitrust enforcement objectives.

2.2 *Hold-Ups in Bilateral Relationships Based on Specific Investments as Exploitative Conduct of Dominant Company*

Among the BRICS countries, Russia is the only country with an industrial structure that was heavily affected by the privatization of state-owned enterprises in mature industries. Legal persons became the units of privatization. Subsequently, after the privatization buyer and supplier of the intermediate product often confront each other as only one potential supplier and only one potential buyer without outside options. This very narrow specialization resolves the paradox described by the analysis of industrial concentration (Brown et al. 1993), in which monopoly is a large problem when concentration indexes are not too high in Russia.

Transaction cost economics (Williamson 1979) analyzes this type of relationship in the framework of the choice of a transaction governance model. If investments are specific, to prevent hold-up, specific contractual precautions are necessary, which range from long-term contracts to vertical integration. Within a central planning system, administrative decisions together with communist party disciplinary tools provide contract enforcement under pre-determined conditions and make specific contract precautions unnecessary. Liberalization eliminated a central planner and relevant enforcement system; however, parties, which are locked in specific transactions, were unable to undertake contract precautions *ex post* after specific investments were made. In this setting, contractual practices demonstrate many types of inefficiencies described by new institutional economics (Williamson 1971, 1979; Klein et al. 1978; Grossman and Hart 1986; Hart and Moore 1990), including post-contractual opportunism, hold-up, and conflicts among counterparties.

In the mid-1990s, Blanchard and Kremer (Blanchard and Kremer 1997) explained the effect on the elimination of the mechanism of contract enforcement among enterprises (called disorganization) in several transition countries on the decline of industrial output. For the development of competition legislation, it was important that parties identified failures of contracts as an effect of the abuse of dominant position on the market, considering a bilateral relationship as a market for antitrust purposes. These interpretations also occur in developed competition jurisdiction (Joskow 2002). In Russian antitrust litigations, the ex-post opportunism of the parties locked in bilateral transaction is systematically considered as an abuse of dominance. Thus, the neoclassical concept of monopoly and welfare losses from the monopolistic decisions replaces the institutional analysis of transaction cost, post-contractual opportunism and the impact of uncertainty and shocks on the performance of the parties.

2.3 Price Discrimination in Export-Oriented Industries as a Policy Issue

Together with other BRICS countries in the international division of labor, Russia obtains important comparative advantages in upstream capital-intensive industries (Hanson 2012), which are dominated by large suppliers. Russia simultaneously has a relatively large domestic manufacturing sector that depends on upstream suppliers. Many domestic commodity markets, including aluminum, cold-rolled grain steel or potassium chloride, are dominated by only one supplier, who can easily increase profit by third-degree price discrimination (Pursell and Snape 1973). Disorganization in the value chains as a result of the elimination of contract enforcement (Blanchard and Kremer 1997) makes domestic demand smaller and less elastic, which therefore increases optimal input prices. The ratio of domestic prices to the prices of export contracts steadily increased following liberalization (Table 1).

For domestic manufacturing, a rapid increase in the input prices following liberalization is among the important obstacles for competitiveness, and this issue remains crucial because of the large scale of the downstream manufacturing sector in the economy. The issue is again perceived as a result of market power abuse and increases the demand for specific competition policy, which the government attempted to achieve via the application of antitrust enforcement instruments.

Among the other BRICS countries, buyers of steel in South Africa faced the same problem. Higher prices for domestic downstream industries weaken their global competitiveness and produce suggestions for remedies directed toward the dominant sellers, which were exactly the actions employed under similar conditions by the Russian FAS (Roberts 2012).

Table 1 Ratio of domestic to export contract prices for selected exported commodities, 1999 and 2009

Selected exported commodities	1999	2009
Motor gasoline	0.68	1.01
Ammonia	0.97	2.73
Chemical fertilizers	0.76	1.31
Nitrogen fertilizers	1.29	2.51
Complex fertilizers	1.09	1.86
Synthetic rubber	0.83	1.21
Cellulose	1.00	1.15
Cast iron	0.92	1.12
Rolled ferrous metals	0.71	1.13
Copper	0.85	1.04
Aluminum	1.11	1.21

Source: Golovanova (2010)

2.4 Distinction Between Competition Policy and Other Policies

In Russia, antitrust enforcement is often expected to substitute other rules and regulations, which are aimed at regulation, competition promotion or restructuring. Two areas of policy should be discussed, including sector-specific regulation in deregulated industries and industrial policies, which leaves many others unattended, such as competition promotion in public procurement.

Antitrust and sector-specific regulation in network industries In Russia, the need for a sector policy for the network industry is reflected in the on-going reforms aimed at deregulation. Different models have been implemented for different network industries, and the scope of price deregulation is different as well. Reforms in the electricity sector are the most advanced, whereas tariff regulation for wholesale suppliers have been abandoned. However, even in the electricity sector, tariff regulation for households remain in place. Conditions of access to local grids (including tariffs and access procedures) are also regulated. In other network industries, the reforms are less advanced. In the gas and railway industries, the tariffs for final customers, including industrial and household, remain regulated. Access to networks is provided through the framework of a third party access model that can be exposed to abuse by the dominant incumbent, which retains incentives to prevent entry.

Even under full vertical separation (for Russia, in electricity), access to networks may be an issue that requires specific regulation. This is even truer in the third party access model, which is applied in gas or freight rail transportation. Internationally recognized best practices require a specialized authority that is responsible for resolving access issues and conflicts that arise regarding access. However, there is no industry-specific independent regulator in any of Russia's deregulated industries. Tariffs for access are set by responsible agency; however, the obligation to monitor compliance with access procedures is assigned to the competition authority. A substantial part of the recent conflicts regarding access conditions have been resolved by actions against exploitative abuse.

Antitrust and industrial policy Deep structural imbalances in the Russian economy have created a demand for industrial policy. However, during the last quarter century, Russia's industrial policy has remained relatively weak and inconsistent. One reason is its ideological nature: industrial policy is considered to be in conflict with the goal of building market institutions. Attempts to institutionalize and develop an industrial policy obtain little support. Simultaneously, competition policy often applies decisions aimed at protecting particular target groups to support economic growth. Examples include the support of domestic food suppliers vis-à-vis large retail chains and non-authorized auto dealers vis-à-vis authorized auto dealers.

A situation in which the allocation of power and responsibilities among different legislative laws and authorities is far from ideal is not specific to Russia. For example, many analyses of China's competition laws note the non-trivial division of power among the legal rules and idiosyncratic norms regarding competition issues on the one hand and the complexity of competition enforcement objectives on the other hand. Competition authorities in all BRICS countries eventually make decisions that are not only guided by competition promotion considerations but broader policy targets as well (Heimler and Mehta 2014). Regarding the standards of economic analysis, the important outcome is that the application of antitrust enforcement to support entrants vis-à-vis incumbents in deregulated industries or a target group under industrial policy relies on the concept of the exploitative conduct of a large supplier, which simultaneously contributes to the transformation of the concept of abuse of dominance.

2.5 Limited Resources and Powers of Antitrust Authorities

Together with other transition countries, Russian competition authority has been heavily constrained in terms of human capital (Gal 2010). The FAS, which is organized as a network of regional subdivisions, has faced a shortage of trained personnel from the beginning of transition period and up to now. In addition to the constraints in human resources, the FAS faces the problem of limited investigatory power. During the initial 15 years of competition enforcement history, the FAS had no power to organize downraids. The competition authority recently obtained a right to conduct secret investigations, but only in conjunction with the authorities responsible for criminal investigations.

Technically, at first glance, the limitations on the ability to collect the evidence on conduct explain the demand for alternative legal instruments to deter coordination, as well as increasing importance of the model of monopoly, in which structural indicators constitute direct evidence available for analysis. To enforce art. 11 (on anti-competitive agreements), to date, the competition authority primarily uses the concept of 'concerted practice', in which substantial indirect evidence useful to detect cartels (Harrington 2008) comprises as good substitute of direct evidence. Simultaneously, a substantial part of the violations that are expected to be deterred as coordination are actually investigated as an abuse of collective dominance.

2.6 Limited Discretion of the Antitrust Authority

The discretion of executive authorities in Russia is legally constrained. Among other powers, the authorities have the power to inspect compliance with legal requirements on their own initiative or on the basis of complaints received. Administrative legislation and regulation attach substantial importance to responding to

complaints. A special law, 'On the procedure of considering complaints of citizens of the Russian Federation' (2006), requires an authority to consider every complaint and either open an investigation or provide a justified refusal within 30 days. These requirements are expected to increase the accountability of public servants. It is assumed that in the absence of strict regulations, they have strong incentives for shirking or rent-seeking. Authorities and public servants are responsible for both decision-making delays and unjustified refusals to open investigation on the complaint.

The importance of complaints as a reason to investigate the practice affects case selection in at least two ways (Avdasheva and Kryuchkova 2015). Incentives to file a complaint increase when individual harm imposed by the practice in question is high because of the absence of a collective action problem. Due to the liability of competition authority to react to complaints, the structure of investigations across alleged violation types reflects the issues that the complaints address. Because of this reason, complaints are more often addressed to the exploitative conduct of a dominant company than to coordination, and among the different types of abuse, abuse of dominance are more often exploitative compared with exclusionary abuses. The typical target of a complaint is not related to the restrictions of competition.

2.7 Standards of Damage Verification and Assessment

The enforcement of both administrative and civil laws in Russia exhibits very weak standards in the verification and assessment of damages imposed on parties. Legal studies of post-Soviet courts stress the low level of compensation for damages as an important problem (see, for example, Hendley 2014) that impedes deterrence. However, there is another side of the coin. In addition to the low level of compensation for damages, and especially for moral damages, as well as the unclear difference between compensation for damages and compensation for moral damages, the causal links between the actions of an offender and the harm of a victim are established using relatively weak standards in Russian legal practice (Maggs et al. 2015). The prevailing legal approach to this issue is to replace fault-based liability with strict liability. First, it was implemented in consumer protection law (Reich 1996); however, it was subsequently extended to other fields of Russian civil law (Brüggemeier 2011). This tradition also strongly affects administrative law: executive authorities can make conclusions regarding harm using very rough evidence. The importance of complaints as the drivers of investigations reinforces this peculiarity of damage verification: in many examples, the statement of the alleged victim is sufficient for an administrative decision. Enforcement against exploitative conduct of a large seller implicitly shares the concept of the strict liability of the dominant market participant for damage that is allegedly imposed on every counterparty. This extends a step further from the European concept of dominant position as a basis for the special responsibilities of the dominant company (Larouche and Schinkel 2013), which are derived from ordo-liberal

tradition. Compared with art. 102 TFEU, the enforcement of art. 10 of the law 'On protection of competition' tends to use the concept of the strict liability of the dominant seller for any harm imposed on every individual counterparty, with a rough interpretation of the casual links among dominance, the behavior of the dominant company and the harm imposed.

3 Influence of the Economic and Institutional Environment on the Standards of Economic Analysis in Antitrust Enforcement

The economic and institutional environment of transplantation of antitrust legislation explains specific features of the standards in the enforcement and economic evidence in investigation and resolution of cases. As a result of historical circumstances, the *exploitative conduct of a dominant seller* in contrast to the *restriction of competition* became the most important target of antitrust enforcement. Economic analysis in the Russian competition enforcement develops primarily around investigations and decisions regarding the exploitative abuse of dominance and predominately around the issue of harm.

Agreements and concerted practices vs. abuse of dominance The specific path of economic analysis development in competition enforcement in Russia does not seriously affect the standards of investigations and infringement decisions in collusion cases. Competition authorities decide on price-fixing and market-sharing using hard evidence. Investigations regarding this type of cases suffer from limited competence and resources for the collection of proofs through detective actions and downraid inspections, but approach to investigate does not differ.

In contrast, the enforcement against concerted practice took a specific path. Using a ban on concerted practice competition, the authorities attempted to compensate for the lack of investigatory power by deciding on a tacit collusion using only indirect evidence. The most important evidence comprised the evidence of price parallelism and the structure of the markets in which the concerted practice was suspected. The outcomes of many successful appeals indicated that Russian courts considered evidence in favor of a tacit collusion insufficient for conviction even if only one alternative explanation for price parallelism remained. The arguments of Russian judges did not substantially differ from the opinions of their European colleagues (Motta 2000; Overd 2002; Nicholson and Cardell 2003). In 2011, the FAS suggested to correct legal definition of concerted practice in order to avoid numerous false convictions in administrative decisions. The changes introduce two additional attributes of concerted practice. One criterion is the threshold market share, and another criterion is the public announcement of future actions by one of participants in concerted practice. The most interesting part of the story is that the standards of proof of infringement other than abuse of dominance were

complemented by a pure structural indicator, which was borrowed from an investigation of the behavior of the dominant company.

Distributive efficiency vs. competition protection and allocative efficiency Competition authority often recognizes its mission in terms of 'weak party protection' in contrast to competition protection and promotion. Special attention to the distributive effects of Russian competition policies can be explained not only by ideology (which is clearly important). At the early stage of transition in many sectors, emerging monopolies imposed substantial harm on customers. In specific circumstances, the harm is persistent. In the early 1990s, the government considered a main task of competition policy to be easing the losses of citizens and domestic businesses from hold-up and contractual inefficiencies in the value chains. As export volume and domestic prices of exported goods increased, additional margins for domestic manufacturing became an important enforcement target. During the second half of the last quarter century, the enforcement of access rules to support newcomers in network industries became essential. The common features of three examples are that they all address the dominant seller, who is assumed to exploit market power to redistribute welfare in his favor. However, at least two of three targets (hold-ups and third-price discrimination) have little in common with protection of competition.

One immediate implication for competition investigations is higher importance of evidence on damage in comparison to evidence on competition restrictions. The outcome comprises not only the fact that the number of abuse of dominance cases in the Russian competition enforcement is higher than the number of investigations on agreements or not only the evidence that the abuse of dominance case investigations on exploitative violations prevail over the investigations regarding exclusionary conduct. One step further is that practice, which is conventionally considered in the framework of agreements, in Russia is investigated as the behavior of a dominant supplier. This is true, for example, regarding selective distribution (see examples in Sect. 4.4): it is considered as an alleged violation not because of the impact on competition but because of the harm to distributors that do not satisfy the qualification requirements. Finally, relatively recently, in 2011, all violations of the law 'On protection of competition' were divided into infringements that restrict competition and infringements that do not restrict competition. Legislators recognized that a substantial part of the alleged violation of *competition* law does not affect competition in contrast to the distribution of welfare.

Individual harm vs. welfare losses It is not only harm that is important as an evidence of violation but also *individual* harm in contrast to reduction of consumer surplus. Several features of development contribute to this type of harm assessment. Under hold-ups and contractual disputes, when only one buyer (seller) represents the market demand (supply), individual harm comprises the core complaint. A trend to replace fault-based liability by strict liability reinforces the importance of individual harm as a ground for legal actions. Things become complicated in some areas of application of anti-abuse provisions because evidence of individual

harm is justified by the objectives of competition protection. Consider, for example, the refusal to grant access to network infrastructure under deregulation. Remedies and penalties are applied not because welfare losses from the exclusion of one new competitor are high enough but for the reason that the prevention of entry of one competitor incumbent can credibly commit to prevent the entry of all newcomers. However, harm to a newcomer in the form of refusal to grant access is immediate evidence of a competition law (or sector-specific regulation) violation. Because these three types of cases constitute a substantial part of anti-abuse enforcement, the principle of the sufficiency of individual harm to prove infringement became common.

There are two side effects of the importance of individual harm. One effect is an underdeveloped effect-based analysis. Although art. 13 of the law 'On protection of competition' clearly states that for a substantial number of violations, an effect-based approach should be applied, the instances of application are rare. The second effect is the absence of a minimum level of harm sufficient for public intervention, which partially explains the substantial number of investigations and infringement decisions.

Evidence regarding structure and harm vs. evidence regarding competition The history of Russian competition law explains why evidence regarding structure and evidence regarding harm appeared to be in the center of the investigations and decisions against the abuse of dominance. As previously discussed, an understanding of monopoly as a structural characteristic as a target for antitrust enforcement increases the importance of evidence regarding market boundaries, market shares and entry barriers. Under the investigation of hold-ups in bilateral relationships and third-degree price discrimination, market structure is most important to explain the content of the practice in question and the effects of the practice. The importance of individual harm as a proof of competition law violation makes this evidence highly relevant. In addition, evidence regarding harm justifies the application of competition rules to substitute alternative policy tools in the resolution of issues that extend beyond the traditional understanding of competition policy issues.

Static vs. dynamic market analysis Historically, the most important targets of competition enforcement after liberalization have been persistent monopolies. This is true for participants in stable bilateral relationships, as well as large suppliers in export-oriented industries because of the unattractiveness of entry or high entry cost. This is also true for regional regulated suppliers of electricity, gas, and heat, which have become the third important target of anti-abuse of dominance enforcement. The irrelevance of the analysis of entry conditions in the largest component of cases contributes to the impression of the general irrelevance of a dynamic analysis of competition.

4 Economic Analysis in the Typical Investigations of the Abuse of Dominance in Russia

This section presents case examples in which investigations and decisions are heavily affected by a specific environment and simultaneously reflect a specific tradition of the analysis of competition. It is not easy to select typical groups of cases to indicate the specific path of economic analysis in the enforcement against abuse of dominance from more than 10,000 decisions only after the introduction of turnover penalties in 2007. The selection criteria are as follows: the amount of trade affected, the importance of the socio-economic effects of the practice in question, and primarily, the influence of a specific environment on the economic analysis approach. For every group, an explanation of the approach to use economic evidence plays a central role.

4.1 Abuse of Dominance in Bilateral Relationships

One might suppose that during the quarter century following liberalization and 20 years after privatization restructuring, domestic companies overcame structural distortions inherited from socialism. This is not always the case. Until recently, relatively large companies have been involved in bilateral disputes, which in transaction cost economics are consider to be conflicts regarding the terms of use of specific investments. Disputes and conflicts of this type often substantially affect the economic performance not only of a specific company but also of the long value chain and regions where the companies are located. The role of public policy in the resolution of these issues is not completely clear. They cannot be left unresolved because of substantial negative effects. However, they appear as contractual disputes between private parties where only one supplier (or one buyer) is in place. Even in developed competition jurisdictions, competition agencies and courts may tend to consider these issues as antitrust (see Joskow 2002 for a discussion of the roots and consequences of this approach). Not surprisingly, Russian competition authorities use this approach more often.

4.1.1 Basel-Cement-Pykalevo Case (2008–2009)

Pikalyovo is a small one-factory town located 200 km east of St. Petersburg with 20,000 inhabitants; it has only one production complex that was built in the late 1950s. The technology of production is idiosyncratic: a colloidal solution for further chemical production and belite sludge for further cement production appear as by-products of nepheline ore recycling to produce alumina. The refinement of nepheline ore to produce alumina is in the center of the technological chain. In 2008, the owner of the nepheline recycling facility, *Basel-Cement-Pykalevo*, a

subsidiary of *RUSAL* (the largest global aluminum producer), reported that the facility in *Pikalyovo* is among the least efficient within the company and decided to close the plant. Thus, the independent producers of cement and soda ash were also faced with the necessity of closing their factories. Massive layoffs and protests began in the city. The actions of *Pykalevo* town citizens became likely the most serious public outrage because of purely economic reasons in modern Russia.

This hot issue of economic policy was resolved using antitrust enforcement. In 2009, *Basel-Cement-Pykalevo* was found to be violating the ban on the abuse of dominance in the markets for belite sludge and colloidal solution in the form of unjustified limitations of production in the market of by-products. The company was fined; remedies were implemented to prevent the unexpected termination of production, and investments in the restructuring of the facilities along the value chain were applied. The definition of markets may appear too narrow; however, it reflects the limited substitutability of inputs for the buyers of resources. An infringement decision relies on two components of evidence: a market structure with 100 % share of suppliers (as well as buyers) and the harm imposed on the buyers of input by suppliers, which is measured by lost revenues.

4.1.2 Achinsk Aluminium Case (2009)

Achinsk Aluminum, a subsidiary of *RUSAL*, is a largest refining facility of alumina in Russia. Historically, *V-Sibpromtrans* company privatized access railroad to a plant. Plant itself and tracks belong to different companies. In 2008, *V-Sibpromtrans* also provided rail freight services to supply alumina ore. In 2008, *RUSAL* attempted to negotiate lower transportation rates, and after the refusal, it switched to another transportation operator. Using access to railway tracks as a bottleneck, *V-Sibpromtrans* began to detain cars with ore. In turn, the new rail freight operator asked *Russian Railways* (the parent company at that moment) to detain the cars of *V-Sibpromtrans* wherever *Russian Railways* could locate them. Both parties submitted complaints to the FAS: *RUSAL* complained about the refusal to provide access, and its counterparty complained about the low monopolistic price (as a type of unfair price) by *RUSAL* and accepted by another rail operator. In 2009, the Krasnoayrsk regional subdivision of the FAS issued an infringement decision against *RUSAL* for its unfair low price (low monopolistic price). The main evidence in the case was the monopsony market structure and harm of freight railway operator as lost revenues. Market was narrowly defined as a market of freight rail transportation of ore for *Achinsk Aluminum*. The market definition appears disputable, and during the infringement decision appeal, the parties argued that this delineation is inappropriate. One potential explanation of the FAS approach is the fact that conflict is not about the abuse of dominance under conventional understanding, but involves contractual disputes between closely interdependent parties (factory and access railroads).

4.1.3 Uralkali: Bereznikovsky Soda Case (2015)

The facilities of the *Uralkali* company and *Bereznikovsky soda* plant in the town of *Berezniki* are other examples of interrelated technologies divided to different legal individuals following privatization. For more than 50 years, the production of soda ash in the *Bereznikovsky soda* plant has used brine that emerges as a by-product of sylvinite ore mining in one of the facilities of *Uralkali*. After an accident at the mine that occurred in 2006, *Uralkali* became unable to supply brine directly from the mine. The price of brine for *Bereznikovsky soda* substantially increased. The dispute between companies attracted the attention of the regional and federal governments because of the severe effects for *Bereznikovsky soda*, which had impacts on employment and incomes in a very sensitive region. In 2014, the FAS Central Office took the case to investigate an alleged abuse of dominance by *Uralkali*.

These three cases do not limit the number of disputes between large producers, which were investigated and resolved under antitrust legislation, using the provision of abuse of dominance. These cases all have several important features in common. First, all cases are legacies of investment decisions made under a completely different economic system. In this sense, these cases are specific for a transition economic system and exhibit the losses from *disorganization* (Blanchard and Kremer 1997). Second, all conflicts provide severe negative economic and social effects, and one cannot exclude that there are reasons for public intervention in these types of cases. Without discussing why competition legislation was applied in these cases, it is important to stress the features of economic analysis that supports the decisions. These features include a narrow antitrust market definition, static analysis of dominance, qualification of abuse of dominance as a purely exploitative conduct, and measurement of the buyer's or supplier's harm by lost revenues. After Russian competition authorities analyzed several hundreds of cases of this type and judicial review did not annul the previous decisions, this approach has become widespread not only in specific types of cases but also for other investigations regarding the abuse of dominance.

4.2 Abuse of Dominance by Large Suppliers in Export-Oriented Industries

The third-degree price discrimination of the large upstream exporters, i.e., higher prices in the domestic market, remains one of the challenges for international competitiveness of Russian manufacturing. In motor fuel markets, it is also the general issue of economic policy that oil exporting countries resolve in different ways (Cheon et al. 2013). In contrast to the examples previously mentioned, this group of cases is specific for Russia not as a transition economy but as an economy with a large manufacturing sector with relatively weak competitiveness, in which

every additional detrimental effect, such as a high input price, is crucial. Economic analysis in this type of investigation is concentrated around the evidence regarding one-sided rigidity of domestic prices towards world commodity prices: high elasticity when world commodity prices increase and low elasticity when world prices decrease.

4.2.1 'Big Four' Oil Companies Case (2008–2011)

The most high-profile investigation regarding the abuse of dominance, which resulted in the largest penalties in the history of Russian antitrust enforcement, is the case against the 'Big Four' oil companies, including *LUKOil*, *Rosneft*, *TNK-BP* and *Gazprom neft* (Avdasheva et al 2012). There were several investigations of the oil sector practices. Two types of infringement decisions were an unfair (high monopolistic) price and limiting the supply in the domestic market. To qualify the position of suppliers as dominant, the FAS applied a collective dominance concept. The definition of collective dominance in Russian law uses the criteria of a high and stable concentration of the market, high entry barriers, market transparency, and low price elasticity. Together, these criteria are considered to be a sufficient evidence on a high level of interdependence of market participants, which enables the presumption of a tacit collusion among them and considers every deviation from the hypothetical competitive outcome an abuse of dominance.

There were three groups of evidence applied in the investigations of the oil companies. First, there is evidence regarding the market structure, including the product market definition, size and stability of market shares, indicators of market transparency, entry barriers, and, to a lesser extent, low price elasticity. Second, there is evidence regarding the asymmetric elasticity of the domestic price of motor fuel on the world price of oil. Third, there is evidence regarding the proportionality of the increase in cost (calculated as the variable accounting cost) and the increase in price. For the investigation of supply limitations on the domestic market, the evidence was concentrated on the casual relationship between the allocation of total amount of motor fuel produced between the domestic market and export and the price dynamics in the domestic market. No competition concerns were discussed.

4.2.2 Novolipetsky Metallurgical Plant Case (2011–2014)

The *Novolipetsky metallurgical plant* is among the largest steel producers worldwide, not only in Russia. In the domestic market for cold rolled grain steel, it accounts for approximately 100 % market share. The largest part of cold rolled grain steel is exported. In 2012, an investigation against the *Novolipetsky metallurgical plant* resulted in an infringement decision regarding the high monopolistic price of steel in the domestic market. The evidence in the case mainly comprised the disparity between export and domestic prices, as well as the disparity between the production costs and domestic price. The competition authority did not

specifically analyze the harm on the domestic manufacturing sector. It was presumed that an increased (up to two times higher) input price undermines the competitiveness of the Russian manufactures, which use this specific type of steel.

Again, the two cited examples do not exhaust a long list of investigations against large Russian exporters. The FAS undertook many similar investigations under merger approval (including mergers of the previously discussed companies—*Novolipetsky metallurgical plant* (2006), *RUSAL* (2007), *Rosneft* (2013), and many other companies). These cases are specific for economic analysis. First, the most important consideration is not competition but the alleged exploitative conduct. Second, there is no doubt that the issue is important for domestic economic policy. Third, in most cases, there is little doubt that companies are dominant in domestic markets.

The most sensitive component in economic analysis is the level of prices in the domestic market and the welfare effects of pricing policy. There is no good method to prove an excessive or high monopolistic price in any competition jurisdiction (Motta and de Streel 2007). However, welfare effects of third-degree price discrimination in cases of higher prices in a domestic *vis-à-vis* export market should be negative, unless price discrimination is the only way to cover the substantial fixed cost of the supplier. Conventional wisdom in modern Industrial Organization is that third-degree price discrimination decreases total welfare if it does not prevent market closure. It is especially welfare-detrimental when we only consider the domestic market. Again, it is not clear that this issue is for antitrust enforcement; however, it is definitely an issue for economic policy.

One interesting point is the way to resolve this issue in Russian competition enforcement. The authority has weak arguments to prove excessive (high monopolistic) price using the definition in competition legislation. Among the cited cases, the judicial review specifically cited this point. The infringement decision against the *Novolipetsky metallurgical plant* was finally annulled under judicial review, and there are examples of court disagreements with the infringement decisions against the largest oil companies. To avoid further discussions regarding the issue, competition authority in many markets has replaced *ex post* competition investigations by *ex ante* remedies on domestic price. The content of conduct remedies on prices that Russian competition authority applies is similar to the Ministry of Commerce (MOFCOM), the competition authority of the People's Republic of China, applied under merger clearance.

Investigations against large exporting companies have strengthened specific features of economic analysis in the cases against the abuse of dominance, including the static analysis of market structure, an accent on exploitative conduct in contrast to restrictions of competition, a broad definition of harm, and the specific importance of price as a tool to impose harm on a counterparty.

4.3 Investigation of Abuse of Dominance by Natural Monopolies

A substantial group of investigations and decisions regarding the abuse of dominance in Russian enforcement are cases against natural monopolies. A natural monopoly under Russian law is a special legal status for companies in industries, in which suppliers use networks under regulated tariffs and procedures. Deregulation in these sectors occurs on different stages; however, tariffs and other conditions of service provisions to household customers in most sectors remain regulated. Competition authorities use provisions on the abuse of dominance, among others, to enforce compliance of natural monopolies with the standards of services. As a result, cases against natural monopolies constitute a main part of decisions on art. 10. Following the introduction of turnover penalties, the share of investigations against natural monopolies of all abuse of dominance cases, according to the FAS statistics, increased from approximately 40 % in 2008 to 70 % in 2014. During this period, the number of infringement decisions under art. 10 increased from 862 to 1948. Thus, more than 90 % of the increase in abuse of dominance infringements during these 6 years were an outcome of actions against natural monopolies.

Investigations against natural monopolies may be divided into two large groups: investigations regarding the refusal to provide access to network facilities, and investigations regarding non-compliance with the standards of final service provision. In the *LCAP* dataset,[1] approximately 54 % of appealed infringement decisions regarding the abuse of dominance during 2008–2012 represent decisions on non-compliance with the standards of service provision to the final customers, and approximately 8 % comprise decisions on refusal to provide network access to a competitor. Therefore, 'household cases' quantitatively prevail over 'access to network' cases.

Provisions of art. 10 may be effectively applied to provide fair terms of access even to fully separated network facilities. The most prominent example is the case of *Transneft* (2000), the operator of an oil pipeline that imposed different procedures and requirements for large and small oil suppliers under regulated transportation tariffs. After investigating the case and issuing an infringement decision regarding unfair trading conditions as dissimilar conditions of similar transactions, the Central Office of the competition authority issued a remedy to restore non-discriminatory terms of access. *Transneft* appealed in commercial court and eventually won judicial review; however, the company's contract provisions were

[1] The LCAP dataset represents a general population of the claims submitted to the first instance commercial courts of the Russian Federation to annul the infringement decision of the Federal Antitrust Service under art. 10 and 11 of the law 'On competition' during the period 2008–2012. The claims cover more than 1/3 of all infringement decisions under these articles. The dataset enables the classification of the cases in different ways, including according to the legal status of the company that is found violating the law (natural monopoly or not), as well as according to the content of practice in question.

substantially adjusted in such a way that the small independent oil extracting companies considered the case to be successful.

At the same time, group of 'household' decisions have very little in common with the decisions on antitrust law violation under conventional understanding of antitrust enforcement. They are substantially closer to the enforcement of consumer rights than antitrust enforcement. Both types of cases affect the overall approach for economic analysis and primarily the understanding of harm. Refusal to provide access is definitely anticompetitive. However, in the analysis of different groups of cases, authorities may tend to consider them uniformly through the lens of harm. Even exclusionary actions are often found infringement because of the harm imposed on the counterparty (for example, a potential competitor), not because of evident anticompetitive effects.

Static analysis prevails over dynamic analysis because the market power of natural monopolies emerges firstly as a result of legal restrictions, and under these circumstances, a detailed assessment of entry conditions is excessive to define the dominant position. One important parallel in a typical investigation of natural monopoly practice and an investigation of hold-ups in bilateral relationships (see Sect. 4.1) is the importance of the facilities that connect buyer with supplier. In the investigations of hold-ups, Russian competition authorities tend to consider the dependence of the buyer from the supplier (or supplier from buyer) as a sufficient ground both for monopoly power and strict obligation of the supplier (or buyer) to sign and perform the contract on 'reasonable and non-discriminatory' conditions. Thus, the supplier (buyer) in an interdependent pair of firms is considered to have the same obligation as a natural monopoly. The impression is that the routines of economic analysis in the largest group of investigations become the standards for other cases with similar features.

To conclude, economic analysis in natural monopoly cases supports specific features of economic analysis in other abuse of dominance investigations, such as the importance of individual harm, the prevalence of harm as a proof of violation even if evidence on anticompetitive effects is available, the static analysis of structure, and the identification of dependence with market power.

4.4 Selective Distribution as an Abuse of Dominance: Examples of Pharmaceutical Companies

Investigations of distribution policy are not large or typical for Russian enforcement under art. 10, law 'On protection of competition'. However, they enable the tracking of how an approach that became routine for competition authorities affects the tactic of economic analysis in cases in which competition should be in the center of the investigation.

Selective distribution is typically considered an issue for antitrust enforcement because of the impact on competition (see Buccirossi 2015). Russian competition

authorities analyze selective distribution from another angle. Examples include investigations and decisions against *Novo Nordisk* (2010, 2013), *Teva* (2013) and *Baxter* (2014). All three investigations were initiated by complaints of the distributing company after the supplier refused to sign the distribution agreement. No pharmaceutical company applies a quantitative selective distribution system. In all cases, the immediate reason not to sign the contract was non-compliance of the potential counterparty with due diligence requirements. *Teva* intended to directly supply pharmaceuticals in the domestic market, whereas *Nova Nordisk* and *Baxter* had distribution agreements with several independent distributing companies.

At first glance, these cases should be analyzed using a vertical restraint approach, for example, suspecting that suppliers tend to impose territorial restraints or exclusivity. However, the only fact under analysis was the refusal to sign or renew the contract with a particular partner. Infringement decisions do not discuss anticompetitive effects of refusals. The influence of the organization of distribution on prices is also not discussed. All three companies were found to infringe on art. 10 by unjustified refusal to supply and application of discriminatory contract terms for distributors. Share in the particular market (defined as a proprietary brand name of a drag) and harm of particular distributors (measured by lost profit) comprised the primary evidence presented in the decisions. The logic of the decision was based on the idea that if a supplier is dominant in the market, he/she cannot deny a proposal to buy or sign a distribution agreement discretionary because it may impose harm on a potential counterparty.

Arguments of decisions regarding the abuse of dominance by suppliers of pharmaceuticals appear surprising if they are not compared with the decisions against natural monopolies or parties which abuse dependence of supplier and buyer. A distribution agreement was considered similar to essential networks in regulated industries and the right of the producer to refuse signing a contract was considered a hold-up or abuse of dependence. The protection of one particular distributor was considered an objective of competition enforcement, using exactly the same logic as the protection of interdependent partners in stable bilateral relationships.

5 Losses from Monopoly in the National Model of Abuse of Dominance Enforcement

To complete the comparison between European and Russian approaches to economic analysis in abuse of dominance cases, it is possible to use the example of a microeconomic textbook model. Both traditions use, as a starting point, the model of monopoly pricing that decreases consumer surplus and total welfare. In a typical European textbook of competition economics, a subsequent explanation follows that consumer surplus is a welfare standard but price is not an immediate target for enforcement. This statement corresponds to the fact that enforcement against a pure

exploitative conduct is rarely applied. In contrast, in the framework of Russian competition policy, consumer welfare is an immediate target for enforcement. A substantial number of investigations against excessive (high monopolistic) price is the main indicator of this approach. Next, the goal to protect consumer welfare extends to the performance of counterparties. At the subsequent step because consumer surplus is a clear concept on the blackboard but not easily measurable, the target to protect consumer welfare extends to the target to protect consumer (counterparty) well-being. Because different dimensions of well-being can be protected by intervention towards a dominant company, both the interests of the individual customers and the broad public interests can become targets of particular competition enforcement. There is no specific ideological reasons for the introduction of public interests in competition policy enforcement (and public interests are not discussed in Russian competition law). Without substantial exaggeration, public interests can become a target for protection by competition enforcement with nearly the same probability as the interests of any individual consumer or company.

The monopoly model from an introductory textbook has been accepted in Russian competition policy until recently, with several important exceptions. One exception is the concept of assessment of expected welfare losses to be compared with the cost of public intervention. Even a case in which one specific consumer is harmed may cause an investigation. A second exception is the potential trade-offs between efficiencies and losses from the restrictions of competition. When the distributive effects of practice are analyzed, allocation efficiency considerations are often neglected. Among these considerations, incentives are the most important. Little attention to the impact of practice and prohibitions on incentives is connected with the prevalence of the static analysis of markets and the behaviors of market participants. For example, if assessment of conduct as exploitative leads to intervention that, in turn, causes a price decrease, but simultaneously decreases the incentives to enter the market, the last effect is likely to be ignored. The same is true for the assessment of intervention effects in cases of hold-ups. If the application of anti-abusive provisions towards companies locked in bilateral relationships *ex post* decreases incentives to undertake contractual precautions *ex ante*, the latter effect will be unattended.

In contrast to the static monopoly model, the concept of monopoly power as a tool to exploit a counterparty and redistribute gains in one's own favor and models of entry accommodation and entry prevention are less influential in competition enforcement. Again, one explanation may be the specificity of the market structure and investment climate, with relatively poor incentives to entry and modest entry rates (Estrin and Prevezer 2010). A rare observability of entry leads to limited attention to related models and arguments in competition investigations.

This framework explains why in economic analysis under investigation of the abuse of dominance, static analysis prevails over dynamic analysis, market shares and market concentration are more important than potential competition and entry barriers, different prices in different markets are always considered with suspicion, and evidence of complaints from final customers and data regarding the losses of business partners may be sufficient to make decisions regarding infringement.

6 Conclusion

Economic analysis in the investigation under art. 10 of the Russian law 'On protection of competition' reflects specific tasks that competition enforcement of the country should fulfill. The substantive rules of the European competition legislation on the abuse of dominance were adapted to meet local needs. The approach to economic analysis has been following the enforcement development way, but not otherwise.

At first, losses due to transitional monopoly were perceived as an outcome of the persistent market structure and, to a lesser extent, were associated with the competition restrictions. Provisions on the abuse of dominance consequently became the most demanded field of competition policy. However, competition policy was not sufficiently separated from the tasks, which, in developed market economics, are performed by regulation in limited monopolized sectors. The assessments of market boundaries and market shares are the fastest growing component of economic analysis. For the same reason, losses from exploitative abuse that are not related to restrictions of competition become the main target of antitrust enforcement. In local conditions, the area of European competition policy, which is minor in Europe, became most significant in Russia. Thus, economic evidence in investigations regarding the abuse of dominance shifts from the analysis of competition to the analysis of harm.

Special attention to the harm of firms on adjacent markets is explained by the large-scale hold-ups in the relationships inherited from the administrative system and their large-scale economic effects; by the severe impact of the third-degree price discrimination by upstream exporting companies. This issue is specific for countries with a combination of large upstream exporters and large domestic manufacturing sector that suffers from high prices on inputs. The application of competition policy to resolve this issue is almost accidental in the absence of widely recognized policy receipts.

Historically, anti-abusive provisions have been applied in circumstances when only one buyer or supplier was harmed (hold-ups) or when one partner represented the entire group (entrants who seek access to network facilities). This experience, at least in part, explains why the assessment of individual harm prevails over investigations of the abuse of dominance. In turn, the lack of alternative policy tools explains why competition enforcement was applied to resolve hold-up issues and to provide non-discriminatory access for networks in deregulated industries, or to enforce compliance with the standards of service provision by regulated companies.

In conclusion, the approach to economic analysis in competition enforcement, local needs for economic policy intervention, legal tradition and the interpretation of substantial rules, and selection the targets for enforcement are interrelated. Economic analysis reflects specific features of Russia as transition economy without a clear distinction between monopolized and competitive sectors; an economy with comparative advantages in the products of upstream capital-intensive

industries; and a legal system with a high level of complainant protection but a weak tradition of harm assessment.

Economic analysis reflects the outcome of the legal transplantation of art. 102 TFEU. Transplanted rule revealed to be able to meet domestic demand after substantial transformation. Citizens, firms and government consider the enforcement of anti-abusive provisions to be important for well-being promotion. However, the most receptive provisions appear to be the least applicable and most questionable in European competition policy, namely, enforcement against exploitative abuses.

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