



NATIONAL RESEARCH UNIVERSITY
HIGHER SCHOOL OF ECONOMICS

*Svetlana Avdasheva, Dina Tsytsulina,
Svetlana Golovanova, Yelena Sidorova*

DISCOVERING THE MIRACLE OF LARGE NUMBERS OF ANTITRUST INVESTIGATIONS IN RUSSIA: THE ROLE OF COMPETITION AUTHORITY INCENTIVES

BASIC RESEARCH PROGRAM

WORKING PAPERS

SERIES: PUBLIC ADMINISTRATION

WP BRP 26/PA/2015

*Svetlana Avdasheva¹, Dina Tsytsulina²,
Svetlana Golovanova³, Yelena Sidorova⁴*

DISCOVERING THE MIRACLE OF LARGE NUMBERS OF ANTITRUST INVESTIGATIONS IN RUSSIA: THE ROLE OF COMPETITION AUTHORITY INCENTIVES⁵

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, large number of 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

JEL Classification: K21, K42

¹ National Research University Higher School of Economics. Institute for Industrial and Market Studies (IIMS). Deputy Director; e-mail: avdash@hse.ru

² National Research University Higher School of Economics. IIMS. Junior Research fellow; e-mail: dtsytsulina@hse.ru

³ National Research University Higher School of Economics. IIMS. Leading Research fellow; e-mail: svgolovanova@hse.ru

⁴ National Research University Higher School of Economics. IIMS. Research assistant; e-mail: eesidorova@edu.hse.ru

⁵ The paper is a result of the Basic Research Program Project of the Higher School of Economics, National Research University. The authors cordially thank Yoannis Katsoulacos for his outstanding advice on the collection and design of the dataset, the strategy for data analysis development, discussion of conceptual framework and policy recommendations, Vadim Novikov for providing the initial dataset, and discussing the conclusions, Polina Kruchkova, Maxim Markin, Andrey Tzyganov, Vitaliy Dianov, Alla Varlamova for helpful comments on legal issues in enforcement of Russian antitrust legislation, Marina Kolosnitsyna for helpful comments and suggestions on the organization of results' presentation, and Marina Lopatina, Karina Fayzullina, and Yulia Modina for ideal research assistance in collecting the database. The usual disclaimers are applied.

Introduction

Antitrust is an important part of the legal structure of most countries around the world. It is aimed to prevent anticompetitive behavior, thus restricting its negative effects on welfare. The distinctive feature of antitrust legislation is that being *welfarist* it is also *process-oriented* [Farrell and Katz, 2006]. It means that only actions that reduce social welfare through restrictions of competition are prosecuted. In this respect antitrust legislation differs from other legislations which have similar purposes to protect one group of economic agents from harmful actions of another group such as consumer protection legislation and legislation relating to the regulation of natural monopoly activities where liability rests on just a finding of harm to others. That is why in most countries the policies are usually governed by different and independent institutions or at least by independent structural divisions of the same institution with well-defined and distinct sets of responsibilities.

In Russia the legal backgrounds are the same. The fundamental objective of antitrust or more broadly of competition policy - to protect competition rather than competitors - can be found in Article 3 of the Law ‘On protection of competition’ in Russia (the ‘Law on competition’ hereafter). However outcomes are different at the end, and that is what we plan to discuss in this paper.

The Federal Antimonopoly Service (the FAS, hereafter) is the authority that controls the execution of the antitrust legislation in Russia. The FAS is responsible for regulating and controlling compliance with antitrust law, as well as with regulations of natural monopolies⁶, advertising, procurement for the federal government and foreign investment in strategically important sectors. Thus its functions are defined wider than in other countries.

At first glance the antitrust authority and its responsibilities are clearly defined and delineated from other government bodies in Russia. Consumer complaints about violations of the Law on protection of consumer rights are considered by the Russian Federal Service for Surveillance on Consumer Rights Protection and Human Wellbeing (Rosпотребнадзор). Tariffs of natural monopolies are established by the Federal tariff service and regional energy commissions. However regulation of access of customers to goods which are made by natural monopolies is not an area of responsibility of the bodies. It is done by the FAS.

Yet at the second glance it reveals that the delineation of responsibilities between the authorities is not clear enough. Analyzing the texts of thousands of FAS decisions carefully we find that it often considers “not genuine” antitrust cases. For example, commercial conflicts causing damage to one of the parties or failure to comply with natural monopoly regulations are

⁶ That is the official translation of the name of the service mentioned on its web-site. However it seems to be more correct to translate it as “Federal Antitrust Service” as antitrust is the core of the powers of the authority.

frequent targets of antitrust investigations. On the one hand, having the ability to appeal to a specialized authority the victims tend to appeal to the FAS. On the other hand the FAS prefers not to refuse to open the investigation and to follow all the required guidelines as if it was an antitrust case. Thus despite the existence of separate authorities responsible for conducting different types of policies, the distinction between them is not clearly held.

This gives us an alternative vision of the fact that 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 FAS 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 down raids⁷. However taking into consideration the unclear delineation of antitrust and non-antitrust cases in Russia mentioned above the number of decisions made by Russian antitrust authority may not seem so excessive as it has to be compared with the aggregate number of antitrust, consumer protection and natural monopoly infringement decisions taken by the corresponding authorities in the other countries.

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.

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 commercial 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

⁷ Comparing the numbers of down raids in Russia and in EU we have to bear in mind that the “observations” are defined in different ways. In Russia it as a raid to the particular entity, while in EU raids to all the participants of the alleged collusion would be considered as the only observation.

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 commercial 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.

The paper is structured as follows. Section 1 presents a literature review on approaches to the analysis of antitrust enforcement. Section 2 briefly describes the development of antitrust legislation and enforcement in Russia. Section 3 describes research strategy and data. Section 4 analyzes the structure of cases providing the comparison between competition restrictions and the harm imposed. Section 5 discusses the impact of ‘competition’ and ‘non-competition’ cases on the cost and performance indicators of competition authorities. Section 6 concludes and provides policy implications.

1. 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 appeal⁸. 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

⁸ Companies that have financial difficulties are more likely to obtain a fine reduction (Geradin, Henry, 2005).

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 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.

2. Development of antitrust legislation and enforcement in Russia: brief overview

History of Russian competition legislation and enforcement accounts for quarter century. The first law, ‘On competition and restrictions of monopolistic actions’ (1991), was adopted by translating relevant articles from the Rome Treaty (sometimes the relevant guidelines) and adding definitions of the concepts applied and descriptions of the implementation procedures. The only country-specific innovation in the law was a set of rules against restrictions on competition by public authorities. Since 2006 several “antitrust legislative packages” (sets of changes and amendments in substantive and procedural rules of competition legislation and enforcement) aimed to implement the best world practiced entered into force. Provisions of the Law on competition in Russia are similar with TFEU provisions. Article 11 of the law (on collusion and concerted practice) and Article 10 of the law (on the abuse of dominance) are actually blueprints of Article 101 and Article 102 TFEU correspondingly. Since 2007 turnover penalties for restriction of competition together with leniency program for cartel participants are applied.

From the very beginning institutional structure of competition policy exhibits some specific features. First, responsibilities of Russian competition agencies are broader than those of typical antitrust authority in the world. It is possible to say without exaggeration that there is no area of responsibility of any competition agency in the world that is not responsibility of the Russian authority, including antitrust, unfair competition, advertising, part of sector-specific

regulation of natural monopolies⁹ (tariffs are set by distinct authority the Federal Tariff Service, but access and interconnection issues are under responsibility of the FAS). In the 1990-s authority was also responsible for small business support and consumer protection.

The FAS has the power to inspect compliance with legal requirements either on their own initiative or on the basis of complaints received. Recent developments in control and monitoring in Russia attach great importance to responding to complaints. A special law, ‘On the procedure of considering complaints of citizens of the Russian Federation’ (2006), requires a responsible authority to consider every complaint and either open an investigation or provide a reasoned refusal within 30 days. Authorities and public servants are responsible for both decision-making delays and unjustified refusals to open complaint investigations. Although antitrust authorities are formally entitled to select among complaints and cannot be compelled to conduct investigations on every complaint received, they are strongly incentivised to do just that. Citizens and companies can sue authorities and officials for any harm that is resulted from inaction. The number of court cases brought against Russian government agencies that have ruled in favour of the plaintiffs is substantial and growing (Trochev, 2012).

The FAS has a power for both inspection and investigation, and decision on the infringement, representing a type of ‘inquisitorial’ system typical for administrative law enforcement in continental model. Violator has a right to appeal the decision of the FAS in a court system (during the period under analysis – commercial courts concentrated on litigations in the economic area. Costs of access to court are relatively low in Russia (negligible fees, rule of cost indemnification, no restrictions of representation).

3. Data and methodology

3.1. Data on commercial 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 subdivisions of the FAS; and
- Decisions of the commercial courts (from the first instance onward to the decisions of the Supreme Commercial Court¹⁰), on the claims to annul the infringement decisions of the FAS.

⁹ “Natural monopoly” is a special legal status in the Russian legislation, defined using approach to ‘essential facilities’ (economic or technical reasons not to duplicate). Legal status of natural monopoly implies tariff regulation and the regulation of service standards. For simplicity, hereafter, any company providing regulated services is referred to as “natural monopoly”.

¹⁰ Our analysis covers the period when the Supreme Commercial Court of the Russian Federation was the highest judicial body for settling economic disputes in Russia. Since the spring of 2014 its functions were transferred to the Supreme Court of the Russian Federation in the course of court system reform.

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.

3.2. *Data coverage*

Our sample covers apparently all the decisions made by commercial 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 commercial 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 commercial courts					
Infringement decisions made ⁽¹⁾	1045	1731	1979	2625	3216
- on abuse of dominance	862	1438	1539	2310	3029
- on horizontal or vertical agreements, concerted practice	183	293	440	315	187
Claims for the annulment submitted in the commercial courts of the first instance	337	648	962	1187	796

- on abuse of dominance	285	499	753	959	695
- on horizontal or vertical agreements, concerted practice	53	150	209	228	101
Structure of the abuse of dominance infringement found					
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 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 commercial 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 commercial courts. During the entire period, Russia's commercial 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 commercial 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 commercial courts; in turn, the higher courts reversed the lowest share of decisions of the first instance courts.

3.3. *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 commercial 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 the 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 made¹¹;
 - 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,

¹¹ 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 commercial 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 mainly 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.

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 commercial 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 commercial court. For every group, we describe typical 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 general research hypothesis (specified for empirical hypotheses further in the text) is that *alleged violations that dominate in the structure of antitrust investigations require less resources from the competition agency and provide higher performance indicators*. Hypotheses of empirical analysis correspond to the role of harm as independent evidence of antitrust violation in evidence-intensity of cases.

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

4.1. 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 commercial courts involve alleged violations by natural monopolies¹². 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 (decisions based on inspection of compliance to service of

¹² 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.

natural monopolies – mainly regional utilities - to household and commercial customers) follow¹³.

Case A35-6556/2012¹⁴

In 2011, an antitrust investigation against company "Samaraenergo" (regional supplier of electricity) was initiated. The investigation was based on the complaint of G, and the company was suspected of violating 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 on competition) by imposing harm on the consumer.

Case A32-5081/2012

In 2012, an antitrust investigation against "NESK-elektroseti" (operator of electricity network) 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 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 subdivision 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" (a regional supplier of gas and a Gazprom subsidiary) occurred in 2011-2012. The regional subdivision of the FAS 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. Being appealed the second case FAS decision was annulled in first instance but then it was reversed. Interestingly, during the period when the alleged violation occurred, the law 'On gas' prescribed

¹³ The names of the complainants in the following paragraphs are indicated by first letters.

¹⁴ This is the identification number of the case in the commercial court of the Russian Federation. This number indicates the commercial 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 commercial court and year.

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 opportunity to impose fairly large penalties¹⁵. 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.

4.2. 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 (decisions based on the investigations of complaints by sub-subscribers of utility services) where one side of this conflict (A) appeals to

¹⁵ More specifically, type of penalty imposed depend on the fact does violation involve restriction of competition or harm on the counterparty only. Violator without legal status of natural monopoly if it does not restrict competition (but only imposes harm on counterparty instead) pays fixed penalties from 300 to 1000 thousand RUB (about 6 -20 thousand Euro). For restriction of competition and for violation by natural monopolies turnover penalties (up to 4% of turnover, generally around 1,5% of turnover for abuse of dominance) are applied. Even fixed and especially turnover penalties for violation of competition legislation exceed penalty threshold for the same action classified according another type of legislation.

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 “Donelektrosbyt” (regional power supplier). The power receiving devices of the entrepreneur are connected to the electric network through the transforming substation located on the property of "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 "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 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 "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 "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 Law on competition. The FAS issued a remedy and ordered "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.

4.3. 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 FAS. 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 Law on competition.

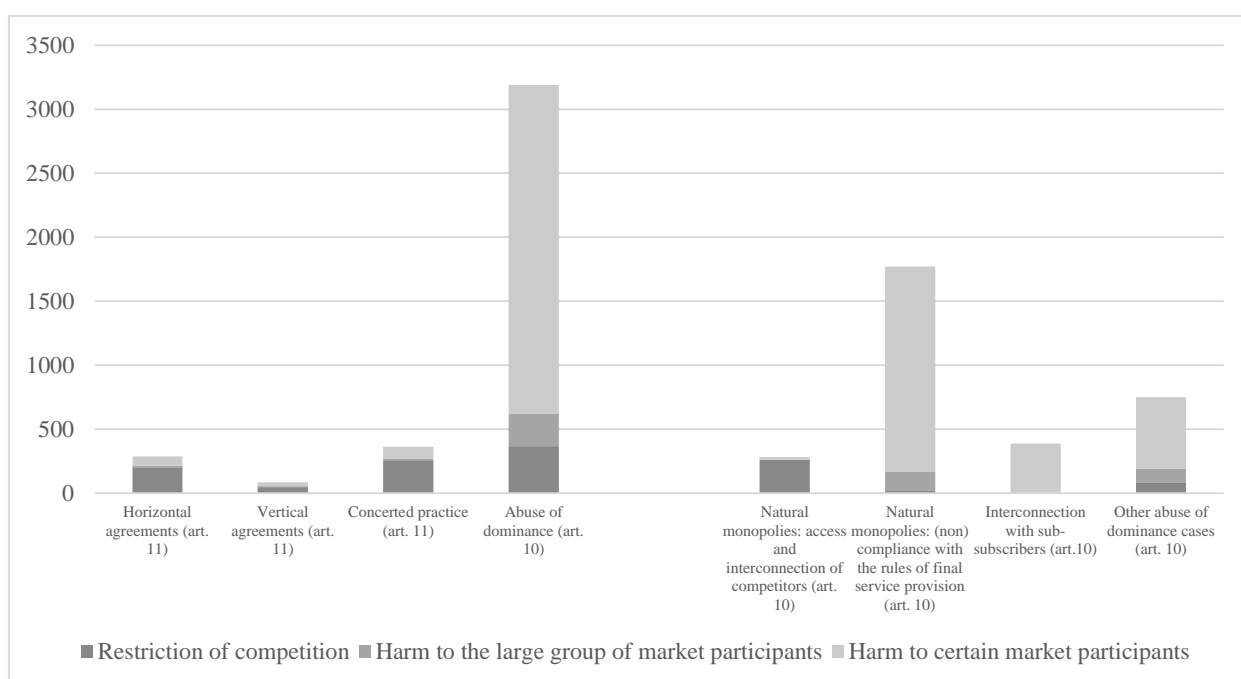


Figure 1. Structure of decisions by the primary infringement evidence across presumed violations

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 commercial 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 world¹⁶. 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)

¹⁶ According to the FAS statistics, from 2008-2012, approximately 96 thousand complaints were submitted to the FAS regional subdivisions, 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).

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 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 commercial courts.

5. 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 commercial 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 commercial 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 commercial 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 the 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 Law on competition violation.*

H2. *Infringement decisions where harm is independent evidence of the 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).

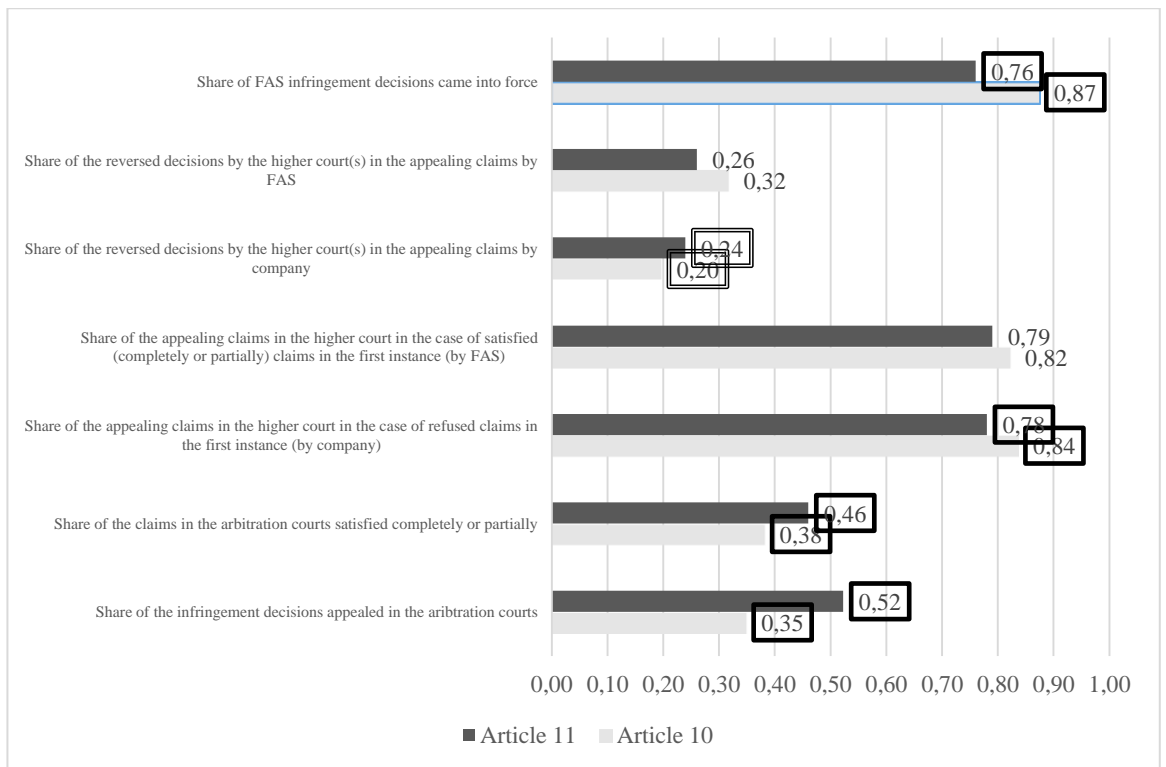


Figure 2a. Determinants of the probabilities for the infringement decision to take effect: articles 10 and 11 compared

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

Source: LCAP database

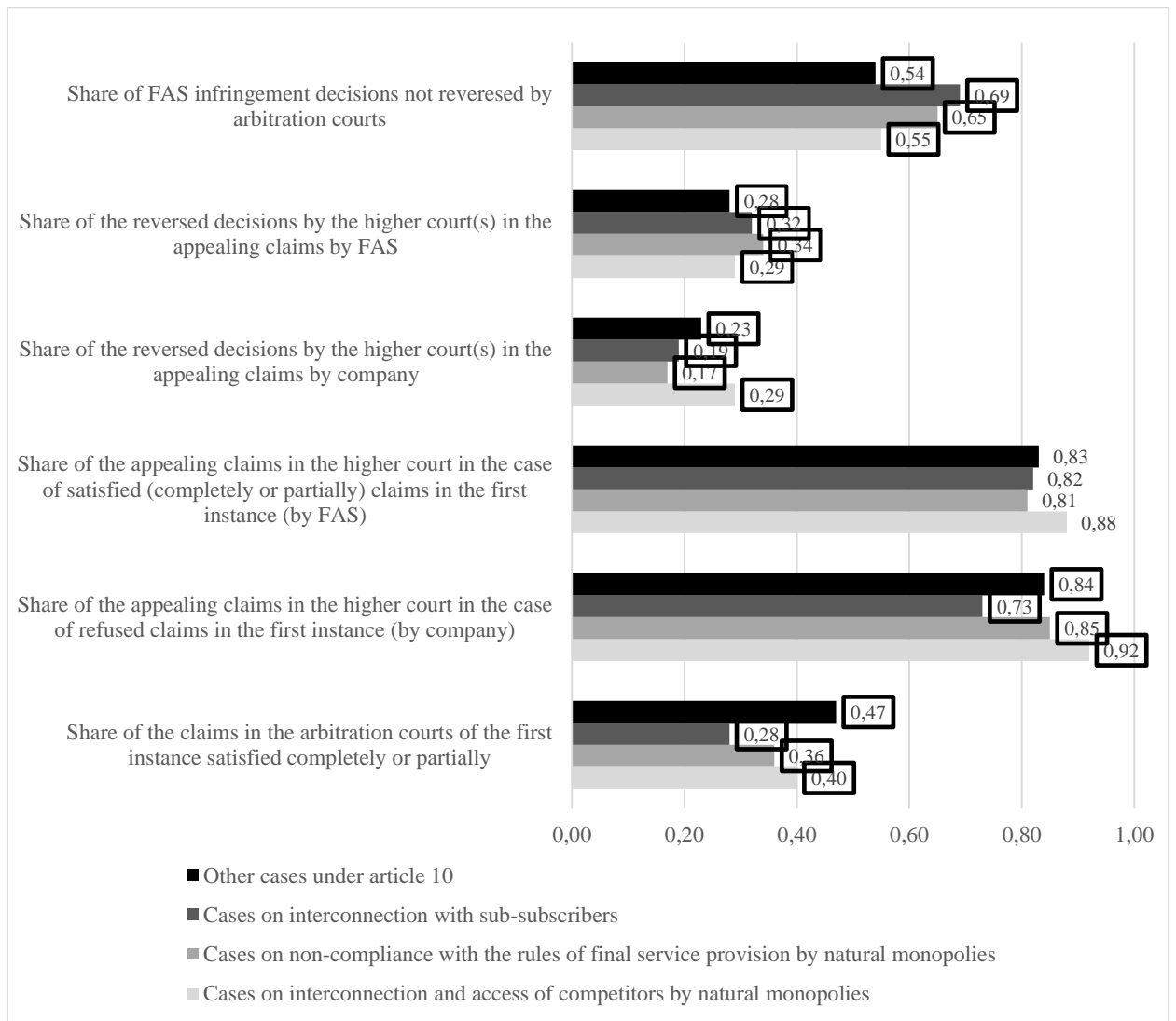


Figure 2b. Determinants of the probabilities of the infringement decision under art. 10 to be reversed by the commercial courts: content of decisions compared

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 commercial 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 the Law on competition. 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.

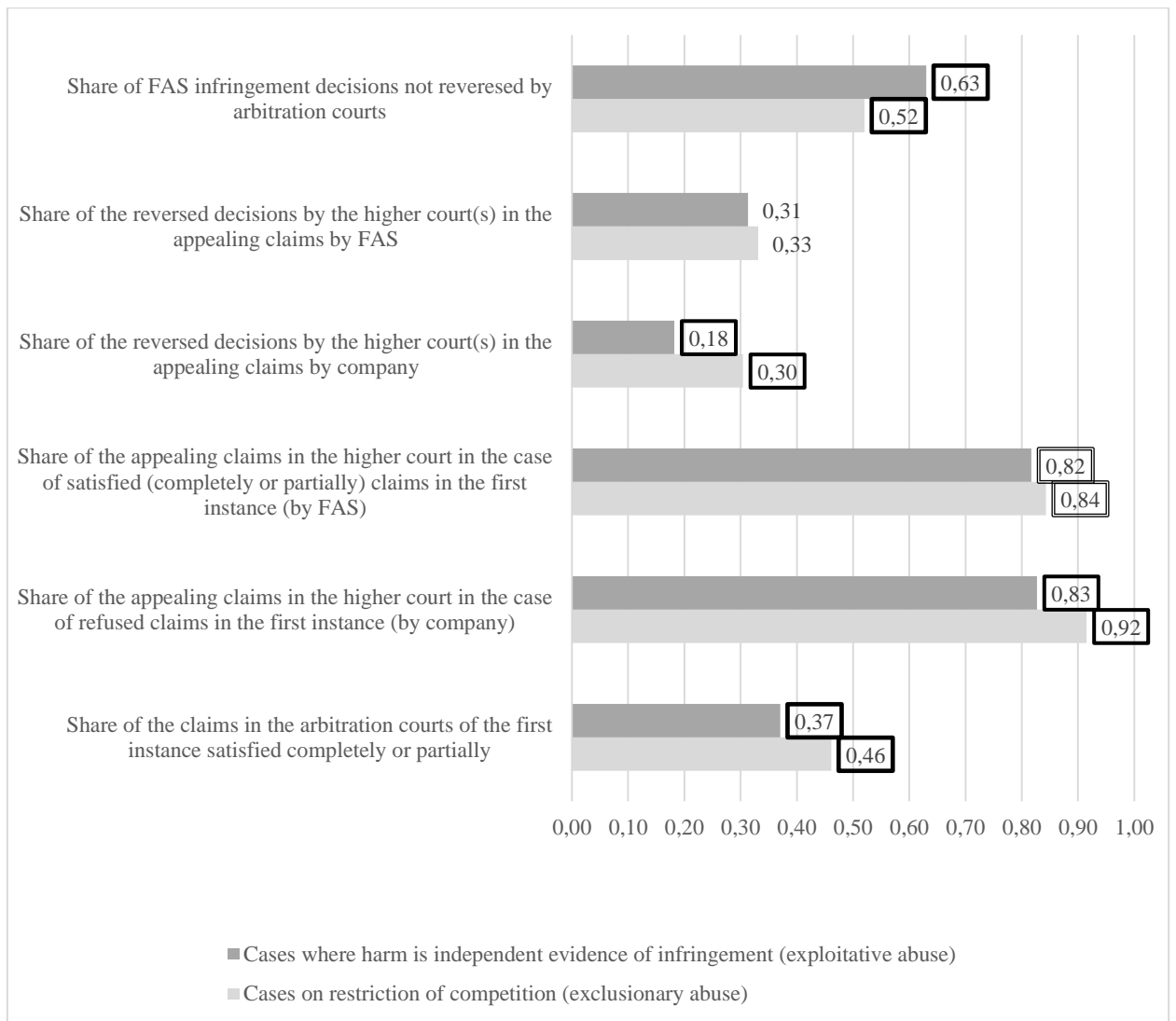


Figure 2c. Determinants of the probabilities of the infringement decision under art. 10 (infringers are not natural monopolies and/or companies in conflict with sub-subscribers) to be reversed by the commercial courts: content of decisions compared

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 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 commercial 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 general hypothesis of the study 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 commercial 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 the FAS is mentioned, %	Market share calculated (mean, st. deviation in parentheses) ¹	Share of the decisions where specialized expertise provided to the 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 commercial 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.

The majority of cases are not proper antitrust ones. Infringement decisions rest purely on a finding a harm to others (as it is in cases on commercial conflicts). Cases on alleged non-compliance with the rules of service provisions by natural monopolies and cases on conflicts on interconnections with sub-subscribers should not be investigated by the antitrust authority not only because they are not genuine antitrust but also due to extremely unfavorable balance of costs and benefits of dealing with them in accordance with the "appropriate" guidelines and standards of proof. However a number of institutional features of the Russian enforcement system distorts incentives of the FAS officials in terms of the type of cases that they prefer to handle.

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 the Law on competition, 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 to be a 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 commercial 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 are several ways in which current principles of case selection for enforcement influence outcomes of competition agency’s actions. First, competition authorities concentrate on the cases with large individual harm and may do not intervene in the cases with total large effect on social welfare but lower effect on individual gains. Second, general standards of economic analysis are largely influenced by the standards applied in the typical cases where network operators are involved. Structural approach for proving the dominance is in the center of evidence in most of the cases. Approach may be insufficient for the most part of the alleged Law on competition violations outside regulated industries. Third, a conflict resolution between natural monopolies and final customers attracts excessive resources because legal rules set threshold of economic analysis for antitrust cases that can be too low for ‘genuine competition cases’ but definitely too high for relatively simple conflicts with natural monopolies.

There is no magic key to improve antitrust enforcement. The fundamental problem of insufficient delineation of legislative and institutional structures relating to antitrust, consumer protection and natural monopoly regulation should be solved. Several steps are also 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 does not only allow but also encourages 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.

References

Avdasheva, S., Goreyko, N., Pittman R. (2012). Collective Dominance and its Abuse under the Competition Law of the Russian Federation // *World Competition: Law and Economics Review*, 35(2), 249-272.

Avdasheva, S., Kryuchkova, P. (2014). The 'Reactive' Model of Antitrust Enforcement: When Private Interests Dictate Enforcement Actions – The Russian Case // *International Review of Law and Economics*, in press.

Baye, M., Wright, J. (2011). Is Antitrust Too Complicated for Generalist Judges? The Impact of Economic Complexity and Judicial Training on Appeals // *Journal of Law and Economics*, 54(1),1-24.

Carree, M., Günster, A., Schinkel, M. (2010). European Antitrust Policy 1957-2004: An Analysis of Commission Decisions // *Review of Industrial Organization*, 36(2), 97-131.

Farrell, J., Katz, M.L. (2006). The Economics of Welfare Standards in Antitrust. Competition Policy Center, Institute of Business and Economic Research, UC Berkeley, <http://econpapers.repec.org/paper/cdlcompol/qt1tw2d426.htm>

Geradin, D., Petit, N. (2010). Judicial Review in European Union Competition Law: A Quantitative and Qualitative Assessment // Tilburg Law and Economics Center (TILEC) Law and Economics Discussion Paper No. 2011-008.

Girgenson, I., Numerova, A. (2012) A Reform of Russian Competition Law: It's a Long Way from Brussels to Moscow. *Journal of European Competition Law and Practice*, 3 (3), 293-299.

Gual, J., Mas, D. (2011). Industry Characteristics and Anti-Competitive Behavior: Evidence from the European Commission Decisions // *Review of Industrial Organization*, 39(3), 207-230.

Harding, C., Gibbs, A. (2005). Why go to court in Europe? An analysis of cartel appeals 1995-2004 // *European Law Review*, 3, 349-369.

Huschelrath, K., Smuda, F. (2014). The appeals process: an empirical assessment, ZEW Discussion Papers, No. 14-063.

Kaplow, L. (1987). Antitrust, Law and Economics, and the Courts // *Law and Contemporary Problems*, 50(4), 181-216.

Paneiakh, E. L., Novikov V. V. (2014) Izlishne podozritel'noe vedomstvo: posledstviia «palochnoi» sistemy dlia raboty Federal'noi antimonopol'noi sluzhby, in Russian [Overly suspicious Office: Consequences "cane" system for the Federal Antimonopoly Service]. *Series "Policy Paper on Law Enforcement"*. The Institute for the Rule of Law, European University, St. Petersburg, Internet address: http://www.enforce.spb.ru/images/analit_zapiski/Web_IRL_2014_02_PolicyMemo_EllaPaneyakh_Novikov_FAS_bur_expansion.pdf

Posner, R.A. (1970). A Statistical Study of Antitrust Enforcement // *Journal of Law and Economics*, 13(2), 365-419.

Trochev, A. (2012). Suing Russia at Home // *Problems of Post-Communism*, 59(5), 18-34.

Svetlana Avdasheva

National Research University Higher School of Economics. Institute for Industrial and Market Studies (IIMS). Deputy Director; e-mail: avdash@hse.ru

Any opinions or claims contained in this Working Paper do not necessarily reflect the views of HSE.

© Avdasheva, Tsytsulina, Golovanova, Sidorova, 2015