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ANTITRUST POLICY AGAINST
COLLUSION IN TRANSITION
ECONOMIES: CHALLENGES FOR
EFFECTIVENESS**

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A COMPARATIVE ANALYSIS OF ANTITRUST POLICY AGAINST COLLUSION IN TRANSITION ECONOMIES: CHALLENGES FOR EFFECTIVENESS²

This article focuses on the development of antitrust policy in transition economies in the context of preventing explicit and tacit collusion. The experience of BRIC countries, Kazakhstan, Ukraine and the CEE countries (Bulgaria, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia, Slovenia, Czech Republic, Estonia) in creating antitrust institutions was analyzed, including both legislative and enforcement practices. This article analyzes enforcement issues, in particular: classification problems (tacit vs explicit collusion, vertical vs horizontal agreements), flexibility of prohibitions (“per se” vs “rule of reason”), design of sanctions, private enforcement challenge, leniency program mechanisms, the role of antitrust authorities etc. The main challenges for policy effectiveness in this field were outlined.

JEL Classification: K21, L41, L42.

Key words: collusion, antitrust policy, leniency program, transition economies, CEE, BRICS

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Introduction

According to antitrust legislation the problem of collusion (anticompetitive agreements) is recognized as a serious challenge in all transition economies, but the institutional norms and enforcement practice of each jurisdiction can vary in many aspects. In this paper I will analyze and attempt to explain the diversity of different countries in how they form antitrust institutions, including both the transformation of legislation and enforcement practice.

In this paper, I will analyze the experience of the BRIC countries and some of the CIS and CEE countries. During the 1990s, most of these countries had to build completely new competition protection systems and these different ways of creating antitrust institutions can be compared.

It was a period of large – scale transformation in economic policy, and in particular in antitrust policy. In the CIS and CEE countries it was a period of market economy reforms. China also had to build new antitrust institutions after 1993, during its market economy development, and the “modern” variant of competition law was adopted only in 2008. In Brazil the first laws were adopted after 1930 (Fritsch, Franco, 1991), but in fact the period of competition policy began only between 1988 and 1994 (Todorov, Filho, 2012). In India the modern competition act was adopted in 2002 and the Competition Commission was founded only in 2003 (however, the first legislation in this field was adopted in 1969 and was initially based on the British Restrictive Practices Act of 1956 (Singh, 2013)).

Section 1 of this article outlines the reasons for the antitrust policy’s limited effects and problems of antitrust policy in developing countries, Section 2 examines the main criteria for comparing antitrust systems in different countries, as well as the key issues and challenges for antitrust enforcement in the field of collusion. In Section 3, I analyze how these key elements of the anti-collusion policy were implemented in transition economies. In Section 4 I briefly provide some information about specific features of competition authority in transition economies, in particular, about priorities problem.

1. Limited effects of antitrust policy in developing countries

The history of antitrust policy in developed countries (such as the United States or Great Britain) can date back further than the last 100 years (Mueller, 1996; Kovacic, Shapiro, 2000). However, the construction of antitrust institutions began in other countries just over the last 10 -

20 years, often simultaneously with forming other institutions of a market economy. For example, according to Nicholson (2004) the number of countries with well-established "antitrust regimes" grew from 35 to 100 from 1995 to 2003. Constructing of antitrust institutions in transition economies was a complicated multistep process, with many attempts at reforms in legislation and law enforcement.

The issue of the effectiveness of the antitrust policy seems to be complex and there are quite a few different approaches to estimations of the institutions' "quality" such as the criteria for the effectiveness of the national anti- cartel policy, formulated by John Connor: (Connor, 2006).

- the speed with which the agencies investigate, negotiate, and impose sanctions
- the pattern of cartel formation over time. The antitrust authority should try to raise their expectations concerning the costs of illegal behavior
 - the size of a company's fine relative to its sales during the cartel period
 - the ratio of monetary sanctions to the cartels overcharge

This is probably not an exhaustive list of criteria. In particular, the speed of investigation does not always equal quality of enforcement, and may lead to the risk of 1 type errors. However, the question, posed by Connor is extremely important and a discussion about the criteria for comparing the effectiveness of national antitrust institutions will undoubtedly be continued.

In the same time in many transition economies we can note also small amounts of cartel disclosures and fines collected, in contrast to Europe and the USA. Certainly the difference in the size of the economy ought to be taken into account, and each country has its own special market conditions, but the figures are still rather indicative. Bulgaria is a good example of this, with 1.2 collusion cases per year over 10 years. Romania had 2.8 cases per year over 8 years, Slovenia has had no vertical agreement cases since 2001, the Czech Republic had 1 – 3 cases per year, and Estonia had practically no collusion cases, aside from some exceptions (for example - 2004, 2009).³ This can be contrasted to the USA, where there were on average more than 60 cases per year in the DOJ (USA Department of Justice) anticompetitive agreements field (Sherman 1), 2004 - 2013⁴.

The same situation has developed in the field of fines. According to the Global Competition Review in 2012 cartel fines reached € 614 mln. in European Commission

³ If another source is not mentioned, antitrust data is based on official reports of the national competition authority.

⁴ http://www.justice.gov/atr/public/workload-statistics.html#N_2_

jurisdiction, €413 mln. in the USA, but at the same rating the highest fines in transition economies occurred in Russia (56,8)⁵, Poland (46) and then Lithuania (5), Brazil (2,9), the Czech Republic (1,4) etc. A significant number of cases and penalties occurred in Ukraine with 300 – 600 cases per year and up to nearly € 30 mln. in fines collected in 2012. But for example in Bulgaria the largest fine in history was nearly €1 mln. (Ruseva 2014). In Hungary the average fine for 6 years is nearly €10 mln. and largest fine (according to the standards of CEE, not the USA) reached €23 mln.

Experts such as John Connor also discuss limited effects of the anti – collusion policy in developing countries. In his international cartel study he declares that 77% of corporate cartellists were from Europe of North America and actually more than 91% of fines were collected in Europe (mainly Western European countries) and North America (Connor, 2014) . Moreover, the average fines in developed countries are much higher – 11.1% of sales in US public enforcement and 5.9% in the EU in contrast to 3.5% on average globally (Connor, 2006).

In this paper, I will consider and discuss the main reasons for the limited effectiveness of the anti – collusion policy in developing countries and main problems of antitrust institutions creation. I suggest the following main hypotheses of limited effects, which I will review, analyzing the experience of the CEE, BRIC countries and some CIS countries. In the same time - why in many transition economies the disclosures of collusion happened comparatively rarely and fines are comparatively low? It is not the case that in these countries there are much fewer violations and threats for competition, that need government intervention, so the problems must also be in enforcement mechanisms.

First of all transition economies had to deal with common challenges for the effectiveness of antitrust policy.

- Type 1 and 2 errors in antitrust enforcement are inevitable. We encounter a type 1 error when a bona fide company is accused of a violation. A type 2 error indicates a case when a market participant is guilty of a violation, but competition authority does not accuse the company or is unable to prove that a violation occurred (Shastitko, 2013b). In this field, there are always challenges for the competition authority, which actions should be regarded as a threat to competition and which criteria should be used to prohibit anti – competitive agreements, to reduce the risk of these errors. In this situation the increased role of the competition authority

⁵ In Russia the competition authority started to gather significant fines, more than 30 mln. euro, only after antitrust reforms, after 2008.

may lead not only to effective enforcement, but also to restricting type 1 errors (Avdasheva, Shastitko, 2011).

- Another challenge is the design of sanctions. Which sanctions (criminal, administrative, civil) should be implemented in case of a violation in order to create right incentives for agents?

- The effectiveness of the cartel disclosure is also a challenge for competition authority. We can expect that modern sophisticated institutions of “collusion disclosure” such as lenience programs or private enforcement could not be introduced in most transition economies quickly and easily. These institutions must be carefully considered and harmonized with each other.

I also suggest that transition economies, which are in the process of constructing market and antitrust institutions, encountered the following specific developmental problems:

- Instability of legal framework. Most countries had to introduce antitrust laws without basic legislation and enforcement traditions; they had to revise these laws regularly. In this situation, when laws are changing too often and abruptly we can predict a certain gap between competition law and enforcement practice, law interpretation and implementation become complicated tasks.

- Anticompetitive agreements (especially not Hardcore cases) may not be regarded as a priority area for a competition authority. In transition economies regulator used to have a lack of human and financial resources and may have concentrated on other important areas, such as natural monopolies, political objectives, advertising. In this case, anticompetitive agreements (especially vertical) may be sidelined by the regulator.

2. Key elements for the analysis of international antitrust experience

There are some good examples of cross-country antitrust analysis, but they usually interpreted first of all quantitative characteristics, without taking into account most of institutional differences. We can use the *Global Competition Review*⁶ which takes into account quantitative aspects of antitrust authorities work, including information on the number of employees and the competition authority budget, the employees’ experiences and their level of

⁶ <http://globalcompetitionreview.com/>

education, the amount of fines collected, etc. However, the rating offers a large number of parameters which assess the scope of the work, rather than the effectiveness of enforcement,

There are also ratings based on research using public opinion. *"World Economic Forum Survey Results on Antimonopoly Policy 2001-2002"* (Nicholson, 2004) contains the evaluation of antitrust regulators, made only by major companies. In the survey they could put a rating from 1 to 7, where 7 was the most effective protection of competition.

Nevertheless, the "quality" of an antitrust policy cannot be characterized solely by using quantitative criteria, we need institutional analysis of the competition protection mechanisms. The following enforcement steps also ought to be taken into account: which kinds of actions are regarded as a violation of competition, which mechanisms are used to prevent these actions (administrative responsibility or the criminal code, investigation procedures, etc) and which agent should initiate an encounter with collusion - competition authority or whether it should be a victim, market participant? I suggest emphasizing the following key aspects of antitrust enforcement:

- **The general problem of classifying violations:** (a particular problem for post – Soviet countries is the juridical separation between cartel formation and concerted actions). Concerted actions can be viewed as a rather complicated challenge for competition authority, because on the one hand the regulator needs some mechanism to prevent anticompetitive actions (for example, parallel significant price increase) in case of the absence of negotiations between the parties. But on the other hand, sometimes very qualified experts are needed to distinguish concerted actions from normal market behavior and price competition, when similar decisions are made just in similar market conditions.

- **The balance of using "per se" (PS) and "rule of reason" (ROR) approaches.** Most countries tend to combine the absolute prohibition "per se" (this approach is often used in the case of explicit collusion or hardcore cartel) with the "rule of reason" principle, which involves an assessment not of the behavior of competitors, but primarily its consequences, calculation of costs and benefits for the society. In European practice terms "category-based" and "effect-based enforcement" are used. The move towards the "rule of reason" approach was complicated even in the United States, and was facilitated and developed through academic studies, in particular through the works of the so-called "Chicago School" (Hart, 2001). An important role in this transition played the increase of the role of economic analysis in antitrust decision-making (Katsoulacos, Ulph, 2009). There are many papers devoted to the problem of finding the optimal way that these two approaches can coexist (Block, 1994; Frezal, 2006;

Katsoulacos, Ulph, 2008; Katsoulacos, Ulph, 2012) and the discussion is far from being finished. One of the arguments in favor of a flexible “rule of reason” regime is connected with regarding consumer benefits as the main target of antitrust intervention (Bork, 1968). The “rule of reason” principle seems to be a priority more for developed countries; it is strongly linked with the costs of expert evaluation of the results of the transaction. There is some kind of a dilemma for developing countries - whether to keep to the “per se” restrictions, which on one hand can really contribute to the antitrust system predictability. On the other hand, the system of strict regulation may restrict economic agents even in those cases when there is no real damage to competition.

- **Legislative and enforcement differentiation in cases with horizontal agreements (HA) and anti-competitive vertical agreements (VA).** Horizontal agreements (collusion between competitors), especially with such consequences, as price-fixing, market division, bid rigging, are mainly analyzed according to the “per se” approach with the relevant severe sanctions, including imprisonment according to the Criminal Code. In most jurisdictions the horizontal **Hardcore cartel (HC)** is determined by the legislation (HC usually refers to horizontal agreements, when such consequences such as price-fixing or market division happened + public procurement collusion, but this depends on the country). HC is recommended to be forbidden in any circumstances, in these cases special “**De Minimus**” (**DM**) thresholds are not usually used.

- **Optimal size of sanctions.** Including whether fixed penalties or a certain percentage of the turnover are used, whether there is a criminal penalty for participating in a cartel, if there is a clear methodology for the amount of fine to be paid, and which factors are taken into account. The criminal prosecution framework for antitrust violations is often characterized by significant problems in the enforcement practice, including cases in Russia and other post – Soviet countries (Avdasheva, Shastitko, 2010).

- **Leniency programs.** These programs offer full or partial exemption from sanctions for companies who provide the regulator with important information about collusion under certain conditions. Therefore, there are incentives to “betray” other cartel members, which can significantly decrease the duration of the cartel and improve the overall competitive environment. These programs were very active in the United States and Western Europe, recently this institution has been actively imported into transition economies. The problem of optimum design of leniency has been actively discussed in the literature (Motta, Pollo, 2001; Spagnolo, 2003; Brenner, 2009; Lefouili, Roux, 2012), laboratory experiments on the effect of leniency on the mechanisms of decision-making were conducted (Hinloopen, Soetevent, 2008; Hamaguchi, Kawagoe, Shibata, 2009). On a theoretical level the idea of a positive payment to a participant to increase the appropriate incentives was discussed (Aubert, Rey, Kovacic, 2006). In

practice it is difficult to implement for obvious reasons, but under some jurisdictions small positive personal payments are used. Nonetheless there are also studies on the adverse effects of leniency introduction (Pavlova, Shastitko, 2014). In most countries, there are different mechanisms to ensure that the program is not a measure of favoring the guilty parties, but a measure of creating the right incentives (for example, the initiator of collusion usually has no chance of being exempt).

- **The role of private enforcement (PE)** and the design of the damage compensation framework. Should public authorities or private companies, who are affected by counterparties or competitors, initiate antitrust interventions? In the US in accordance with the “Clayton law” (1914) an agent that was the victim of an anticompetitive agreement can receive a triple repayment after submitting their complaint to the court. This law dramatically increases the role of private initiatives in antitrust litigation. Outside the United States this opportunity tends to be very limited. At the same time emerging problems are also actual (the role of type 1 errors (Avdasheva., Kryuchkova, 2012)), including the possible transformation of antitrust into an instrument of unfair competition, or even rent - seeking.

- **The quality of the judicial system.** In antitrust enforcement the court’s ability to take into accounts the results of economic analyses and guarantee consistent and rigorous judicial tradition is extremely important. In many countries special antitrust courts (or departments) were created to provide qualified enforcement with equal kind of decisions on certain equal cases.

3. Key elements of antitrust policy in collusion problem – the experience of transition economies

3.1 Classification of violations

In legislation and antitrust enforcement immediately the basic problem arises. What kind of competitors’ behavior should be characterized using this term - collusion? In most jurisdictions any kind of cooperation between competitors can be regarded as collusion. This can include not only price – fixing or limiting or controlling production, but also dividing the market on a territorial basis, in terms of sales or purchases, goods sold or by group of sellers or buyers, and even just the exchange of confidential information.

In practice of Slovakia there was an interesting case of the General Assembly of the Chamber of Restorers (2012)⁷. This Assembly adopted the ethics code, which suggested that restorers should not try to "recapture" the client from their colleagues, including reducing the

⁷ <http://www.antimon.gov.sk/data/att/955.pdf>

prices for similar work. The Code stipulates that if a customer comes to another restorer for price advice, the restorer must refuse a client and redirect them to the old master. The regulator found this code as a restricting competition agreement and prohibited it, which shows how far can be interpreted participation in a "cartel" compared with the original term of collusion with standard features.

There is another actual problem especially for post – Soviet countries (Russia, Kazakhstan) – juridical separation between cartel formation and concerted actions. In Ukraine the term “concerted actions” is also used, but in fact the law prohibits actions more like explicit collusion. In Europe usually explicit collusion is regarded as a priority problem (and also for example in China, according to the European Commission’s recommendations (Wu, 2012)), but for example in Slovakia concerted actions can be also regarded as a kind of cartel agreement according to legislation.

In contrast to cartel cases, concerted actions cases do not require evidence of negotiations between parties. Problems arise in distinguishing - whether the actions can be explained by coordination, or whether they are based on objective economic factors which affect all participants in a similar way. Although, for example, Russian competition law, under Article 8⁸, stipulates such exceptions – “... changing regulated tariffs, changing prices for the raw materials used to produce goods, changing prices for the goods on the global goods markets, considerable changing of the demand for the goods...”, but sometimes the ordinary price competition still can be regarded as a violation (Avdasheva, Dzagurova, Kryuchkova, Yusupova, 2011).

That’s why competition law must contain certain postulates aimed at protecting bona fide competitors. For example:

- Companies’ actions must comply with the interests of all participants;
- Participants must have comparable market shares in order to make concerted actions effective;
- Participant’s plans should be known before actions.

However, the practice shows a priori weaker standards of proof in these cases than in the case of a classical cartel, difficulties in the interpretation of company strategies in the context of concerted actions may induce serious risks of 1 type errors.

It is often difficult to obtain data that can identify the "real cartel". Companies demonstrate more and more complicated strategies of cartel maintenance, good examples are cases from Russia or Hungary. Previously, most of the disclosed cartels have practically "official" documents, contracts about their creation, with the signatures of the CEOs (Kinev,

⁸ http://en.fas.gov.ru/legislation/legislation_50915.html

2012). Now companies are increasingly using unusual ways of cartel formation, encryption, so it is more difficult for the competition authority to obtain literal proof. This strategy can also be interpreted as an indicator of the regulator's effectiveness.

In this situation we may expect that regulator would use concerted actions legislation to protect competition in an easier way. For example, in Kazakhstan, according to the latest annual reports, about 20% of the cases were initiated on the grounds of concerted actions, while collusion cases amounted to only 1% of the total number (for example, in 2012, 30 cases of concerted actions and 2 cases of collusion were investigated).

In Kazakhstan companies are often accused of concerted action on agricultural markets. A good example is the situation on the eggs market⁹, where, after price increase (more than 40%) collusion investigation began. Eventually, however, the regulator accused companies of concerted actions, concluding that the price of eggs was not confidential, but was publicly available. In this regard, the regulator maintained that, the company's actions should be known (taking into account the role of the media and market transparency), and therefore the price increase occurred because of the concerted actions. In this case the market transparency has been considered as a basis for collusion.

At the same time, an entirely different approach to evaluating of the awareness of companies may be used. For example, in the "Benziny.cz"¹⁰ case in the Czech Republic (2012) (exchanging information about companies in the oil sector), the regulator decided not to punish companies, indicating that the exchange of information could be considered as collusion, which harms competition, only when the market is substantially opaque. This was not the case in the oil industry.

There is an interesting example which can be seen from the Russian practices. The number of cases of cartels and concerted actions (Articles 11 and 11.1 of the competition law) decreased from 482 to 292¹¹ in 2012 after some legal amendments. It was added to the law that competitors must know a participant's plans only after some public statement had been made. In fact, the increase in formal requirements dramatically reduced the number of accused companies.

To reduce the degree of legal uncertainty the regulator may define standard requirements for concerted actions. Concerted actions corresponding to these requirements do not require special permission from the authorities.

⁹ <http://www.newskaz.ru/regions/20140207/6108342.html>

¹⁰ http://www.uohs.cz/download/VZ_EN/UOHS_VZ-2013-ang_www.pdf

¹¹ http://www.fas.gov.ru/netcat_files/File/Tsyganov-RUS.pdf

3.2 Choosing between "Per se" vs "rule of reason" approaches

There are traditional arguments against collusion, from high prices and DWL measures to the X – efficiency problem. However, in the literature (since the ideas of Joseph Schumpeter) it is often discussed that the cooperation between firms and even monopolization may also contribute to the social welfare.

According to Shapiro (1989) the question of social benefits in the case of anticompetitive agreements is rather complex and it is difficult to reach simple conclusions, because in each case various factors must be taken into account. However, he believes that it is possible to increase social welfare in the case of effective investments, made by the participants of the agreement.

When summing up the results of empirical studies on the impact of cartels on investment, R&D and progress in the industry Levenstein and Suslow, (2006) come to the conclusion - that in general we can neither deny nor confirm the Schumpeterian hypothesis. There are good examples of how collusion resulted in the stabilization of the industry and significant investments in research and development. There are also vivid examples of collusion, which caused considerable damage to social welfare. The authors note that we should check the Schumpeterian hypothesis, taking into account the specific ways of maintaining the agreement and in connection with established institutional conditions, which determine market dynamics.

Jacquemin and Slade (1989) maintain that even if we initially acknowledge the serious harm from horizontal agreements in terms of production efficiency, the problem should not only be discussed in this context, and we must carefully take into account all the consequences of monopolization, including allocative efficiency, employment and possible benefits in external trade. The authors note that “the most competitive market”, (if we accept the assumption that it can exist in a similar way to the Bertrand model) is hostile to technical progress, leaving no funds for R & D. At the same time collusion can generate the profits needed for R & D. Thus, a key issue in the ROR principle should be whether the institutional conditions exist which are necessary to encourage companies to use their “extra profits” in the right way.

Most countries use the strict “per se” approach for horizontal agreements (price fixing, output restriction, collective boycotts, and collusive tendering). At the same time, the traditional approach (although not in all countries) to vertical agreements (tying, full-line forcing, dealer discounts or rebates, exclusive dealing, territorial allocation, resale price maintenance) is closer to the “rule of reason” approach. Severe penalties may be used only in cases of significant market power. There are different theories of how to evaluate vertical agreements and their

influence on the competition level (Avdasheva, Dzagurova, 2010). Many papers examine the significant positive effects of vertical agreements, in particular the protection of investments in specific assets, the development of non-price competition practices (Pittman, 1997).

Table 1 indicates the author’s evaluation of whether different approaches to horizontal and vertical agreements are used in legislation and practice in different countries. This and other tables are created, taking into account regulators’ reports and guidance, expert assessments, literature, enforcement cases etc. An “Arrow” (→) in the tables means that the term is not absolute, but is the most appropriate for the country, for example in many countries we cannot definitely say whether different approaches to HA and VA are used, that’s why the arrows are used. The results are partly subjective, as special cases and some discrepancies between law and enforcement practice always remain. For example, anti – collusion policy in India is well characterized by an expert appraisal, – “because there is a long-established tradition in Indian (*antitrust*) law to treat a “presumption” as rebuttable” (Bhattacharjea, 2008)

Table 1: Different approaches to horizontal vs vertical agreements (close to EU standards)

Brazil	→No	Latvia	Yes
Bulgaria	→Yes	Lithuania	→ No
China	→ No	Poland	→ Yes
Czech Republic	Yes	Romania	→ Yes
Estonia	→ Yes	Slovakia	Yes
India	Yes	Slovenia	Yes
Hungary	→ No	Russia	→ Yes
Kazakhstan	→ Yes	Ukraine	→ No

Source: author’s evaluation, based on sources [5 -6, 12, 18 – 33, 37, 41, 45, 52, 55, 57, 58, 63, 65 – 68, 74, 79, 83 – 87, 92]

A good example of different approaches can be seen in the Czech Republic, which has a rather severe approach to HC horizontal agreements and consequences estimation approach in vertical cases (taking into account significant impact on market conditions)¹².

¹² http://www.uohs.cz/download/VZ_EN/UOHS_VZ_2013_eng_final.pdf

Table 2: The use of PER SE or Rule of reason (ROR) principles

The use of PER SE or Rule of reason (ROR) principles in collusion cases (author's evaluation)			
Brazil	→ Initially Per Se →Rule of reason (market power principle)	Latvia	→ EU
Bulgaria	Initially Per Se → EU, liberal approach to VA	Lithuania	→ EU
China	→ Rule of Reason	Poland	→ EU, liberal approach to VA
Czech Republic	→ EU, liberal approach to VA	Romania	→ EU
Estonia	→ Per Se	Slovakia	→ EU, (Per Se for HA, ROR for VA)
India	→ more ROR (especially for VA)	Slovenia	Initially Per Se → EU
Hungary	Initially Per Se → EU	Russia	→ EU, but more Per se
Kazakhstan	→ EU	Ukraine	→ Rule of Reason

Source: author's evaluation, based on sources [5 -6, 12, 18 – 33, 37, 41, 45, 52, 55, 57, 58, 63, 65 – 68, 74, 79, 83 – 87, 92]

Table 2 indicates the evaluation of using PER SE and RULE OF REASON principles in transition economies, based on regulator's reports and expert opinions.

In most countries, there are exemptions from collusion prohibition if they could lead to positive results which would outweigh the adverse effects. In Russia Article 13¹³ clarifies the circumstances for these exemptions. In most countries they are more or less similar, based on the EU's recommendations, for example, in Poland main conditions are¹⁴:

- 1) contribution to improvement of the production, distribution of goods or to technical or economic progress;
- 2) allowing the buyer or user a fair share of benefits resulting thereof;

These norms are more or less the same in many countries, but for example in Latvia, Lithuania or Slovakia the competition law requires not "a fair share of benefits", but just an increase in consumer benefits and in India this norm is not mandatory but can be employed just

¹³ http://en.fas.gov.ru/legislation/legislation_50915.html

¹⁴ http://www.uokik.gov.pl/competition_protection.php

in case. It is interesting, that in Estonia, individual exemptions from collusion prohibition are provided in case of some ecological improvement.

There are a lot of exemptions in China (article 15)¹⁵.

- improving technology, or researching and developing new products;
- improving product quality, reducing costs, enhancing efficiency, harmonizing product specifications and standards, or dividing work based on specialization;
- enhancing the competitiveness of small and medium-sized enterprises;
- serving social public interests such as energy saving, environmental protection and disaster relief;
- alleviating decreases in sales or cuts in production overcapacity in periods of economic downturn;
- safeguarding legitimate interests in foreign trade.

In India anticompetitive actions should also be regarded through the balance of consequences (Jain, 2012): the creation of barriers to new entrants in the market; the ousting of existing competitors from the market; the foreclosure of competition by hindering entry against benefits to the consumers; improvements in the production/distribution of goods; and the promotion of technical, scientific and economic development.

A unique case can be found in the example of Ukraine where also additional criteria are offered¹⁶. The ROR approach in Ukraine may be the most evident case, with great possibilities for the interpretation of permitted and prohibited activities. Collusion is allowed in procurement for small and medium-sized enterprises, if it increase their competitiveness; also if it improves the production, acquisition or sale of goods, technical or economic progress, the development of small and medium entrepreneurs, the optimization of export or import, the rationalization of the production.

In the end, even if the competition authority does not permit concerted actions, Cabinet of Ministers may find the agreement to be admissible, it was necessary to prove that the general positive effect for the public interest would be greater than the direct damage. On the other hand, there are counter-arguments, particularly, if the "the restriction of competition is a threat to the system of the market economy."

We can conclude that using the Rule of Reason approach (especially with many criteria, as in China or in Ukraine) can help to avoid type 1 errors, but the authority must demonstrate a high level of administration to relate law requirements and observable market conduct.

¹⁵ <http://globalcompetitionreview.com/reviews/60/sections/206/chapters/2336/china-cartels/>

¹⁶ Competition law - <http://pravoved.in.ua/section-law/209-zuzek.html>

3.3 The regulator’s enforcement priorities (Hardcore Cartel, “De Minimus”)

More and more countries are beginning to use the term “Hardcore cartel” in their legislation. It can be very useful to once again separate the horizontal from the vertical agreements and to concentrate limited resources on real challenges and threats for competition.

The European Commission encourages marking out "hardcore cartels". This standard includes price-fixing cartels, market dividing, including through quotas, and public procurement collusion. Many CEE countries have used this recommendation (see Table 3), but the criteria may vary between jurisdictions (for example, in Romania vertical agreements can often be regarded as Hardcore Cartel). The traditional approach to the prohibition of such cartels - per se, although there are papers that justify such cartels (Bos, Pot 2012).

Table 3: “Hardcore cartels” in legislation

Using “Hardcore cartel” term in legislation			
Brazil	→ No	Latvia	→ No
Bulgaria	→ Yes	Lithuania	→ Yes
China	→ Yes	Poland	→ Yes
Czech Republic	Yes	Romania	→ Yes (often also VA may be regarded) ¹⁷
Estonia	→ Yes	Slovakia	→ Yes
India	→ Yes	Slovenia	→ Yes
Hungary	Yes	Russia	→ No
Kazakhstan	→ Yes	Ukraine	No

Sources: collected from national competition laws [18-33]

Another antitrust measure, the “De Minimis” thresholds suggest not punishing companies, with a small market share, because their bargaining power is in fact very limited, and, therefore, the possible damage to social welfare is likely to be insignificant. This threshold is an important measure of (small companies') protection against excessive regulator’s pressure. The European Commission recommends thresholds of 5-10% for horizontal agreements and of 10 - 15% for vertical agreements. The DM were introduced in most countries, in BRIC countries the situation is special (see Table 4).

¹⁷ <http://www.consiliulconcurentei.ro/uploads/docs/items/id9183/peer-review-romania-2014-en.pdf>

Table 4: “De Minimus” in legislation

“De Minimus” in legislation					
Levels	HA	VA		HA	VA
Brazil	Market power (→20%)	Market power (→20%)	Latvia	15% (20%) ¹⁸	10% (30%)
Bulgaria	10%	15%	Lithuania	Case	Case
China	case	case	Poland	5%	10%
Czech Republic (not law, but recommendations)	10%	15%	Romania	10%	15%
Estonia	10%	15%	Slovakia	10%	10%
India	case	case	Slovenia	10%	15%
Hungary	10%	10%	Russia	0%	20%
Kazakhstan	20%	20%	Ukraine	15%	20%

Sources: collected from national competition laws [18-33]

It is interesting, that in Kazakhstan, the “De Minimus” level for explicit collusion (20%) exceeded the threshold for concerted actions (15% + ROR approach, including the presence of new technologies, "the development of small and medium-sized business"¹⁹)

In most CEE countries there was a tendency to establish or raise the “De Minimus” levels, but, for example, in Russia there was another way of antitrust transformation (from dominance criterion – to 35% threshold - 20% threshold (only vertical)).

An interesting case is Lithuania where there are no official thresholds in competition law, but the authority must define De Minimus in each particular case. In India the “appreciable adverse effect on competition” (AAEC) criteria is used without using De Minimus (Bhattacharjea, 2008).

We see that in many cases De Minimus thresholds are more for vertical agreements (than for horizontal). This enforcement practice corresponds to the theory (see for example - (Pittman,1997)).

¹⁸ <http://www.kp.gov.lv/en/prohibited-agreements/reports-regarding-agreements-between-undertakings>

¹⁹ http://online.zakon.kz/Document/?doc_id=30369177#pos=7;-5&sel_link=1000928654_2

3.4 Design of sanctions

Posner (1969) identifies two types of sanctions for the cartel formation: he calls them "remedial" and "punitive" sanctions. The first type of sanctions helps in damage compensation for the counterparties and helps to smooth out the existing market imbalances. The second type of sanctions should scare agents, "punish them" by imposing sanctions much greater than the possible agent benefits or losses of counterparties. In this way, we can regard criminal responsibility as "punitive" sanctions, which should be a credible threat to members of anticompetitive agreements.

Criminal responsibility in the field of collusion (see Table 5) is rarely used and is sometimes is just an opportunity for some cases, not a real threat to the company. In most countries (also in the European Union, but not the US) administrative responsibility is mainly used (see Table 6), which is sometimes combined with the private enforcement mechanism.

Table 5: Criminal responsibility

Criminal responsibility, maximum duration of imprisonment for collusion cases			
Brazil	5 years (often used)	Latvia	No
Bulgaria	No ²⁰	Lithuania	No
China	No	Poland	No
Czech Republic	8 years (case implementations)	Romania	4 years
Estonia	1 year (3 for HC, often used)	Slovakia	No
India	No	Slovenia	5 years
Hungary	5 years (case implementations)	Russia	6 years (case implementations)
Kazakhstan	3 years (case implementations)	Ukraine	No

Source: author's evaluation, based on sources [5 -6, 12, 18 – 33, 37, 41, 45, 52, 55, 57, 58, 63, 65 – 68, 74, 79, 83 – 87, 92]

²⁰ "No" means that there is no criminal responsibility in this country for collusion cases.

Table 6: Administrative responsibility

Administrative responsibility in collusion cases, corporate monetary fine			
Brazil	0, 1 – 20%(+ personal fines)	Latvia	0-10% (HA), 5% (VA)
Bulgaria	0-10%	Lithuania	0-10% (+ personal fines)
China	1 – 10%	Poland	0-10% (+ personal fines)
Czech Republic	0-10%	Romania	0, 5 – 10%
Estonia	0-5% (5- 10% for HC)	Slovakia	0-10%
India	10% of all turnover or three times total profit	Slovenia	0-10% (+ personal fines)
Hungary	0-10%	Russia	1 – 15% (+ personal fines)
Kazakhstan	5% (10% for big companies)	Ukraine	0-10%

Sources: collected from national competition legislation [18-33]

Some countries have a more or less clear methodology to determine fines. It is important, that in some jurisdictions (for example in Brazil) the fine is expected to be no less than the amount of the unlawful gain from the conduct.

An interesting case is China, where there is no official criminal responsibility for collusion, but in fact there are some cases when people were arrested for participating in a cartel, according to other opportunities of the Criminal Code (Wei, 2013).

In Kazakhstan, Article 196²¹ provides sanctions (up to 3 years) for any acts which in some way harm competition when huge damage is incurred or a large “monopolistic” income (damage threshold for individuals is small enough – less than \$ 10 000 (1000 MRP). However, from 2007 to 2011, only 5 cases occurred (one imprisonment), simultaneously with 227 administrative cases²². The explanation may be the following. Criminal cases are the competence of the financial police that often fail to initiate criminal proceedings due to difficulties with damage and profit calculations. On the other hand, before making a decision about the administrative case, courts should ask the financial police to make a decision whether to use criminal responsibility. In some cases, the financial police either did not make any decision and

²¹ Criminal Code (http://online.zakon.kz/Document/?doc_id=1008032#sub_id=1960000)

²² http://azk.gov.kz/rus/analit_doklady_obzory/otchet_sost_konkur/?cid=0&rid=1641

returned the case to the court, or may analyze the case for a long time without a procedural decision. In this situation, criminal enforcement procedure even blocked administrative responsibility and that's why the process of decriminalization in Kazakhstan began.

In Russia the FAS (regulator) also states, that unfortunately among described cases (with criminal sanctions) actually there were no real cartels - "It is a very sad conclusions, which confirm that, in fact, criminal liability for violation of the antitrust laws was declared ... hardly used (statistics - "at the statistical error level"), and if used – then it was obviously not on purpose" (Kinev, 2012, p. 189). The main reasons for this were the presence of two regulators (FAS and the police in criminal cases) and the design of criminal sanctions (Shastitko, 2013a). So in 2011 the criminal liability for concerted actions was abolished. Now in Russia there are legislative attempts to solve the problem of inter-agency cooperation (Sinyayeva, Petrov, 2013).

Until 2003, Ukraine also had criminal responsibility for collusion, but then only punishment for forcing somebody to take part in a cartel remained , finally in 2011 the article was fully cancelled with regulator's resistance (Malskiy O., Boychuk, 2008).

3.5 Leniency program efficiency

Leniency is now an essential part of modern competition policy. Whilst in the US the program was launched in 1973 (and then seriously reformed and revised in 1993), in transition economies it is rather new institution. By 2011, all the new entrants to the European Union were forced to implement this type of program (Borrell , Jiménez, García, 2012).

In the EU there are general recommendations for the leniency design (2006)²³. The first company that reports about the cartel should be exempt. There should be discounts for rivals, which provided essential information - 30 - 50% for first participant, 20 - 30% for the second, up to 20% for the subsequent ones (most CEE countries used this recommendations, see table 7). It is recommended not to indemnify (but with opportunities for discounts) the initiator of the cartel, not to encourage companies to use the program to artificially create cartels and punish competitors.

In some countries the leniency program is more of a formal act, than a real opportunity. The problems with it are often a lack of reliable guarantees, whether a cartel participant will be exempt from liability, and difficult application conditions. On the other hand leniency may not be used if the probability of disclosure of the cartel is considered to be at a low level, and insufficient to encourage agents to take part in the program. That's why there were almost no

²³ <http://ec.europa.eu/competition/cartels/leniency/leniency.html>

leniency applications for example in Romania²⁴, Kazakhstan or Ukraine. Moreover leniency was practically unused in Estonia, but it is connected also with a very small number of collusion cases (Frolov, Sild, 2005).

Table 7: Leniency programs

	Introduction	Opportunity for Leniency after investigation has started	Discounts for subsequent companies
Brazil	2000	yes (-2/3, cooperation level, (after investigation)	no
Bulgaria	2003	yes	EU, 4+ - 10 – 20%
China	2009 (2011)	yes	Up to 100%, cooperation level, 2 types of leniency
Czech Republic	2001	Yes	-50%, than – 20%
Estonia	2010	yes (including criminal)	Case
India	2002	yes	50%, 30%, 10%
Hungary	2006	yes (including criminal and PE)	EU
Kazakhstan	2009	no	no
Latvia	2008	no	30- 50%, than 20 – 30%
Lithuania	2008	no	50 – 75%, than 20 – 50%
Poland	2004	yes	-50%, - 30%, - 20%
Romania	2004	yes	EU
Slovakia	2001	yes (oriented on HC)	-50% (and + discounts)
Slovenia	2010	yes	EU
Russia	2007	no	no
Ukraine	2001	yes	no

Sources: collected from national competition legislation [18-33]

It should be noted, that in some countries (such as Slovakia, Slovenia, the Czech Republic) leniency programs are oriented firstly (or only) on Hardcore cartels.

²⁴ <http://uk.practicallaw.com/4-532-4276?service=crossborder>

But in some countries leniency programs are very successful and are very often used. The first Russian version (2007) allowed any company to be exempt (including initiator, last member in the queue etc). Therefore amendments were adopted in 2009, so that now only the first member (as well as in the US) may be exempted from liability, which must provide sufficient information to identify the cartel. Leniency program in Russia was very popular, especially in the early years of liberal design (Avdasheva, Shastitko, 2011, Yusupova, 2013). The largest companies in Russia, such as Sberbank, "Rossgostah", "Wimm - Bill - Dann" benefited from this program.

Many versions of the program were introduced in India. The first program (2002) offered leniency only for the first participant, but only when the competition authority had no information about the collusion and the investigation had not been initiated. The second version could be used by all participants but the law did not clarify how much fine would be reduced. Meaning that both versions were able to limit the policy's effectiveness (Ghosh , Ross, 2008). After 2008 the leniency program was altered according to the modern variant.

In theory, positive leniency payments are discussed as an effective way of preventing collusion (Aubert, Rey, Kovacic, 2006). It is difficult to expect such design of the program in practice, but in some way this idea was established in Hungary and Slovakia in the way of personal leniency. In these countries managers can apply for personal leniency, provide essential information and receive 1% of fines, collected from the company. This strategy helps to separate personal and corporate incentives and can be a good way of obtaining confidential information about collusion. In Hungary this mechanism became rather popular with 10 applications at the beginning of the program (2010), 20 applications next year etc²⁵.

3.6 Private enforcement challenge

Private enforcement design is a rather complex issue. McAfee, et al. (2008) note that private firms, due to personal interests are in general better informed about market violations . However private enforcement may become more of a strategy for resolving conflicts with competitors than a real method of protecting market competition. Therefore, they conclude that we can rely on private enforcement only with parallel effective public enforcement and with high competence in the courts.

Among the possible consequences of “private enforcement – based” antitrust, authors point to a decrease in the intensity of competition, extortion from more successful competitors,

²⁵ http://www.gvh.hu/en//data/cms1000267/gvh_ogy_pb_2011_a.pdf

as well as greater incentives for tacit collusion. The positive side is primarily connected with a mitigation of the information asymmetry issue, because the market participant can certainly be more competent in industry problems, in comparison with the competition authority.

PE is used often in the US and is becoming more and more popular in Western Europe (Wigger, Nölke, 2007). However, in the majority of analyzed transition economies there is a formal opportunity of damage compensation claims but because it is a legally complicated procedure it is practically unused in most cases and is more of a legal issue for the future, see table 8 (even in the Ukraine, where a victim has a formal right to apply for double damage repayment).

Table 8: Private enforcement

Private enforcement (PE) opportunity for damage compensation in collusion cases (author's evaluation)			
Brazil	Yes	Latvia	No, formal opportunity
Bulgaria	No, formal opportunity	Lithuania	No, formal opportunity
China	In the development	Poland	Yes, second antitrust mechanism
Czech Republic	In the development	Romania	No, formal opportunity
Estonia	No, formal opportunity	Slovakia	No, formal opportunity
India	No, but regulator consultations	Slovenia	Yes
Hungary	Yes, regulator consultations	Russia	No, formal opportunity
Kazakhstan	No, formal opportunity	Ukraine	No, formal opportunity (double compensation)

Source: author's evaluation, based on sources [2, 6, 12, 18 – 33, 37, 41, 45, 48, 52, 55, 57, 58, 63, 65 – 68, 70, 74, 78- 79, 83 – 87, 89- 90, 92]

In China there were various problems with litigation processes, the burden of proof and in fact no successful stories of damage repayment before (Wei, 2011). Despite this, in recent years, the situation has changed and now PE is developing.

In India, companies actually have no right to go to court with private enforcement claims, but complaints about damages can be considered by the regulator. However, it can be difficult to get government support in this sphere (Ghosh, Ross, 2008).

In Russia we do not have the practice of private enforcement, but (according to Avdasheva and Kryuchkova (2014) and Avdasheva et al (2015) in Russian antitrust enforcement, there are strong incentives to open investigations in the case of an existing complaint, so in this way companies in have widely used a substitute mechanism in public enforcement.

In the CEE countries, PE is also generally a formal institution, but is beginning to play an important role in certain jurisdictions (Hungary, Poland). In some cases, private enforcement is conducted with the regulator's help and consultations. However, for example in Poland it is quite another way of solving competition problems and PE functions separately from the competition authority (Jurkowska, 2008). In Poland the new competition act (2007) shifted the legal system towards public enforcement, prohibiting agents from initiating an investigation through the UOKiK (competition authority) head, prior to a formal investigation by the regulator. It was done with a purpose to redirect private enforcement proceedings in the judicial way and therefore divide two types of enforcement. Unfortunately, the new regime seriously increased time and financial costs for applicants.

The private enforcement framework should also be adapted to the leniency program, so it does not become an obstacle. For example in Hungary this problem was solved effectively²⁶ – participants have some kind of PE immunity– they may repay damage only after a trial and only in case that other companies have no opportunity to provide compensation.

3.7 Consistent judicial practice

A great challenge to the national antitrust system is ensuring consistent and united law enforcement framework. It is difficult to overestimate the role of the courts in this field – courts must guarantee a more or less unique and qualified level of litigation resolution. In some countries (see table 9) authorities succeeded in creating special courts (or departments) for antitrust issues, in order to unify the enforcement mechanism. A bad example is in China, where

²⁶ http://www.gvh.hu/en/for_professional_users/leniency_policy

ordinary judges usually have no education neither in the antitrust field, nor in economics (Owen, Sun, Zheng, 2008).

Table 9: Courts

Special court departments for collusion (antitrust) cases			
Brazil	no	Latvia	no
Bulgaria	yes	Lithuania	no
China	no	Poland	yes
Czech Republic	no	Romania	no
Estonia	no	Slovakia	yes
India	no	Slovenia	yes
Hungary	yes	Russia	no
Kazakhstan	no	Ukraine	no

Source: author's evaluation, based on sources [6,9-10, 18 – 33, 37, 41, 45, 52, 55, 57, 58, 63, 65 – 68, 74, 79, 83 – 87,89- 90,92]

It should be noted that there is some nuance in the European Union's jurisdiction. A national regulator used to work with small cases across the country; cases that affect more than one country are the prerogative of the European Commission, but large-scale cartels (officially covering one country) often have an impact on competitors, suppliers and buyers from other countries, and so this cartel may become an EC case. More and more cases are handled by joint efforts of both national and pan-European regulator.

4. Competition policy in transition economies: priorities problem

The antitrust policy in the majority of transition economies can be characterized firstly by a lack of stability both in law and enforcement. We can use the example of Estonia, where the new Competition act was adopted in 2001, only 3 years after the adoption of a similar law in 1998. This similarly occurred in Romania, where competition laws were adopted in 1996, 2004, and 2010. In general, in many countries (especially in CEE) we see the increase in using the ROR approach, but at the same time tightening of sanctions for violation happened (Makarov, 2014b). This process can be viewed as positive in terms of a public policy movement towards

increasing the system's efficiency. Simultaneously, it is the situation of increased legal uncertainty, a threat to business strategy and investment.

When analyzing the competition policy in the field of collusion, we must take into account general objectives and challenges that the regulator encounters. In many countries, the competition authority has a very wide range of activities (including advertising or consumer protection) and with limited resources this may have some negative consequences. In some countries, the competition authority is mainly focused on socially important areas, strategic sectors, natural monopolies (electricity, communications, transport), as could be demonstrated by competition policy in Estonia (Schinkel, Thielert, 2002; Eerma, Sepp, 2007). In some cases, antitrust policy may not be concentrated on the protection of competition but may be used to control prices, in the fight against inflation. Good examples are Kazakhstan and originally Hungary (Zoltan, 2009). In Hungary during the 1990s strong "per se" prohibition was introduced for both horizontal and vertical agreements, but in fact the regulator was concentrated on monopolistically high prices during the high inflation period. In Bulgaria before 1998 the competition authority also used to concentrate on cases of abuse of dominant position and paid little attention to anticompetitive agreements (Boyanov, 2011). In Brazil, it was only after 2000 that the collusion problem became one of the country's priority issues (Todorov, Filho, 2012). Until 1988, the Brazilian regulator used to focus on the "protection of the popular economy" (Oliviera, 2000), government's regulation of the economy (including price control), rather than competition protection according to the standard meaning. In China there still can exist a strange balance between competition policy and government regulation. For example, when in 2001 twenty airline companies formed a cartel with price – fixing, the head of the Chinese Civil Aviation Administration praised them for stabilizing the prices and recommended that they consider the additional obligation of indemnity (Yang, 2002).

The regulator's focus on such areas means that the competition authority may not pay attention to collusion cases in the "non – priority" markets, that's why other ways of cartel disclosure are required. Some potential solutions for solving this could be:

- the development of private enforcement model (with the introduction of a large compensation level to make PE an economically attractive strategy),
- the development of leniency programs to increase incentives to stop participating in the collusion.

Conclusions

This article analyzed the experience of transition economies (16 countries) in developing antitrust policy in the field of fighting with tacit and explicit collusion. These countries over the past few decades have done a lot to create (or import) modern antitrust institutions.

The CEE countries in their reforms were more limited by the EU integration process, the BRIC and CIS countries were more independent the development of their institutions, showing greater diversity in antitrust design.

The analysis shows that transition economies encountered challenges connected both with common problems of effective design of antitrust institutions and also problems, connected with the instability of the legislative framework and regulator's priorities.

The main challenges can be formulated in the following way:

1) Risks of type 1 and 2 errors. Transition economies tried to find an optimal balance in this field, relying on developed countries' (primarily- the EU) guidance and recommendations. There was a move towards the ROR approach, which helps to reduce the probability of type 1 errors. This approach is based on social welfare calculations, firstly taking into account the agreement's consequences. More unified criteria in this calculation are used, based on EU standards, aside for some special jurisdictions with a high level of legal uncertainty (China, Ukraine etc.). It is noteworthy that most countries (11 vs 5) introduced more liberal antitrust policy towards vertical agreements, which is consistent with EU recommendations and economic theory. However, the big challenge remains in using these standards in law enforcement.

2) Design of sanctions. Transition economies have reached more or less common design of administrative responsibility (fines up to 10% of turnover). However there is a problem of very limited effectiveness of criminal sanctions in the antitrust field. This is due both to the uncertainty of the legal framework, and the issues of inter-agency cooperation, as the competition authority has traditionally no rights in the Criminal Justice sphere. The police may lack economic thinking and have difficulties with the damage/profit estimations. Therefore, criminal responsibility in most jurisdictions is not used in legislation (8 countries) or rarely used only in individual cases (4 countries).

3) Complicated institutions of cartel disclosure. In developed countries institutions such as the leniency program and Private Enforcement (PE) became important ways of cartel disclosure. Leniency programs were introduced into legislation in all analyzed transition economies. The main challenges in this field are – clear methodology and harmonization with other antitrust institutions. If the program is used only for administrative proceedings, but not

intended to mitigate criminal liability (for some countries liability in the field of private enforcement is also important), it can greatly discourage companies from participating. Moreover, several countries introduced extremely harsh conditions for application and faced with the lack of methodology, these factors can sharply limit cartel disclosures (Romania, Ukraine, Kazakhstan, initially India). Personal leniency payments (Hungary, Slovakia) could be regarded as a new effective innovation in antitrust. The private enforcement mechanism is also a challenge for transition economies. In most countries it is still a formal opportunity in legislation that can never be used in practice (10 countries). Countries should therefore decide if they want to turn it into a really effective tool, and if they are going to establish PE, they should decide if Private enforcement can be used as a supplement for competition authority activity (as, for example, in Hungary) or as an independent institution (as in Poland).

4) Instability of legal framework. Legislative and enforcement mechanisms in transition economies are constantly changing, which is understandable. However, in this situation legal uncertainty problem becomes inevitable, because legislative and enforcement practices can vary greatly. Legal uncertainty therefore remains in the understanding the collusion problem and also in the regime of antitrust enforcement and supervision. Special antitrust divisions of courts can help to create more consistent judicial practice in this field and some countries have begun to use this feature, at the same time there are also negative examples (China).

5) Priorities problem. In transition economies the competition authority used to lack time and resources, that's why priorities in the antitrust policy are very important. Antitrust institutions such as the "Hardcore cartel" (12 countries) and "De Minimis" (DM) thresholds (11 countries in competition law and 2 countries using recommendations) have been introduced in legislation. Whilst they offered a more favorable regime for vertical agreements, they also focused the regulator's attention on large companies with real market power, which can really harm competition. At the same time, the DM thresholds may vary depending on the regulator's policy, up to case - study approach in Lithuania or India. At the same time there are still countries where antitrust policy in the field of collusion is expected to be less effective because competition authority, as described in Section 4, is concentrated on other important areas, such as natural monopolies, price regulation, advertising etc.

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