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Distorting effects of competition authority's performance measurement: the case of Russia

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Abstract

Purpose – The purpose of this paper is to explain the impact of the incentives of competition authorities concerning antitrust enforcement on the structure of enforcement and understanding of the substantive norms and welfare standards in Russia using case-level evidence.

Design/methodology/approach – The study is based on a unique data set of appeals to infringement decisions in 2008-2012. Quantitative and qualitative analyses are applied to derive an understanding of the targets of competition policy in the practice of enforcement.

Findings – The analysis reveals that the majority of cases would never be investigated under conventional understanding of the goals of antitrust enforcement. It is also shown that antitrust authorities tend to investigate cases that require less input but result in infringement decisions with lower probability of being annulled and lower cost to proceed. Structure of enforcement is skewed toward cases where harm serves as independent and sufficient evidence of competition law violation.

Originality/value – The results show that it is dangerous to motivate authority and public servants based either on number of tasks completed or completeness of tasks when they are heterogeneous in terms of difficulty and where easier ones provide lower positive effects on welfare. Judicial reviews may poorly contribute to performance measurement under a discretionary choice of enforcement targets.

Keywords Russia, Motivation, Competition, Antitrust enforcement, Authorities' incentives, Harm

Paper type Research paper

Introduction

Effective public policy requires efforts of the responsible authorities. Governments all over the world attempt to develop appropriate motivation systems for the authorities responsible for different public policies. An important part of such motivation systems is performance measurement. Rewards to the authority or even particular public officers based on performance scores put in place to motivate efforts.

The effectiveness of a motivation system substantially depends on the appropriateness of performance score measurement. Application of poorly designed performance indicators distorts incentives provided to authorities and public officers,

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and prevents the improvement of policy outcomes. Authorities that use discretion in the selection of targets are more strongly impacted by motivation and performance measurement. There is a threat that authorities will perform easy tasks, instead of important but difficult, ones; as the completion of these easier tasks result in higher expected performance scores.

Competition enforcement is among the areas of public policy where responsible authorities have substantial discretion in choosing particular targets. Competition authorities are able to allocate scarce resources among investigations and actions with different effects on welfare, and this makes prioritization an important issue. Resources and efforts should be directed toward targets with the highest expected positive welfare effects. However, the welfare effects of enforcement actions are extremely difficult to assess. This is why, in addition to an assessment of the impact on welfare, governments often use other performance indicators for competition authorities.

The goal of this paper is to explain the impact of incentives imposed by performance measurement on the structure of antitrust enforcement by a competition authority. Using the example of Russia, as a country with relatively young competition legislation, we show that performance measurement affects the prioritization of cases, and thus the outcomes of competition policy. The conventional aim of antitrust enforcement is to prevent the restriction of competition. Russian, as well as European competition policy, contains rules that, in addition to restrictions of competition, prohibit exploitative conduct of dominant market participants. The application of Russia's specific performance measurement system (PMS) explains why Russian competition authorities concentrate on targets that are of minor importance in European competition enforcement.

The following part of this paper is devoted to a literature review, which provides a basis for hypotheses. The next section briefly discusses the peculiarities of Russian context. The empirical analysis is based on a data set comprising claims to commercial courts to annul infringement decisions of the competition authority in Russia 2008-2012. The paper's final section concludes and provides policy implications.

Literature review

Motivation of authorities and public officers is central to the new public management (NPM) concept, which aims to enhance performance efficiency across different policy areas (Wilenski, 1988). Motivation requires management and measurement of performance (Hood, 1991). The success of a PMS thus depends on two factors, which are the choice of a suitable measurement tool and the achievement of operative-level commitment (Jääskeläinen and Sillanpää, 2013). Selecting appropriate measures of performance is a difficult task and should correspond to the particular context (Kaplan, 2001; Diefenbach, 2009).

Performance assessment that is successful in one condition may not work well in another, and may even lead to negative externalities for the effectiveness of public policy (Modell, 2004; Lonti and Gregory, 2007). Problems persist in terms of the definition, quality and presentation of indicators (Fryer *et al.*, 2009). Strengthening of performance stimulation may cause negative effects, such as suboptimization, symbolic behavior, lack of innovation, increased monitoring costs, lack of clarity concerning measured indicators (e.g. quality), etc. (Bouckaert and Balk, 1991; Smith, 1995; Van Thiel and Leeuw, 2002). Literature on agency theory shows that there is a risk of efforts being biased toward quantitative results instead of qualitative ones. The design of incentives under multiple dimensions of tasks is especially difficult if efforts in more observable (but less important or worthless) dimensions of tasks substitute efforts in less observable but more valuable tasks (Kerr, 1975; Holmstrom and Milgrom, 1991; Gibbons, 1998).

Regulatory agencies have to take into account several constraints in relation to legislation, administrative procedures, etc. (Viscusi *et al.*, 2005). As a result, performance measurement differs across developed countries. In many cases indicators aim to reflect the impact of enforcement on welfare. Performance indicators of the US Federal Trade Commission (FTC) include total consumer savings compared to the amount of resources allocated to consumer protection, the amount of money the FTC has returned to consumers and forwarded to the US Treasury, etc. (Federal Trade Commission, 2014). The Directorate General for Competition (European Commission) aims to use benchmarks for (observable) customer benefits resulting from cartel prohibition decisions and from horizontal merger interventions, respectively (European Commission, 2014).

Another problem pertaining to motivation and performance measurement in competition agencies is related to multitasking. Competition authorities are often responsible not only for enforcement against collusion, monopolization, and merger approval, but also for sector-specific regulation, consumer protection, support of small businesses, etc. Multitasking generates the problem of prioritization in competition agencies (Petit, 2010). Prioritization might create the systematic non-enforcement toward a certain type of infringement (Wils, 2011). Schinkel *et al.* (2014) built a model to explain the choice of competition agency between simple and difficult cases, and showed that multiple equilibria are possible, with different allocations of effort between simple and difficult tasks, depending on budget available. When the tasks of regulation mismatch the institutional framework appropriate for its application, this, in combination with multitasking, may result in migration of potential targets to other policy domains. As a result, regulatory agencies prioritize tasks while abandoning certain policy goals (Hyman and Kovacic, 2013).

Performance assessment for competition authorities may include the quality of investigations of legal violations and evidence collected. Antitrust enforcement is constrained by court judgment (in the USA and countries with similar organization of competition policy) or potential judicial review (in the EU and other countries with administrative enforcement). Companies appealed more than 33 percent of decisions on violation in the USA in 1996-2006 (Baye and Wright, 2011), and more than 29 percent of decisions in the EU in 1957-2004 (Carree *et al.*, 2010). In countries with relatively young and developing competition, enforcement has decreased the rates of appeal (from 70 percent in 2000 to 20 percent in 2012 in Brazil (de Azevedo, 2014)); this is considered as an indicator of improvement to the actions of authorities. The high rate of appeals to decisions in antitrust cases provides important information on the efforts of competition authorities to collect and present evidence on law violations.

All of the above-mentioned problems arise even in developed countries, but for countries with less well-established traditions of competition policy and judicial review in antitrust cases the problems can be a particularly significant issue. The impact of performance measurement and motivation systems on the structure of enforcement is important to explain the effectiveness of competition policy. Thus, the argument of this paper can be applied to a range of jurisdictions, using the Russian case as an example.

The Russian context

Brief review of antitrust enforcement in Russia

Russian antitrust enforcement provides ideal data to test hypotheses on the impact of performance measurement and incentive systems on the activity of public officers in competition agencies.

First, Russian antitrust enforcement is relatively young. The national competition authority, the Federal Antitrust Service (FAS), which is organized as a system of relatively independent regional subdepartments, was established in 1990. However, the influence of decisions made by competition authorities began to increase rapidly following the introduction of turnover penalties for violations of Russian law "On protection of competition" (up to 4 percent of the violator's turnover in the market affected) in 2007.

Second, the scale and structure of Russian antitrust enforcement represents a puzzle that deserves explanation. Articles 101 and 102 of the Treaty on the Functioning of the EU are blueprints for article 11 (on collusion and concerted practice) and article 10 (on the abuse of dominance) of the Russian law. Russian legislation borrowed most of its legal provisions from European competition law, including the illegality of exploitative conduct of dominant sellers (Vickers, 2008).

At the same time, the scale and structure of enforcement in Russia are specific. According to the Rating Enforcement, Global Competition Review, in 2013 Russia conducted the highest number of investigations compared to competition agencies in other countries. FAS investigated more abuse-of-dominance cases than all other authorities in the world: in 2013, 2,635 investigations were opened, and 2,212 were cleared.

Review of the Russian competition policy made by OECD in 2005 specifically mentioned overtasking (OECD, 2005, p. 117) together with non-credibility of sanctions and lack of investigatory power as a source of limited positive impact of the enforcement on welfare. Ten years ago an overall consensus was that "investigating and prosecuting anti-competitive agreements has proved to be a challenging task for Russia's competition authority" (OECD, 2005, p. 120). Since 2005, stronger sanctions, which include turnover penalties for restrictions of competition and criminal liability for collusion, were introduced. According to OECD review in 2013, FAS also "proved the ability to undertake more serious investigation activity" (OECD, 2013, p. 154). At the same time OECD repeats that the workload of Russian competition authority is "very large and very broad," and excessive workload explains "delay in the development of economic analysis skills and investigation practices" (OECD, 2013, p. 8).

Third, Russian competition enforcement has developed under the strong influence of administrative reform that started in 2003 through adoption of the law "On the public service system in the Russian Federation." Administrative reform generally follows the NPM concept. Among other important innovations, the role of performance management and motivation of executive authorities and public servants increased (Verheijen and Dobrolyubova, 2007). Since 2003-2005, competition authorities (as regional subdepartments of FAS) have applied specific PMSs in addition to legal constraints on decision making.

The question is, therefore, whether the applied PMSs have contributed to the unexpected results of European competition rules transplantation, and to what extent substantive and procedural legal rules, on the one hand, and motivation, on the other, have contributed to the specific development path.

Motivation and performance measurement in the Russian competition authorities

Motivation of the Russian competition authorities relies on both the external legal requirements and the internal system of performance measurement. Following the administrative reform of 2003-2005, FAS has been an independent authority regarding the organization of executive power in the Russian Federation in several dimensions. According to the legal provision, FAS is independent from any other ministry or government agency. The FAS budget is specified separately in the federal budget, and

does not depend on any fees for merger approvals, or penalties paid by violators of the law. According to its legal status, FAS is responsible for the supervision and control of compliance with several laws related to competition, including competition law specifically, and laws on public procurement, advertising, and a set of sector-specific laws on tariff regulation (which was added recently). Competition law and statutes of competition authorities do not contain any provisions on the necessity to balance the objectives of competition protection with other policy objectives, or explicit provisions on "public interests." In other words, FAS decides on actions under a relatively high level of independence from the Government of the Russian Federation. The independence of competition authorities' decisions is constrained by the inquisitorial model of decision making, whereby officers from the same competition authority investigate the case and decide whether there has been an infringement (law violation). However, this is not specific to Russian antitrust enforcement: in many jurisdictions (for instance, in the EU), it is organized in the same way.

At the same time, decisions made by the FAS are highly influenced by the requirements of Russian administrative law. Competition authorities may inspect compliance with competition law either on their own initiative (*ex officio*), or on the basis of complaints received. Regulation of control and monitoring in Russia attaches great importance to responding to complaints. A special law, "On the procedure of considering complaints of citizens of the Russian Federation" (2006), requires an authority to consider every complaint in order to 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 investigations. Relevant rules are introduced in order to prevent administrative silence and improve accountability. Although antitrust authorities are formally entitled to select which complaints to address and cannot be compelled to conduct investigations on every complaint received, they are strongly incentivized to open as many investigations on complaints as they can. Complainants can sue authorities and officials for any harm that results from inaction, and the threat of suing is credible (Trochev, 2012). Rewards such as promotions and bonus payments are also related, more or less explicitly, to the share of complaints that result in investigations.

Finally, internal performance assessment in FAS contains explicit reference to the legal quality of infringement decisions. An indicator of legal quality is the share of infringement decisions coming into legal force from all decisions made. In other words, a decision is considered to be of high legal quality if neither company appeals the decision of the competition authority, or if the commercial court (which specializes in disputes between legal persons and public authorities) refuses a claim to annul the infringement decision. Costs of access to judiciary are relatively low in Russia. Fees are negligible, the rule of cost indemnification is applied, there are no any restrictions regarding representation, and there are different ways to provide evidence. Companies that are found to have infringed often appeal the decision, and judges in commercial court often annul the decisions of competition authorities.

Taking into account the fact that antitrust enforcement is complex and difficult, requiring costly secret investigations and complex assessment of the practices in question, it is problematic to handle a large number of cases and provide a high-quality analysis. The importance of complaints explains the overenforcement in terms of number of investigations, as well as the high probability of wrongful conviction (Avdasheva and Kryuchkova, 2015). However, performance measurement applied to Russian competition authorities motivates to avoid legal errors. In order to achieve a higher performance score, competition authorities can select "simple," in contrast to

"difficult" (or "low-cost" in contrast to "high-cost"), cases to investigate. In this paper we identify this precise group of cases, and explain the relationship between motivation of competition authorities and case selection.

Decision of competition authorities and judicial review

Table I shows recent trends in competition enforcement in Russia, and outcomes of judicial review of infringement decisions. The increasing number of complaints makes satisfying the majority impossible. Although there is a decreasing ratio of opened investigations to complaints, this number is still higher than in Europe (for the

	2008	2009	2010	2011	2012
Complaints submitted to competition authorities	10.704	16.959	23.046	27.063	27.347
Investigations opened by FAS (% of the number of complaints in parentheses)	6.541 (61.11)	9.664 (56.98)	11.431 (49.60)	11.276 (41.67)	10.009 (36.60)
Infringement decisions					
Infringement decisions made by FAS	1.045	1.731	1.979	2.625	3.216
On abuse of dominance (article 10)	862	1,438	1,539	2,310	3,029
On horizontal or vertical agreements, concerted practice (article 11)	183	293	440	315	187
Claims for the annulment of FAS decisions					
Claims for annulment submitted to commercial courts in the first instance (% of the number of decisions in parentheses)	337 (31.96)	648 (37.09)	962 (48.05)	1129 (43.01)	626 (19.47)
Decisions of commercial courts					
Infringement decisions annulled (completely or partially) by the courts of the first instance (%)	51.50	42.83	41.32	35.87	33.87
Appeals of decisions of courts in the first instance (%)	73.05	78.97	84.54	83.97	82.75
Decisions of first instance court reversed by higher courts upon appeal (%)	40.57	21.30	19.53	18.88	17.37
Share of FAS decisions finally annulled (%)	46.41	43.15	39.96	37.56	36.42
Average time taken to reach final decision (in months; standard deviation in parentheses)	9.49 (6.42)	9.96 (6.03)	9.80 (6.15)	10.56 (6.28)	10.31 (5.60)

Sources: Database of Laboratory of Competition Policy and Antitrust Enforcement, Institute of Industrial and Market Studies, Higher School of Economics (LCAP database hereafter), data of the Federal Antitrust Service RF 2008-2012

Table I. Competition enforcement and judicial review of infringement decisions: 2008-2012

European Commission, this ratio is around 10 percent (see Gual and Mas, 2011, p. 220)); in addition, it predicts an increasing number of investigations. The legal quality of FAS infringement decisions, defined as the probability of non-appeal or non-annulment by commercial court, has increased steadily. In comparison, of the 503 decisions made by the European Commission during 1957-2004, 31 percent were annulled partially (or the claimant received fine reduction), and 17 percent were annulled completely under judicial review (Carree *et al.*, 2010, p. 126).

Without in-depth analysis of decisions made, we cannot be sure that it is improved quality of analysis by the competition authority that explains the decrease in the ratio of annulled decisions over time, and, if the quality has improved, how it is possible to combine increasing quantitative and qualitative performance indicators with a much slower increase of resources available to competition authorities. We propose an alternative explanation: performance management induced subdivisions of FAS to investigate a specific group of cases that at the same time are less often appealed and annulled (*H1* in the empirical analysis), and require less resources in order to make decisions and confirm them under judicial review (*H2* in the empirical analysis). The data in Table I show that the increased number of investigations was due to a rise in investigations on abuse of dominant position. Provisions on abuse of dominant position in Europe and Russia prohibit not only restrictions of competition but also actions that impose harm on a counterparty or consumer. Due to historical circumstances regarding the development of Russian law, standards of proof for the fact of harm (but not for the quantitative assessment of harm) are relatively low. The same is true for causal links between the actions of the potentially liable company and the damage (Brüggemeier, 2011). If imposed harm is the main evidence of violation, then the probability of annulment of the decision by judges in commercial courts is lower. Analysis of judicial review on micro level is aimed to support the conclusion that prioritization permits the Russian competition authorities to achieve higher performance scores measured by the number of investigations, and the share of infringement decisions that come into legal force.

Data and methodology

The data used in our research covers almost all decisions made by commercial courts in the Russian Federation on claims to appeal infringement decisions made by competition authorities during 2008-2012 (see Table I). The data set includes 3,682 cases and its coverage exceeds one-third of all the infringement decisions of competition authorities.

To describe and explain the standards of proof in competition investigations, we combined qualitative and quantitative analyses. Using the decision of the commercial court as an observation, we attributed to the observation variables that reflect the following characteristics:

- the nature of the alleged violation (we indicate separately abuse of dominance and anti-competitive agreements and concerted practice; the more detailed classification includes non-compliance with the rules on final service provision by natural monopolies, non-compliance with the rules on interconnection of competing networks by natural monopolies, access to the network by vertically disintegrated competitors, conflicts between operators of local networks and their sub-subscribers, other abuse of dominance violations, horizontal agreements, vertical agreements, and concerted practice);

- indicators of competition restriction (we distinguish cases where restriction of competition represents evidence of law violation and cases where the harm imposed is independent and sufficient evidence of a presumed violation; the last group is also divided into cases where the harm is inflicted on the group that is sufficiently large relative to the overall market demand or supply, in contrast with cases that consider harm for only a small group (to one physical or legal person in extremis));
- indicators of the court decisions (whether the court satisfies or refuses the claim in the first instance, whether the fact of refusal is appealed, whether the higher court reverses the decision);
- indicators of evidence that is applied to prove a law violation (substantial indicators include application of the Guidelines for Market Analysis and Competition Assessment, developed and legally approved by FAS, and the fact of calculation of the market share of the alleged violators; organizational indicators are the fact that specialized expertise is provided to the parties, and the number of economic experts used by the parties); and
- the duration of litigation as an indicator of the efforts the parties have made and costs that competition authorities bear under judicial review.

We started with a quantitative description of the structure of infringement decisions to show a "typical" decision in Russian commercial court. The combination of qualitative and quantitative analyses allows us to assess the structure of cases in terms of "individual harm imposed" and "competition restriction" as a principal component of proof. We propose two hypotheses:

H1. FAS prioritizes cases with lower expected probability of being annulled.

H2. FAS prioritizes cases that are "less costly" for competition authorities.

To test the empirical hypotheses, we compared the characteristics of groups of cases that affected the costs of the competition authority and their performance indicators. As an explicit performance indicator, we used the legal quality of the infringement decision measured by the probability that the decision would come into legal force. Cost of judicial review was measured using two groups of indicators. The first is the time necessary to obtain results from the judicial review. Since litigation requires resources of competition authorities, the duration of judicial review in months is a straightforward indicator of costs. In turn, analysis of competition and welfare effects of the practice in question is expensive all over the world (Schinkel, 2008), and Russia is no exception. The second indicator of cost is economic evidence applied. We measured economic evidence by reference to the fact that the Guidelines for Market Analysis and Competition Assessment (elaborated by competition agencies) are applied, by reference on calculation of the market share of alleged violator; and by reference to the economic expertise in addition to presentation of direct evidence (pure facts). The last group of indicators is not ideal, because the information on the fact that in order to obtain conclusion some calculations are applied, and these calculations are discussed in the commercial court does not allow us to assess the quality of economic analysis. However legal requirements for the analysis according to Guidelines for Market Analysis and Competition Assessment, for example, guarantee that economic evidence mentioned in the court decision is not very poor.

To identify significant differences in the characteristics of groups of cases, we applied χ^2-test and Kruskal-Wallis test when appropriate.

Findings and discussion

Restrictions on competition compared with the harm imposed

Figure 1 presents structure of decisions by the primary infringement evidence and shows that the largest portion of decisions reviewed by Russian commercial courts involve alleged violations by natural monopolies. The evidence corresponds well with the FAS data; according to the annual reports, decisions against natural monopolies represent two-thirds of the activity of FAS. This group includes a large (in absolute, not relative, terms) group of cases in which the alleged violation is a refusal to provide interconnections for competitors on fair contract terms (especially in telecommunications) or access to networks for competing suppliers (especially in electricity supply).

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). In all the cases involving this group, alleged violators are dominant in the regional market of supply to residential and small industrial customers. There is no evidence of competition restriction, and all the evidence is concentrated on the harm imposed on a small group of customers, or even on one customer. There is no convincing evidence that dominance in the market creates possibilities to impose harm. Finally, in many cases, there is no evidence that the harm is intentional.

All investigations on harm imposed by natural monopolies (legally defined as dominant companies) were opened through complaints. Consumers complain to FAS because of the large standard penalties for antitrust violations. High penalties are applied rarely, but even a low probability of application makes compliance easy to enforce. Moreover, if the competition authority prescribes contract terms in the form of a remedy, non-compliance with the remedy would almost certainly be penalized.

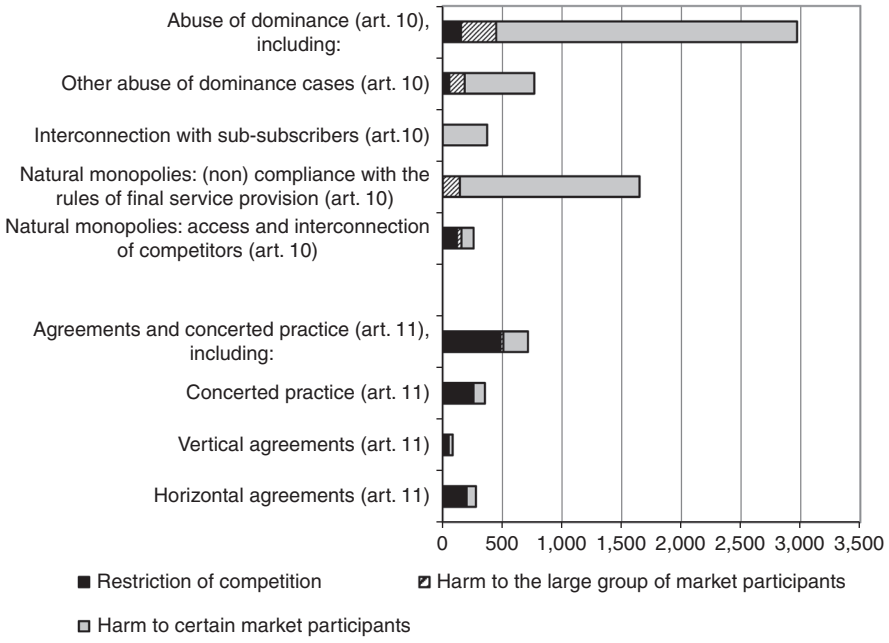

Figure 1.
Structure of decisions by the primary infringement evidence across presumed violations

Source: LCAP database 2008-2012

A common situation is for one organization to connect to a network through a device located at the premises owned by another organization. The parties must agree with each other on the terms of interconnection to the network. Contractual disputes that result in the restriction of network connections (indicated as interconnection with sub-subscribers) represent a sufficient share of claims to annul infringement decisions (more than 10 percent of all the cases). The common feature of this group of cases is that local networks are defined as relevant antitrust markets. Automatically, the operator of a local network becomes dominant on his own facilities. In this case, the approach described in the previous section is applied: any broadly defined harm is considered an abuse of dominance.

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 made by FAS. Harm serves as independent proof of violation without any evidence of restrictions of competition in more than 75 percent of the clams submitted. Of this group, in 85 percent of the cases, harm is considered as the alleged loss suffered by one party (one physical or legal person, which represents a negligible share of the market demand).

We divided all cases according to the type of infringement; within each group of cases, we then highlighted the type of main evidence followed by the main evidence of violation (restriction of competition vs harm imposed; for harm imposed, we also distinguish between "harm to consumers/counterparties as a group" and "harm to one specific consumer/counterparty"). Figure 1 indicates the structure of all the infringement decisions across the different groups. The data show that a typical infringement decision does not correspond to internationally recognized and accepted understandings of what constitutes a violation of competition law. Enforcement is substantially skewed toward investigations and infringement decisions on individual harm imposed, in contrast to restrictions of competition. The structure of infringement decisions explains the limited positive effects of enforcement on competition and welfare. A large number of the investigations would never be opened under a conventional understanding of the objectives and methods of antitrust legislation.

The hypothesis that the nature of the main evidence on infringement (restriction of competition vs harm imposed) is independent from the alleged violation (abuse of dominance (article10) vs anti-competitive agreements and concerted practice (article11)) is rejected according to the χ^2-test ($p < 0.001$). In the majority of abuse-of-dominance cases (about 95 percent), not only harm, but individual harm, is considered evidence of a violation. In contrast, the share of "competition restriction" cases exceeds two-thirds if the presumed violation is horizontal agreement or concerted practice. Share of "individual harm" cases is the largest among the decisions against retailing units of natural monopolies and local network operators (91 and 100 percent correspondingly). Thus, the observed trend of an increase in the absolute and relative number of abuse-of-dominance cases considered by the Russian antitrust authority in 2008-2012 simultaneously reflects a shift in the structure of the cases in favor of those in which the individual harm imposed is independent and the main evidence of a presumed violation. The prioritization of the regulator requires explanation, and is addressed in the following section.

Impact of "competition restriction" and "individual harm imposed" cases on performance indicators of competition authorities

We use the χ^2-test to determine if there is a statistical significance of difference in court decisions across alleged violations of antitrust law and subjects of investigations at different steps of judicial process.

Table II shows that "competition restriction" and "individual harm imposed" cases differ in terms of the probability of the infringement decision coming into force. Across the two groups of cases ("individual harm imposed" and "restriction of competition"), we calculated the share of claims in commercial courts satisfied completely or partially in the first instance (38 vs 47 percent of cases, respectively), the share of reversed decisions by higher court(s) in appealed claims (16 vs 24 percent), and the share of FAS infringement decisions that came into force (62 vs 52 percent). All the differences are statistically significant at 1 percent according to the χ^2-test.

As the non-independence of the case types and the presumed violation of antitrust law was confirmed in the previous stage of our analysis, it is not surprising that the

	Share of claims in commercial courts satisfied completely or partially (%)	Share of appeal claims in the higher court upon the refusal in the first instance (%)	Share of reversed decisions by higher court(s) in appealed decisions of the first instance (%)	Share of FAS infringement decisions that came into force (%)
Alleged violation of antitrust law				
Individual harm imposed	38.03	82.72	16.27	61.97
Restriction of competition	46.62	80.59	24.09	52.28
Statistical significance of the difference	$p < 0.001$***	$p = 0.341$	$p = 0.002$**	$p < 0.001$***
Across articles of antitrust law				
Abuse of dominance (article 10)	37.99	83.38	16.81	61.92
Agreements and concerted practice (article 11)	45.86	77.72	20.67	53.58
Statistical significance of the difference	$p < 0.001$***	$p = 0.008$**	$p = 0.107$	$p < 0.001$***
Article 10: across subjects of investigation				
Natural monopolies: access and interconnection for competitors	41.13	90.41	26.52	54.44
Natural monopolies: (non) compliance with the rules on final service provision	36.26	84.97	14.78	64.71
Interconnection with sub-subscribers	27.69	73.23	13.20	71.24
Other abuse-of-dominance cases	46.81	83.33	20.59	52.67
Statistical significance of the difference	$p < 0.001$***	$p < 0.001$***	$p < 0.001$***	$p < 0.001$***
Article 11: across subjects of investigation				
Horizontal agreement (collusion)	44.60	81.81	21.43	56.83
Vertical agreement	46.99	65.91	37.93	50.60
Concerted practice	46.74	77.13	16.55	51.56
Statistical significance of the difference	$p = 0.849$	$p = 0.079$	$p = 0.033$*	$p = 0.357$

Notes: *$p < 0.05$; **$p < 0.01$; ***$p < 0.001$ (according to χ^2)
Source: LCAP database 2008-2012

Table II.
Determinants of legal quality of infringement decisions of competition authorities

probability of infringement decisions coming into force demonstrates the same statistically significant difference between abuse-of-dominance cases and cases on agreements and concerted practice:

(1) Decisions on abuse of dominance (article 10) are less frequently annulled compared with decisions on agreements or concerted practice (article 11). Share of annulled decisions in the first group is eight percentage points lower. Companies systematically rarely appeal on the first instance court's refusals to annul the decisions on abuse of dominance.

(2) Among the decisions on abuse of dominance (article 10), those that consider conflicts with sub-subscribers and non-compliance with the standards of service provision to final customers are less frequently annulled compared with decisions on the interconnection of competitors and other infringement decisions under article 10. Among other decisions on abuse of dominance, those that consider the harm as independent evidence of a violation are annulled less frequently. Specifically, annulment ratios of the decisions on non-compliance with the standards of final service provision by natural monopolies and interconnection with sub-subscribers are 10-19 percentage points lower than of decisions on other abuse of dominance cases.

(3) Among the decisions on agreements or concerted practice (article 11), no statistically significant impact of the type of the alleged violation on the probability of the decision to come into force is found.

The evidence confirms *H1* fully. Individual harm involved increases the probability of a decision to come into force, and therefore to contribute to the performance scores.

Impact of "competition restriction" and "individual harm imposed" cases on costs of competition authorities

Table III presents a comparison of the costs of judicial review for different infringement groups such as alleged violations of antitrust law and subjects of investigation. We consider different indicators of resources such as application of the Guidelines for Market Analysis and Competition Assessment, the calculation of market share, the involvement of different types of expertise into investigations. We use Kruskal-Wallis test to check the equality of distribution of duration of litigation between the infringement groups and apply χ^2-test to measure an association between indicators of evidence and the infringement groups.

On average, "individual harm imposed" cases required less time to obtain final decision compared to "competition restriction" cases (almost three months less in the court of first instance, two months less to obtain final decision if the decision of first instance was appealed). In the international context the difference might seem negligible, but we should take into account that Russian commercial courts generally make decision faster. The share of decisions in which the Guidelines for Market Analysis and Competition Assessment are mentioned is also smaller (15 in contrast to 26 percent) for the first group of cases. The structure of FAS infringements shifts in favor of "less costly" ones. However, an inter-group comparison of other evidence indicators makes the conclusion less obvious. FAS estimates the market share and appoints specialized expertise statistically significantly more often when investigating "individual harm imposed" cases relative to "competition restriction" ones (almost 11 in contrast to 5 percent).

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

	Average time of proceedings in the commercial court, months (SD in parentheses)		Share of the decisions where Guidelines for Market Analysis and Competition Assessment applied by either party are mentioned (%)	Share of the decisions where market share calculated by FAS is mentioned (%)	Share of the decisions where specialized expertise provided to FAS 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	Time spent by first instance court to make a decision					
Alleged violation of antitrust law							
Individual harm imposed	9.79 (5.88)	4.37 (3.55)	15.30	13.46	10.51	1.58	1.15
Restriction of competition	11.70 (6.90)	7.14 (7.35)	25.90	10.52	5.34	1.26	1.57
Statistical significance of the difference	$p < 0.001$***	$p < 0.001$***	$p < 0.001$***	$p = 0.044$*	$p < 0.001$***	$p = 0.548$	$p = 0.380$
Across articles of antitrust law							
Abuse of dominance (article 10)	9.90 (5.96)	4.35 (3.53)	16.77	14.79	10.07	1.65	1.38
Agreements and concerted practice (article 11)	11.06 (6.65)	6.67 (6.88)	18.65	5.33	7.71	0.98	0.56
Statistical significance of the difference	$p < 0.001$***	$p < 0.001$***	$p = 0.232$	$p < 0.001$***	$p = 0.055$	$p = 0.190$	$p = 0.074$
Article 10: across subjects of investigation							
Natural monopolies: access and interconnection for competitors	11.78 (5.78)	4.63 (4.34)	16.67	15.11	4.26	1.55	2.33

(*continued*)

	Average time of proceedings in the commercial court, months (SD in parentheses)		Share of the decisions where Guidelines for Market Analysis and Competition Assessment applied by either party are mentioned (%)	Share of the decisions where market share calculated by FAS is mentioned (%)	Share of the decisions where specialized expertise provided to FAS 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	Time spent by first instance court to make a decision					
Natural monopolies: (non) compliance with the rules on final service provision	9.54 (5.79)	4.46 (3.63)	9.76	10.07	11.46	1.15	1.03
Interconnection with sub-subscribers	9.06 (6.19)	3.92 (3.91)	14.25	16.40	7.80	1.61	0.27
Other abuse-of-dominance cases	10.52 (5.99)	4.62 (3.34)	32.33	23.47	9.91	2.61	2.22
Statistical significance of the difference	$p < 0.001$***	$p = 0.056$	$p < 0.001$***	$p < 0.001$***	$p = 0.004$**	$p = 0.086$	$p = 0.009$**
Article 11: across subjects of investigation							
Horizontal agreements	11.04 (6.49)	4.90 (3.31)	11.51	4.32	6.47	1.44	0.00
Vertical agreements	9.11 (4.60)	6.36 (5.37)	13.25	10.84	6.02	1.20	0.00
Concerted practice	11.52 (7.10)	7.91 (8.60)	25.50	4.82	9.07	0.57	1.13
Statistical significance of the difference	$p = 0.020$*	$p = 0.169$	$p < 0.001$***	$p = 0.056$	$p = 0.398$	$p = 0.531$	$p = 0.128$

Notes: Kruskal-Wallis test is used to test for equality of distribution regarding the duration of litigation across infringement groups; χ^2-test is applied to test the independence of evidence indicators and the infringement groups. *$p < 0.05$; **$p < 0.01$; ***$p < 0.001$

Table III.

Comparing the characteristics of abuse-of-dominance cases and cases on agreements and concerted practice also yields mixed results. On the one hand, the time spent to obtain a final decision generally negatively correlates with the share of decisions annulled across types of violations. The judicial review of a typical abuse-of-dominance case takes more than two months less in the first instance and one month less if the decision of the first instance is appealed 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 compared to cases on interconnection and access for competitors. This result holds for all cases and for the subpopulation of cases, where the decision of the first instance was not appealed.

On the other hand, the results do not support the conclusion that decisions on the abuse of dominance systematically require less input in terms of evidence. The results of comparison indicators of evidence across the groups are opposite to those expected: market shares are calculated and specialized expertise is provided to FAS more often in investigations of abuse of dominance than in those pertaining to agreements and concerted practice (15 percent of cases in contrast to 5 and 10 percent in contrast to 8 correspondingly). Among the decisions on abuse of dominance (article 10), the most numerous group of cases (on non-compliance with the rules on final service provision) is characterized by the lowest frequency of application of the Guidelines for Market Analysis and Competition Assessment (10 percent only, three times less than in decisions on the abuses of dominance outside natural monopolies and contracts with sub-subscribers, and almost two times less in comparison with the decisions on article 11, on agreements and concerted practices), the lowest frequency of market share estimation, and at the same time the largest share of the decisions where specialized expertise is provided to FAS. Thus, the results pertaining to *H2* are mixed. Decisions on individual harm require less time to obtain outcome of judicial review, but in this group of cases parties apply specialized economic analysis more often. At the same time without a deeper assessment of the quality of expertise, we cannot make final precise conclusion.

Discussion

The empirical hypotheses tests show how the combination of substantial and procedural rules on one hand, and motivation of authorities on the other explains the path of development that Russian competition enforcement has taken. Substantial rules on the abuse of dominant position consider exploitative conduct as a legal violation. However, there is no difference in the wording of European and Russian norms. The difference in interpretation arises in two stages. First, in Russian competition enforcement there are no limits on the qualification of practice as abuse of dominance from the point of view of the scale of effects imposed. Harm imposed on any number of consumers or counterparties can serve as sufficient evidence of law violations. Second, there is a low standard of evidence on causal links between dominant position in the market and harm imposed on counterparties or consumers. Dominant companies are considered to be strictly liable for any damage imposed, regardless of the fact that their dominant position is neither cause nor consequence of the harm.

It may seem surprising that judges in the Russian commercial courts generally share this understanding of the targets of competition enforcement, especially taking into account that they are skeptical toward FAS infringement decisions. An explanation might be that there is a strong tradition of considering large companies to be strictly liable for any harm imposed on individual consumers under Russian consumer

protection law. Being unable to distinguish between a violation of consumer rights and exploitative conduct of a dominant company, especially if the target for "exploitation" is a consumer, judges presume strict liability in cases of abuse of dominance.

Such an interpretation of the provisions of abuse of dominance sharply contradicts conventional understanding of competition policy targets. Prioritization of investigations toward this group of cases limits the positive outcomes of competition legislation enforcement. Comparative advantages of investigations into individual harm for the Russian competition authorities are explained with reference to procedural rules on investigations and the system of motivation. Rules on considering complaints and performance assessment, which were adopted in accordance with the NPM concept, distort the incentives of public officers in specific policy areas. Short deadlines for responding to complaints and liability for silence make simple investigations preferable. Low standards of proof for harm attach to this group of cases high legal quality, in terms of lower probability of being annulled. The existing performance management system motivates competition authorities to primarily choose cases that entail lower costs and higher legal quality, because doing this will result in a higher performance assessment score for the competition authority. In this way, PMS diverts efforts from the proper target of antitrust enforcement, which is the restriction of competition. This tendency becomes stronger during the observed period: in the general population of infringement decisions, the share of cases devoted to individual harm increased from 75 percent in 2008-2010 to 90 percent in 2011-2012.

Negative effects of motivation appear to be especially strong in Russia because of relatively young and developing competition enforcement. Large-scale enforcement results not in improvement of the standards of evidence in the investigations of competition law violations, but conversely in mixing the standards of evidence in competition protection and consumer protection legislation.

Our explanation of the development path of Russian competition enforcement does not contradict but complement the assessment of extremely large caseload of FAS and limited quality of economic analysis (OECD, 2013, p. 155) as major challenges. We only want to draw attention to the fact that large number of investigations and decisions, including those of cases with small welfare effects can be explained by the system of motivation itself. When investigations, which we consider as "non proper antitrust," require less resources and result in better performance scores, officers in the authority are incentivized to open increasing number of investigations of that type together with "proper antitrust" cases in order to compensate relatively negative impact of the latter on performance indicators. In turn, large number of investigations itself limits the resources dedicated for economic analysis in each case.

Conclusion

Performance indicators set for competition authorities are no less important than substantive norms (e.g. understanding of harm, standards of evidence) and procedural aspects (e.g. decision and appeal procedures) in explaining the structure of antitrust enforcement. Due to the motivation of competition officers, enforcement may have low-deterrence effects and may not prevent welfare loss. Under distorted selection of targets, large-scale antitrust enforcement may coexist with difficult competition restrictions and relevant harm to the consumer.

The use of output indicators (quantitative indicators of activity) in contrast to outcome indicators (welfare effects) in performance measurement may prevent the achievement of policy objectives. The situation becomes especially dangerous if the

responsible authority discretionarily selects between different targets, where both cost and welfare effects of difficult targets are disproportionally higher in comparison with cost and welfare effects of simple ones.

An important lesson from the experience of Russian competition enforcement pertains to the sources of performance assessment. Performance indicators derived from the external assessment by parties with individual interests and expertise, which are not strongly related to the final objective of public policy, are likely to be misleading. In the Russian case, complainants pursue individual goals but undervalue the impact of competition and violations of competition law on the welfare of consumers as a group. In turn, judges are unable to recognize whether competition law application is appropriate in a particular case, and especially how the structure of enforcement affects welfare. External assessment may even miss the ultimate objective of policy.

Finally, when assessing alternative PMSs, it is necessary to take into account the interaction between performance indicators and legal procedural requirements applied to the authority. In particular, requirements aimed at preventing administrative silence (in the Russian case, the short deadline for responding to a complaint) make simple enforcement targets preferable to difficult ones.

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