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Enactment of a New Antimonopoly Law in Russia (2006): Can We Explain the Changes and Amendments by Means of Logic of Strategic Interaction?

1. Introduction

In July 2006, a new law "On Protection of Competition" was enacted in Russia to replace two previous laws, "On Competition and Restriction of Monopolistic Activities in Commodity Markets" (1991) and "On Protection of Competition in the Markets for Financial Services" (1999). The new law has some highly important changes from the two previous. The first goal of the paper is to find out whether these changes from the two previous laws, including those introduced at the stage of deliberation and enactment, can be explained in terms of strategic interactions between the legislator, the antimonopoly body and influential market participants. The second is to assess the influence of strategic interaction of the expected effectiveness of new rules.

The history of enactment of the new law offers such an investigation because it was extensively discussed at every stage, while all influential players in Russian markets, including business associations, chambers of commerce and large corporations, had wide opportunities to contribute to the discussion (at least in comparison with the majority of legislative acts that had been recently enacted in Russia). Moreover, we have to keep in mind that content of formal rules is very much important to the Russian antitrust law because judges in Russia have a tendency to demand that parties in the antitrust process should prove that their actions exactly correspond to the letter but not the spirit of the law. Making a hypothesis that there was a strategic interaction at the stage of deliberation, we can expect to derive from the discussions how market participants were going to influence the content of regulations and opportunities to enforce them.

To test this hypothesis, we have to start from an explanation what are the main novelties that were introduced by the new law to antitrust rules of the Russian Federation. The most important of them are: (i) changes in the rules regarding supervision of mergers; (ii) changes in the antitrust rules related to tacit collusion (including introduction of a concept of joint dominance and a more precise definition of rules regarding concerted practice); (iii) changes in the penalty system; and (iv) changes in procedures of enforcement of antitrust legislation. Explaining this revision of the legislation, we are going to discuss two questions. Firstly, how much does the scope of strategic firm-authority-legislator interaction depend on how the parties understand antitrust rules and ways of their implementation, as well as on their experience of enforcement? Secondly, how harmful can this strategic interaction be to effective enforcement of antitrust policy?

In our evaluation of ways and results of this strategic interaction we are going to use the approach to the assessment of antimonopoly rules that were formulated by Joskow. Good antimonopoly legislation minimizes costs of type I and type II errors [Joskow, 2002]. In turn, potential transgressors of the antimonopoly legislation, at first sight, should typically wish that differentiation between legal and illegal practices could create prerequisites for errors of the type I. A more "lenient" implementation of antimonopoly laws complies with their interests. However, in fact the errors of type II may also be not in conflict with strategic interests of potential transgressors in case when the latter can discredit the antimonopoly legislation and make the government actually limit the scope of its implementation. In this context, we can conventionally differentiate between two effects: the "direct" and the "strategic" one. Higher plausibility of errors of the type I brings "direct" benefits to potential transgressors, and of errors of type II brings them "strategic" gains.

Certainly, interests of the business community should not be identified with incentives of potential transgressors. However, this very identification is typical of the Russian big business, which is most widely represented in interaction with the authorities. The tradition of law enforcement shows that those who are mostly disposed to rely on antimonopoly legislation for protection of their interests in Russia are people in midsize business. Large market participants prefer to solve their problems in other ways, relying mostly on direct lobbying even in cases when they suffer losses from restrained competition. This peculiar mode of protection of rights in the business community has definitely left its mark on the course and results of deliberation of the new law "On Protection of Competition".

As we shall see, strategic interaction between the business community and antimonopoly authorities resulted in enactment of many rules, which are of ambiguous quality from the point of view of efficient antimonopoly policy. At the same time, it is still too early to make conclusions about the extent of unjustified reaction of antimonopoly authorities to the steps made by the business, and about future effect on law enforcement of the rules that were enacted under strategic pressure.

2. Competition Policy and Antitrust Legislation in the Russian Federation: Main Points of Criticism

Competition policy in Russia has been evoking severe criticism for almost a decade. At that time, enforcement of antimonopoly rules could not create any essential resistance to restriction of competition in domestic markets, but often imposed excessive administrative costs on business enterprises.

The above notice holds, in the first place, for preliminary control of mergers. Criteria of merger control were inadequate to the goals of competition policy both in terms of assessment of industry concentration and in terms of choice of the minimum scale of transactions liable to preliminary control. Not only mergers and acquisitions of large blocks of company shares but even amalgamation of non-profit organizations were liable to coordination. Purchase of every block of shares that gave the buyer more than 20% of total voting shares was to be submitted to approval by the antimonopoly agency. Till October 2002, preliminary agreement was mandatory to all transactions with enterprises having book value of assets over 100,000 minimum wages (10 million rubles), and from October 2002 till February 2005, to those with over 200,000 minimum wages (20 million rubles) [1].

Let us compare the prescribed standards for preliminary approval with actual sizes of industrial enterprises. For instance, in 1999 [2] total book value of enterprise assets in the light industry was about 81.5 billion rubles. The industry had 4,515 enterprises[3], so that book value of an average firm was over

[1] The indicator of book value of assets as an indicator of company size is not quite adequate. Book value is distorted because it is based on historical value (in Soviet-time prices, which were completely virtual), and disfigured by a number of corrections that followed

[2]. The Industry of Russia, 2000. Statistical Abstract, Federal State Statistics Service, Moscow, pp. 346 and 352

[3] Ibid., p .20-27

18 million rubles, or 1.8 times as much as the minimum for liability to get a preliminary approval by the antimonopoly agency of a transaction that led to industrial concentration. In other industrial sectors, the excess of average enterprise book value over 100,000 minimum wages was still higher: 4.5-fold in lumber, woodworking, pulp-and-paper; 6-fold in building machinery; 6.7-fold in food industry; 20-fold in machinery and metalworking; 67-fold in non-ferrous metals, and so on. In other words, according to the prescribed standards for preliminary approval, transactions between market participants much below average size required preliminary approval. Quite visibly, the increased level of benchmark value for preliminary approval in 2002 could bring no positive result.

Obviously, the scope for ex-ante antimonopoly control was defined with excessive wideness and included those market participants that could do no visible harm to competition with their transactions, but bore additional administrative costs. The same low benchmark value for preliminary approval of transactions that could lead to industrial concentration was set for financial institutions.

In coordination of transactions involving industrial concentration, economic firm boundaries were never taken into account: each market participant was identified with a juridical person. Many mergers that were subjected to preliminary approval under formal guidelines were actually made for changes in corporate structure of the same holding company group and could not make any serious impact on competition.

Additional remedies, which were imposed on participants of a merger in case when the merger could substantially restrain competition (about 5% of all examined transactions), as a rule, were of behavioral rather than structural nature. In turn, behavioral conditions were usually defined very vaguely and repeated official formulas that restraint of competition was inadmissible. The Russian antimonopoly agency had a limited period of time of thirty days for examination of a merger leading to industrial concentration, and was unable to prolong this period.

Why measures taken against cartels and abuse of dominance had less than modest success, can be explained mostly by low sanctions against violation of antimonopoly legislation. Until present days, the upper level of penalties, in addition to confiscation of profits illegally gained from restraint of competition was a fine of 5,000 minimum wages equivalent to half a million rubles or less than 15,000 euros. Under current legislation, sanctions against many types of illegal practices were imposed not against violation per se, but rather against non-compliance with guidelines of antimonopoly legislation. Probability to impose sanctions in form of return to budget of unlawfully received income is extremely low for the reason of prohibitively high cost to prove before court not the fact of violation but amount of unlawful income under weak incentives to reveal relevant information on the side of private parties of enforcement.

Plausibility of application of even such modest sanctions is also not very high. Under current legislation, almost every restriction of competition can be claimed legal if it has a “positive socio-economic effect”. Since the tradition of defining this “socio-economic effect” has not yet been established in Russia, decisions openly conflicting with the spirit and goals of antimonopoly policy could not be ruled out. For example, increased fiscal revenue (which is inevitably due to rising profit gains under consolidation of market power) could be recognized as a “positive socio-economic effect”.

This state of affairs is unfavorable to the effectiveness of antimonopoly policy in three ways. In the first place, the sanctions set an inadequately low level of risk for violators. Secondly, those who have suffered from violations of antimonopoly legislation have no motivation to go to the antimonopoly agency or to court to show proofs of illegal practice. Finally, low sanctions also discourage the personnel of the antimonopoly agency from investigations of anti-competitive cases, which require much more costs than the expected sums that can be transferred to the state budget.

The low level of sanctions is reducing the potential effect from enforcement of the antimonopoly legislation to zero regardless of the rest of its content. Even if description of illegal activities in the current laws were much better, they would have no proper effect on the behavior of market participants under the present level of sanctions.

At the same time, it should be pointed out that the difficulties the Russian antimonopoly agency is facing are objectively very high, so that its low efficiency is only partly due to poor legal rules.

In the first place, problems of ensuring and restraining competition in Russia markets are too specific to be solves with standard tools of antimonopoly legislation. Russia inherited from the Soviet economy a peculiar type of industrial organization producing monopolization of markets, which has not been eliminated up to the present days. So, reliance on traditional tools of passive or protective antimonopoly policy can never fully replace active policies aimed at changes in the economic structure. For instance, Russian industrial structure is still biased towards relatively large firms, while small enterprises account for no more than 4% of total output. This is evidently the legacy of policy of industrial location under socialism. In turn, development of small businesses in recent years was limited by problems on the side of resource provision (for instance, by high cost of borrowing), as well as by problems on the side of demand (under poor contractual discipline, customers refrain from transaction with small firms and prefer well-known traditional, usually large suppliers).

In the second place, Russian antimonopoly bodies, for a number of reasons, cannot yet use even the available tools of antimonopoly policy. The reasons are mostly related to a gap between high professional skills required for enforcement of antimonopoly legislation, on the one side, and inadequate level of education in economics, which is typical to personnel of antimonopoly bodies, on the other. [4] Moreover, Russian judicial system imposes very high requirements on antimonopoly bodies and on the very content of antimonopoly legislation. To recognize impediment of competition as really illegal, courts require that behavior of market participants should precisely fit into descriptions of violation that are narrated in the law. For this reason, Russian antimonopoly legislation is getting more and more detailed over time. However, problems are being created rather than being solved: going more and more into details of violation of antimonopoly legislation, prosecutors become more and more vulnerable as courts place the emphasis on signs rather than on results of violations.

The tendency towards excessive elaboration of the content of antimonopoly rules can be demonstrated in a comparison of regulations containing in two laws: “Law on Competition and Restriction of Monopoly Activities on Commodity Markets” (1991) and “Law on the Protection of Competition on the Financial Services Market” (1999). On the one hand, at that time it was acknowledged that markets for financial services are specific enough to require a special law, although, naturally, the substance of regulations against possible restraint of competition is absolutely identical in both laws. On the other hand, although basic provisions of the two laws are the same, the latter is also more detailed.

In the third place, targets of the Russian antimonopoly legislation were, from the very outset, defined much more widely than in most other countries in the world. In addition to traditional objects of antimonopoly regulation, namely, collusion, abuse of dominance and mergers, Russian legislation contains rules regarding “unfair competition”, restraint of competition by the government, antimonopoly requirements to government procurement, and since enactment of the new law “On Protection of Competition”, even rules of rendering government aid. Under limited resources, such broad scale of goals initially set for the antimonopoly agency could have created a situation when major functions of this body, from the point of view of international practice, are performed not very well.

The latter conclusion can be easily illustrated with a breakdown of activities of antimonopoly bodies. In 2000-2002, the Russian antimonopoly agency handled, on the average, 23,000-25,000 cases a year. However, their majority were preliminary controls of mergers – 19,000-20,000 applications per year. At the same time, in three years only 70 proceedings were instituted against cartel agreements. Proceedings against abuse of dominance amounted to 40% of the remaining 4,000-5,000 cases

[4] This reason is still more important because referring to the personnel of antimonopoly bodies who are older than 35, it is better to speak about *absence* rather than about inadequacy of their economic education as such. Education that was provided by Soviet colleges, and which is sometimes is still provided by Russian institutions, is generally insufficient as a normal foundation for enforcement of antimonopoly laws.

examined annually. Assessing this number, we have to take into account that since regulation of network industries is relatively underdeveloped, the Russian antimonopoly agency is obliged to take active part in resolution of conflicts between the incumbent entity and new participants in these industrial sectors. About 30% are proceedings against restraints of competition by authorities, and a little less than 10% are cases related to signals about violations of rules related to fair competition. With prevalence of preliminary controls on mergers in the activities of the antimonopoly agency, which are usually made quite formally, its activities are biased toward administrative management. Together with a great workload of controls of mergers, which mostly have no negative effect on competition, this lowers the efficiency of antimonopoly regulation.

Obviously, enactment of the new law could resolve only the problems related to descriptions of legal and illegal practices in the legislation and to definition of reasons for application of sanctions against violators.

3. Enactment of the New Antimonopoly Law: The Context and Brief History

Elaboration of the new Antimonopoly Law started in March 2004, at the same time when the Ministry of Antimonopoly Policy was transformed into the Federal Antimonopoly Service. This date is likely to become an important milestone in the history of Russian antimonopoly policy.

New leaders of the antimonopoly body set itself as an object not only to promptly revise the antimonopoly legislation, but also to enhace the role of antimonopoly policy in Russia's economic policy in general. Beside the traditional targets of antimonopoly policy, which have always been numerous, leaders of the Federal Antimonopoly Service have assumed new obligations. They are: to ensure competitive procedures in allocation of scarce resource (land, mining rights, and rights for housing development) by the government for state procurement. The antimonopoly body is using the whole range of its instruments to influence the markets in question, its capacity to oversee observance of competition laws, and also its capacity for competition advocacy.

However, the antimonopoly agency has also become much more active in traditional fields of antimonopoly regulation. Suffice it is to say that in 2005, the Federal Antimonopoly Service collected more fines that it had in eight preceding years.

The activity is becoming more transparent. The Agency's web-cite was improved, and renewal of information has become more regular. Leaders of the antimonopoly agency give interviews more frequently and make statements on current issues of competition policy. Evidently, the Federal Antimonopoly Service aims not only at provision of information to all interested parties about courses of legal investigations, but also at making competition and antimonopoly regulation popular with market participants.

Deliberation of the bill "On Protection of Competition" was also successfully used as a means to raise the prestige of the Federal Antimonopoly Service. The bill was first submitted for public discussion in the early 2005. In the recent years, no other piece of legislation relating to regulation of public policy was discussed so extensively. Even before the bill was submitted to the State Duma, a number of public discussions had been held in the Ministry of Economic Development and Trade of Russia, largest Russian universities and think-tanks. The text of the bill was placed on the web-cite of the Federal Antimonopoly Service together with presentations explaining the reasons for its enactment. Rules of the new bill were widely commented in the press, in academic publications and at scientific conferences. This background makes the law "On Protection of Competition" a very interesting piece for examination of strategic interaction between market participants and legislators. Business representatives were very well informed not only on content of the bill that was submitted to the legislature, but also on its potential consequences.

Meanwhile, negative environment of enactment of the new law also deserves mentioning. The main point is growing skepticism of the highest authorities on real necessity to develop competition in principle. In the recent years, the bulk of Russia's national income has been created in those industrial sectors where Russian producers face only limited competition. Another obstacle to recognition of competition as necessary is ambiguous outcome of mass privatization, which public opinion almost completely identifies with competition as compared to EU practice.

After being submitted to the State Duma in spring of 2005, in the following nine or ten months the bill got expert opinions in the Presidential Administration, in the Russian Union of Industrialists and Employers, in the Russian Chamber of Commerce and Industry and in other business associations. According to V. Draganov, chairman of the Duma committee on economic policy, entrepreneurship and tourism, in 2005 the law "On Protection of Competition" required from the committee the hardest efforts for reconciliation of different positions.

An overview of differences between the new and the old law displays that the new one contains many useful innovations, which can improve basic standards of antimonopoly regulation and competition policy. However, a number of its provisions are quite doubtful, especially because approaches to their enforcement are different.

In comparison with the text submitted to the first reading at the State Duma, the bill was considerably modified by the time of its third reading. Business representatives took active part in elaboration of amendments to the bill, acting as perhaps the main initiators of innovations, which we can explore in the next section.

4. Changes in Content of the Antimonopoly Law: the Role of Strategic Interaction

4.1. General Structure and Design of Legal Rules

Strategic interaction between authors and critics of the law "On Protection of Competition", including representatives of the Russian business community, went on in a traditional Russian way. Firstly, participants of a number of markets tried to remove their sectors as fully as possible from the purview of the law. For instance, representatives of natural monopolies made efforts to bring their industries completely out of the purview of antimonopoly regulation. This amendment failed only because of a minor prevalence of negative voices in the State Duma. Potential meaning of this amendment can hardly be overestimated because regulation of network industries in Russia cannot provide legal standards for promotion of competition. Antimonopoly legislation has to fulfill this task, at least partly.

Secondly, most criticisms were aimed not at concrete formulations of antimonopoly rules, but at insufficient working out of these rules in detail. Test of the bill for its propensity to corrupt is one of the key instruments of such criticism. According to this criterion, the bill got extremely low scores. The grounds were that the rules of the bill were vague and left the antimonopoly agency too much room for discretion in interpretation of these rules and assessment of concrete types of behavior.

For this reason, the critics insisted on additional specification to the bill in the whole course of its deliberation, and the authors (connected with the antimonopoly agency) either made the relevant amendments or included references on the rules that were earmarked for further elaboration by the Russian Federal Government. We believe that this route made the quality of the law much worse.

In the first place, too many blanket rules were left in its text. The new law has more than twenty two references to the rules that are due to be passed by a resolution of the Russian Federal Government, against two in the previous version of the law. The field of strategic interaction between the interested parties has obviously shifted from enactment of a law to enactment of subordinate

legislation. However, the procedure of passing resolutions by the Federal Government is much less transparent and allows for much more room for manipulations and simply unintended errors.

In the second place, if the description of illegal practices is more specified, there may be more errors in enforcement, including those that may occur when courts and respondents will require evidence that actions of defendants should exactly correspond to description given in the law, taking this correspondence as an obligation. In this case, even slight roughness in codification of legal and illegal practices may be dangerous. Here is an example. The law codifies indications of restraint of competition (Sec. 4) in the following formula:

"Indications of restraint of competition include: reduction in the number of entrepreneurs not belonging to the same group of entrepreneurs in a product market; increase or decrease in the price of a product unrelated to corresponding changes in other general conditions of trade in the product market; refusal of entrepreneurs not belonging to the same group of entrepreneurs from independent operation in a product market; determination of general conditions for trade in the product market with an agreement between entrepreneurs or in accordance with directions of another entrepreneur, which mandatory for them to follow, or as a result of concerted actions of entrepreneurs not belonging to the same group of entrepreneurs in a product market; and other circumstances creating for an entrepreneur of several entrepreneurs a facility to exert unilateral influence on general conditions of trade in the product market".

Implantation of this formula into the law is likely to increase the cost of substantiation of illegal practices. In any case, violators of antimonopoly legislation could quite reasonably require that the prosecutor (the antimonopoly agency) should substantiate validity of at least one of these indications (or all indications). How much this will change the possibility of type I and type II errors, will depend on correctness of formulations of the indications of restricted competition. We shill examine two in detail:

1) "*Reduction in the number of entrepreneurs"* may follow restraint of competition, but far from certainly. It is quite easy to see a situation when restraint of competition covers not all but the largest (therefore, the most "dangerous") competitors, but does not prohibit new minor entrants from the market
2) "*Other circumstances creating a facility … to exert unilateral influence of other general conditions of trade in the particular market".* In this case the law defines features of a certain market structure rather than indications of actions by market participants. This regulation is untenable because a market structure cannot be considered (at least) as a proof of actions illegality (although it might create incentives to restrain competition).

In this context, the addition to antimonopoly legislation, seeming quite innocent at first sight, is increasing likelihood of errors of both types.

However, authors of the law, representing the interests of the antimonopoly agency in the first place, also took strategic measures in order to get more power and grounds for antimonopoly regulation. Leaders of the antimonopoly bodies admitted that they had no intention to use a large part of the powers they had gained. Nevertheless, negative effect of the presence of such rules on efficiency of law enforcement cannot be ruled out.

Definition of market share of a dominant seller is a striking example. The new law lowers the quantitative criterion for definition of a dominant company to a 50%-market share from the former 65%. At the same time, the law contains a rule that other regulations by the Russian Federal Government can establish different criteria of domination. At present, there is a conflict between retail networks, on the one side, and the authorities the Russian Federal Government and antimonopoly agency, on the other. The latter believe that retail networks discriminate against Russian agricultural producers in purchasing their goods and threaten the retailers with a promise to lower the criterion for domination to a 5%-market share, which will make the majority of market participants liable to application of a rule against abuse of dominance. Such application of the law is not quite adequate to

the spirit of antimonopoly regulation. This rule makes the law "On Protection of Competition" likely to be used as an instrument for state influence on the business community and a weapon for a warfare between different business groupings with reliance on the state.

4.2. Merger Control

Russian business community acted in response to the predominantly administrative procedure of preliminary merger control with an attempt to eliminate this control as an instrument for antimonopoly regulation in principle. From the standpoint of the business community, this problem had two aspects: in the first place, there rules imposed additional costs upon participants of the market for corporate control; in the second, they involved disclosure of information about final beneficiaries of holding company groups for assessment of the impact of a merger on competition,. The latter point is traditionally painful for Russian companies, which are inclined to believe that opaque structure of shareholding and control is a means for protection of ownership rules.

In 2003-2004, the Russian Union of Industrialists and Employers supported a proposal to completely change the procedure – from authorization of transactions that led to economic concentration to notification[5]. This idea meant that the antimonopoly body upon notification about a transaction should decide within 30 days whether it could make a negative effect on competition, and set up a claim to protect competition.

However, the authors of the bill chose to modernize the current procedure of preliminary control, improving the rules related to benchmark value for this type of transactions and the rules defining the very fact of such transactions.

Before the new law "On Protection of Competition" was enacted, the upper limit of transactions requiring preliminary control had been made higher. Since February 2005, it was set at the value of company's book value of asses more than 2 million nominal wages (200 million rubles). According to the new law, preliminary control of a merger is mandatory in case when either the sum of balance values of assets of the parties is over 3 billion rubles or their annual turnover is over 6 billion rubles and the book value of assets of the company targeted for a takeover is no less that 150 million rubles, or in case when one of the participants enters the register of companies with a market share over 35%[6]. It is easy to verify that the lower limit of a company assigned for preliminary merger control is even slightly higher than in the United States Antitrust ($100 million).

Let us repeat a comparison of a transaction requiring coordination with the scales of Russian industrial enterprises. According to the data of 2004[7], average Russian industrial enterprise had 46 million rubles worth fixed assets, ranging from 3 million rubles in light industry to close to 1 billion rubles in electric power. Let us assume that about 70% of book value of assets is fixed assets, then, according to the rules that were in force till February 2005, "average" enterprises in all industrial sectors except light and pulp-and-paper industries came within the regime of preliminary control of mergers. After the benchmark value of book value was raised to 3 million nominal wages (300 million rubles), criteria of the lower limit for application of preliminary control of a merger could be applied only to "average" companies in electric power, fuel industry and iron and steel. The law "On Protection of Competition" transferred the limit for application of preliminary control to the level that is more the twice as high as book value of assets of an average enterprise in these industrial sectors.

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[5] At present, the procedure of notification is used for "not too big" transactions involving economic concentration.

[6] The register was compiled as a list of companies that could potentially acquire dominance (according to the Competition Law of 1991, a company was registered as a dominant one if the antimonopoly body could poof the fact of dominance). According to the new rule, content of the register is the factor to define the scale of enforcement. According to experts, at present the register is overloaded with companies that actually are not dominant. However, we have to point out that companies also had no incentives to seek their expulsion from the list. Now, as we can see, the situation has radically changed.

[7] Calculated from the data of The Industry of Russia, 2005, Rosstat, Moscow, Tables 1.4 and 3.1.

According to the criterion of turnover (which can be considered as a rough equivalent to sales volume), the law "On Protection of Competition" makes preliminary coordination mandatory if the combined turnover of the merging companies is over 6 billion rubles. In 2004, average annual earnings of a Russian industrial enterprise amounted to 73 million rubles, ranging fro 8 million rubles in light industry and 1 billion rubles in fuel[8]. Even taking onto account that Russian enterprises are members of holding company groups (which are known to have mostly less than 8 industrial enterprises [Avdasheva et al., 2007]), we can conclude that the newly introduced limits for preliminary coordination lower the probability of application of this regime from a "typical" Russian company to quite small values. Mergers of medium-size enterprises in electric power, fuel, iron and steel and non-ferrous metals with larger companies require ex-ante approval. Such choice of targets for preliminary coordination seems reasonable.

The new law makes a step forward not only towards determination of limit for preliminary coordination but also in the very definition of a transaction involving industrial concentration. Although this type of transaction is defined very broadly in Section 4 as any transaction *exerting influence on the state of competition,* interpretation of industrial concentration in Section 7 is made as close as possible to the concept of redistribution of control. Only transactions between commercial enterprises are targets for preliminary coordination, and non-profit organizations are exempted from this regime. Acquisitions of shares require preliminary coordination only in cases when the purchaser concentrates a large block of shares: more than 25%, 50%, or 75%, which gives additional controlling power.

Redistribution of shares within a group of persons is exempted from this regime on certain conditions. If member companies of a group provide information, which allows making a conclusion that legally independent enterprises belong to a single market participant, they get free from costs of preliminary coordination. Disclosure of information about final beneficiaries is the condition for getting free from these costs. It is yet unclear how much Russian holding company groups will be willing to use this rule (most experts are skeptical about this opportunity), but if they will, they will make analytical work of antimonopoly bodies much easier, and understanding of structure of Russian markets will become much clearer.

This novelty could make the burden of administrative efforts on Russian companies much easier, taking into account that about 40% of Russian enterprises are members of holding company groups [Avdasheva et al., 2007], and that dynamic redistribution of share ownership is going on inside these groups. At present, there is some information that about 80 large Russian companies have decided to use this opportunity and to disclose the structure of control to the antimonopoly agency.

Basic term for preliminary coordination has remained the same thirty days, but the antimonopoly agency has gained a longer term for additional examination: two months, instead of twenty fays in the former law.

Obligation of the antimonopoly agency to upload information on the transaction on its site and to invite interested parties to assess its effect on competition is an important addition to the regime of preliminary coordination.

In public discussion of the bill, business representatives except those who were critical of any form of preliminary coordination made practically no comments on new rules for merger control. The business community initially declared its negative attitude to the regime of preliminary coordination in principle. Meanwhile, there is no doubt that ambitions of the business community coincide with the aim to improve the efficiency of antimonopoly regulation in Russia: when the scale of preliminary coordination goes down (the number of cases are expected to decline to 1/50), the antimonopoly agency will be able, firstly, to reorganize its efforts in favor of other policy goals, and secondly, to improve the quality of examination of transactions involving industrial concentration.

[8] Calculated from the data of The Industry of Russia, 2005, Rosstat, Moscow, Tables 1.4 and 1.5.

4.3. Tacit Collusion: Joint Dominance, Coordination and Concerted Practice

During the last decade, counteraction to cartel agreements has been the least effective field of antimonopoly policy. The antimonopoly agency finds difficulty in proving the existence of such agreements. A number of factors make this task difficult. Firstly, the Russian anti-monopoly agency is deprived of the right and facilities for on-the-spot investigation. Secondly, Russian courts do not acknowledge circumstantial evidence of collusion. Finally, the institutional environment of Russian business is encouraging tacit collusions, which are hard to be supported with admissible evidence.

The most part of accusations made by the Federal Antimonopoly Service against large companies relied on the rule related to *concerted practice*. In courts, the main line of contest between prosecution and defense is to what extent are collusion and concerted practice the same type of behavior and, consequently, how different should admissible evidence be for these types of practice. Legal cases, which the Federal Antimonopoly Service brought against large companies, were mostly lost.

For this reason, the new law includes a special proviso that concerted actions are not the actions related to implementation of an agreement. In the definition of concerted actions (Section 8) the central point is conceptions of interaction and effect of interaction on decision making.

1) The result of such activities comply with the interests of each of the mentioned economic agents only in the case if their activities are known by each of them in advance;

2) Activities of each of the mentioned economic agents are induced by activities of other economic agents and are not a result of circumstances that are equally affecting all economic agents in the relevant product market….

In fact, only those actions are claimed illegal that are based on assessment of interdependence of market participants on the assumption that they make public announcements, and prices and other conditions of transactions are transparent for all parties.

In addition to agreements and concerted actions, the new law outlaws coordination of activities by market participants. This rule was necessary to be included in the law because Russian market participants are using such form of public announcements about prices as forecasts made by heads of ministries and agencies, which certainly make tacit collusions easier to achieve.

In addition to making the differentiation between agreements and concerted actions more accurate, the new antimonopoly law introduced one more instrument: a conception of collective dominance. Criteria of determination of collective dominance are borrowed mostly from the German Antimonopoly Law (Section 19 of the «Act against Restraints on Competition»). The bill that was submitted to the first reading contained almost exclusively quantitative criteria of collective domination: combined share of three (five) market participants should be no less that 50% (70%), while shares of each are rather high (initially, no less than 5%).

This point evoked probably the strongest negative response from the business community. Representatives of Russian major metal, railroad and electric power companies were unanimous in their statement that "*the antimonopoly agency has failed to prove our collusion … therefore, they ask for additional powers".* Another widely presented view was that the main purpose why the concept of collective dominance had been introduced was unrelated to the goals of antimonopoly policy and had been made for the sake of giving the authorities power for stronger pressure on Russian companies in general.

Having met the new rule in the law with an extremely negative reaction, the Russian business community tried, rather than to have it discarded from the law, to bring clear and concrete criteria for qualifying a market structure as a case of collective dominance. As a result, the benchmark level for a seller to be treated as a member of a collectively dominant group was raised from a 5%-share to an 8%-share. In turn, criteria of collective dominance based on market share were supplemented with criteria based on types of market structure, including the following:

2) Relative market shares of economic agents are stable or changing little within a long period…and access of new competitors to the relevant product market is made difficult;

3) The product sold or purchased by economic agents cannot be replaced with another product for consumption…, rising price for the product does not bring a corresponding decline in demand for it, and information about the price and conditions of sale or purchase of this product in the relevant product market is available to an indefinite circle".

To make an assessment how the new rules will affect the efficiency of competition policy, we should find, among other things, an answer to the question how good is this definition for description of a market structure that can induce tacit collusion [Ivaldi et al., 2003]. The answer will be mixed. On the one hand, a small number of sellers, high barriers to new entry and informational openness of a market are the major incentives for tacit collusion. Stable distribution of a market between participants can be treated as an indicator of existence of a tacit collusion (at least in case when the market is not competitive). On the other hand, the definition of collective dominance contains clearly poor wording. For instance, "*impossibility to replace a product with another product"* means nothing more than that sales territory – which is the first key component of an antimonopoly investigation – has been correctly identified. The "insufficiently high" price elasticity of demand is more difficult to define. On the one hand, low elasticity of demand encourages market participants to support their tacit collusion. However, the wording holds a supposition that there is a certain "normal'" level of elasticity, which antimonopoly bodies and courts of justice are aware of, and must determine how much the actual price elasticity of demand is deviating from this» normal'" level. If, for the sake of simplicity, we suppose that non-elastic demand is interpreted as demand with elasticity below unity (modulo), we will make the situation still worse. If companies, following their tacit collusion, are maintaining a price that is close to monopoly pricing, price elasticity of demand is always more that unity. Then the above condition will be met in not a single case of tacit collusion[9]. So, definition of a market structure that is inductive to tacit collusions contains components that can potentially lead to errors of 2nd type.

As a result, although the rules that are aimed at prevention of tacit collusions were altered and complemented at different stages of deliberation and enactment of the law, the initial goal that had been set by the antimonopoly agency was achieved in spite of strong criticisms of the modifications by the business community. Why has it happened to be achieved? We believe that the reason ifs two-fold. In the first place, business representatives could not fully realize the possible threat of antimonopoly legislation in action. This is partly because the existing sanctions are still low. In the second place, the business community, even realizing the threat, never formulated it in terms of antimonopoly policy. Even the most experienced and successful lobbyists have such a poor command of economic and legal foundations of antimonopoly policy that they have failed in devising amendments to lower the threat of antimonopoly sanctions against large companies.

4.4. Penalties (Provisional Changes)

In the Russian legal system, changes in levels and application of sanctions are regulated not by the antimonopoly law per se, but by the Code of Administrative Violations. As early as in June 2006, the State Duma passed in the first reading a number of amendments to this Code, which changed rules

[9] In definition of a market for the purposes of antimonopoly regulation, this problem is known as "cellophane fallacy".

for imposition of fines for violations of antimonopoly legislation and increased the levels of fining. Fines divisible by minimum wages are being gradually replaced with fines calculated as percentage of turnover of market participants. This percentage is slightly lower than in the European Union: penalty for participation in cartel agreements is up to 4% of turnover, and for abuse of domination, up to 2% of turnover. Meanwhile, fines calculated on the base of minimum wages are still in force for a number of violations.

However, these amendments have not yet finally passed the State Duma. In essence, this is the line of strategic interaction between the business community and the antimonopoly agency. If, in the end, these amendments are not enacted, all changes to the law, including the above mentioned, would exert negligibly small effect on efficiency of competition policy. Suffice is to point out that at present, established violations of antimonopoly legislation are repeated in 90% of cases, because the low level of sanctions gives no reason to avoid them.

In contrast to changes in content of the law which were discussed more or less openly by experts and in the business community, the scuffle over amendments to the Code of Administrative Violations remains hidden from outsiders.

However, even if the new rules for sanctions are enacted, potential violators would not yet lose their fight against the antimonopoly agency. This fight is very likely to be transferred to courts. So far, the antimonopoly service has been losing most of its cases in court, particularly those related to violations made by large companies. It cannot be ruled out that after amendments to the Code of Administrative Violations are enacted, the transgressors will manage to practically block application of really high sanctions.

The Federal Antimonopoly Service, in an attempt to strategically prevent this threat, will probably insist that along with fines, the rule for confiscation of illegal profits, which is now in force, should be maintained.

4.5. Leniency Program

This section contains reflections on three key aspects of Leniency program (LP): general idea of the LP from the perspective of game theory (GM); institutional design and external prerequisites for efficacy of implementation of the Leniency program. The LP is closely related to modification of the system of sanctions. In Russia, levels of fines are determined by the Code of Administrative Violations (CAV). Section 14.32 of the bill contains a short set of rules describing content of the LP related to exemptions from administrative prosecutions: (1) notice to the Federal Antimonopoly Service about a fact of collusion and participants in the arrangement, (2) provision of information about the collusion, (3) denial of participation in the collusion.

Obviously, at the present level of administrative sanctions, which cannot exceed a maximum of about $20,000, any LP is waste of resources. Consequently, we assume that fines based on turnover will be introduced into new law, which is currently being deliberated in the Russian parliament.

The LP is an instrument to raise expected costs for violators of rules of fair competition who participate in legally prohibited arrangements constraining and preventing competition in product markets. According to basics of the game theory, one of the key problems of social interaction is contradiction between individual rationality and social efficiency: individually rational actors produce socially inefficient outcomes. This problem is illustrated and analyzed, first and foremost, within the framework of Prisoners' Dilemma game (PDG). The general idea is as following: dominating strategy of each player (in two or multisided one-shot game) corresponds to the unique Nash equilibrium, which is not Pareto-optimal. One way to cope with this problem is to repeat the game without definite end with a rather close, homogeneous and stable set of participants. As a result, evolutionary stable strategies (e.g., tit-for-tat) lead to cooperation without implementation of any centralized mechanism of enforcement. An alternative way is to create specialized enforcement mechanisms to support cooperation. It does not require a game of such length as in the first case. Since cooperation within the

context that we have established means collusion, the second way, ceteris paribus, is riskier because in the presence of this type of mechanism, collusion can be rather easily identified (so that it is easy to have a direct proof of the collusion).

At the same time, if players are prospective participants of collusion, it is reasonable to evaluate this PDG in a wider context including two more subjects: «consumers» and «government». That is why strategic interaction within the business community complements strategic interaction between the business community and government. From this perspective, the aim is not to create and maintain cooperation among the players but to prevent and destroy it. This means a need to recreate the one-shot PDG in strategic interaction between the above mentioned market participants. It is the function of the government to establish and enforce rules that will create incentives compatible with conditions and results of the one-shot PDG. A fundamental question here is whether different ways of establishing collusive behavior are invariant from institutional design of the LP. Our preliminary answer is *No,* because implementation of the first strategy will require that antitrust bodies must seek additional information (evidence) in order to prove the fact of collusion before the court. In the Russian situation, where no established court practice exists to discriminate between explicit and silent collusion, the LP related to the first strategy will not work. That is why we concentrate our attention mainly on explicit collusions (cartels) on pricing or market sharing.

In fact, the LP may mean (1) differentiation of penalties for participation in collusions; (2) elaboration of mechanisms to identify and document agreement of a participant to cooperate with antitrust authorities (including his acting as a witness in the court), and (3) protection of participants of the LP from sanction of other members of a collusive arrangement.

There are a lot of important practical questions. Some of them should be resolved in elaboration of institutional design for the LP. We are going to try to name and describe them very briefly.

1. It is necessary to answer who would be eligible for participation in the LP. The simplest case is when only one participant provides antitrust authorities with information on collusion. There is a number of other possible situations when a second or a third participant is involved and, finally, an extreme case - all participants simultaneously make an announcement about a cartel (for example, because information has already leaked from state agencies). Alternatively, the court may have more than one witness.

2. Since there are differences between a legal and a physical person, does it really matter who will present information to antitrust authorities? Is it one of the controlling final beneficiaries? Or is it a director general (president)?

3. What percentage of a penalty will be discounted for provision of information and cooperation with the relevant authorities? Does it depend on the moment in time when cooperation with the authorities was started? More precisely, is it related to the moment when the authorities got the information on collusion from other sources, including their own? This point is critically important and related to other aspects (see, for instance, point 1)

4. Does it mean that exemption from penalty or a discount may prevent this particular subject from getting in further mess of a regular civil process?

5. What is the direct cost of starting and maintaining the LP? To answer this question, we'll have to clearly understand not only institutional design of the LP as such, but also its external prerequisites.

The LP is considered here as an element of competition policy. At the same time, there are many important aspects of workability of the LP, which are outside competition policy as such. First of all, it is the quality of public administration, including skills and incentives of participants of the LP on the government side. High rate of temptation (prospective losses of a cartel participant relatively to wage of a civil servant) could be a problem for perspectives of implementation of the LP in Russia. Pessimistic expectations are strengthened by recurring scandals around stolen databases (especially those related to credit histories and information about taxpayers), which must be confidential by law.

Another important aspect is the state of affairs in public finance in the long run, because the LP is a long-term procedure by definition. This aspect is more positive in Russia than the first one.

Unlike many other countries, Russia has some aspects in the LP that are related to prospects for strategic interaction between business community and government/ They are: (1) institutional design of the LP rules in the context of changing system of fines, (2) mechanisms of implementation of the LP rules, taking into account specialized organizations, such as antitrust agency and arbitrage courts. As for the first point, the matter of primary importance is to launch a discussion of design of the LP, using techniques of utmost transparency, monitoring the changes, assessing their regulatory impact. From this perspective, there is no way for abiding by the best international practice of strategic interaction. The second point can be evaluated even more pessimistically due to widespread practice of selective (discriminating) enforcement of rules. Unfortunately, we have no detailed information even about agenda of discussion between the business community and government on the LP in Russia.

5. Conclusion: Strategic Interaction under Limited Experience of Antimonopoly Regulation

Analysis of discussions, amendments and enactment of new law "On Protection of Competition" allows to draw some important conclusions about strategic firm-legislator interactions.

First, participants in strategic interactions brought few changes to the law in the process of public discussions and upgrading of the bill. Therefore, the final version of the law to a large extent reflects initial goals of antitrust authority.

The limited number of changes in such fields as levels of antitrust remedies, criteria of merger control and standards of collective dominance at the first glance seems to be explained by the restricted experience of application of relevant rules. While the very concept of collective dominance that could be extensively enforced against influential market players has attracted extensive interest, representatives of the business community failed to correctly recognize the main "threats" associated with the relevant rules and therefore were unable to introduce changes in order to diminish the scope of these "threats". The same has happened with further delimitation of collusion and concerted practice in the law.

While, the main explanation of the absence of struggle for the correction of legal rules is that not the description of legal and illegal actions but the norms on penalties are actually the key point of strategic interaction. As long as the amount of penalties and the probability to impose a penalty remain to be low, firms are relatively indifferent towards alternative descriptions of illegal behavior.

This state of affair is extremely detrimental for the future development of antitrust regulation in Russia, since any positive changes in the legal rules till now are neutralized by the unsatisfactory enforcement.

Second, in the weak institutional environment strategic firm—legislator interaction leads to the deterioration of antitrust legislation not only from the side of business but also from the side of antitrust authority. Trying to introduce norms those would allow to increase bargaining power in the interactions with transgressors, legislator use the tools contradicting to the core ideas of antitrust legislation.

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