

Enactment of the New Antimonopoly Law in Russia (2006):

Firms- Legislator Strategic Interaction?

Svetlana Avdasheva, Higher School of Economics,

Andrei Shastitko, Moscow State University

New law "On protection of competition" in Russia (2006)

- Previously in force:
 - Law "On competition and restriction of monopolistic activities in commodity markets" (1991)
 - Law "On protection of competition in the markets for financial services" (1999)
- Were criticized as a sources of relatively low efficiency of Russian antitrust policy
- Now are replaced by the law "On protection of competition"

Objective (s) of the paper

- To explain the specificity of firms-legislator strategic interactions within the weak institutional environment on the example of the new Russian law "On protection of competition" enactment
- To discover the main source of threats for the future development of antitrust law in Russia: is that big business or legislator?
- To assess the results of firms-legislator strategic interaction in the specific context

Plan of the paper

1. Antitrust legislation in Russia: main points of criticism
2. Context of the enactment of the new antimonopoly law
3. Changes in the legal rules: role of strategic interaction and threats for future antitrust policy on the example of
 - General features of legal rules in the new law
 - Rules on collusion, concerted practice and collective dominance
 - Rules on dominance
 - Rules on economic concentration control
 - Rules on sanctions and penalties
4. Conclusions

Antitrust legislation in Russia: main points of criticism

- It is impossible to impose penalties sufficient to make illegal behavior unprofitable
- The reasons to defend restrictions of competition are too broad (positive-socio-economic effect)
- There is excessive ex-ante control of mergers
- The activity of antitrust authority is shifted towards ex-ante control of mergers

Political environment of the new law enactment

- On the one hand:
 - Criticism towards legal base of antitrust regulation in Russia during last decade
 - New Russian antitrust authority Federal Antimonopoly Service
 - Increasing efforts to improve the reputation of antitrust policy
- On the other hand:
 - Growing skepticism towards competition and the role of antitrust in Russia (actual and potential)

Institutional environment of the new law enactment

- Passive role of courts and excessive requirements to antitrust legislation:
 - To prove illegal actions it is necessary to have the precise description in the law
 - Empirical evidence is hardly acceptable (if it is acceptable at all)
- Many norms presented in the law are not applicable at all:
 - Norms on criminal penalties on violator of antitrust rules
 - Norms on civil suits on violator of antitrust rules
- Extensive discussions on the content of the new law. Legislator and antitrust authorities tried to react strategically on the strategic behavior of business... but with what success?

Strategic interaction of legislator and antitrust authority: general design of antitrust rules

- Legislator: attempts to transplant rules from European (EC and German) antitrust legislation
- Business: requirement to precise rules (motivation: in order to exclude discretion of antitrust authority); attempts to exclude network industries from the authority of antitrust legislation
- Outcome:
 - Tendency to give “complete description” of the evidence of the infringements
 - Eventually gives the way to type I and type II errors in antitrust legislation enforcement
 - There is no sectoral exemptions in the law, but special exemptions are possible due to special Decrees of Russian Government
 - Institutional environment to enforce antitrust rules is still weak

Strategic interaction of legislator and antitrust authority: rules on collusion, concerted practice and collective dominance

Legislator:

- Concerted practice is not a collusion
- Introduction of a doctrine on collective dominance
- Prohibition of coordination

Firms:

- Very negative reaction but there is no alternative suggestions

Outcome: rules on concerted practice, collusion and collective dominance remain almost the same during the process of discussions

Strategic interaction of legislator and antitrust authority: rules on dominance

Environment:

There are problems to identify and prove dominance on the market, including market boundaries and structural features

There is intention of Federal Antitrust Service to develop tools able to influence on big companies

Legislator:

- Russian Government obtained a discretion to prescribe market share that implies unilateral dominance on selected market

Firms:

- Very negative reaction but there is no alternative suggestions

Outcome: rule that *any* market share may imply dominance under Decree of Russian Government is included in the law.

Possible threat: Antimonopoly policy can be considered more as *ad hoc* regulation than policy based on economic reasoning

Strategic interaction of legislator and antitrust authority: rules on ex ante merger control

Business: Rules and procedures of merger control before 2006 create excessive administrative burden and should be replaced by notification procedure only without any authority to give or not to give permission for merger

Legislator:

- Boundary of firm to be an object of ex ante control is adjusted (now it is on about the same level as in US)
- The very concept of economic concentration is adjusted considerably basing on the notion of redistribution of control
- Redistribution of shares within holding company groups are removed from the procedure of *ex-ante* merger control

Outcome:

- Regulation of *ex-ante* economic concentration control is modernized that allow to improve the effectiveness of antitrust
- In contrast to 22,000-23,000 deals recently FAS expects to analyze only about 400 deals each year

Strategic interaction of legislator and antitrust authority: rules sanctions and penalties

Legislator:

To increase administrative sanctions for violation of antitrust law:

- Up to 0,25-2% of turnover – for the abuse of dominance
- Up to 0,5-4% of turnover – for the cartels and collusion
- The same tendency for other infringements of law

Business community (presented in Duma RF):

- Till now the amendments to Russian Code of Administrative Violations are not approved.

Outcome:

- Under existing rules and procedures on remedies all other changes and amendments of antitrust legislation could provide minor impact

Results of the firm-legislator strategic interaction: new legal base of antitrust policy in Russia

- New law tries to introduce new rules able to improve the antitrust legislation and enforcement
- In the weak institutional environment efforts to improve rules describing illegal behavior could be inefficient
- Therefore, strategic reaction on threats created by new law for potential violators could be aimed at not to reject or change new rules but to keep institutional environment weak
- “Strategic reaction” on the business action is potentially harmful for Russian antitrust legislation and can lead to deterioration of antimonopoly legislation
- It seems that in the framework of strategic interactions firms do not oppose not only to rules which can lead to type I errors (illegal behavior is considered as legal) but also to rules which bring type II errors (legal behavior is considered as illegal). One explanation is to diminish the value of antitrust authority reputation.