Antitrust Legislation in Russia: Recent Trends, Achievements and Threats[1]

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Abstract

In recent years the role of antimonopoly policy in Russia has significantly grown. Enforcement power of antitrust agency increased dramatically. At the same time adverse trends in competition policy have emerged and strengthened. The main reason was paradoxically an evolved role of antitrust in the Russian government. The application of antitrust rules is expected to immediately result in control of price increases and/or in support of a defined group of market participants (e.g. suppliers of food products).

In this context legal rules are changing in the way that leads to an increase of the number of false positives (type I errors) in antitrust cases. False positives do not only impose a burden on the accused but also induce incorrect signals for market participants, restraining potentially efficient business practices. Often they create a basis for abusing norms of the law in behalf of interest groups. Articles considers three examples of adverse development of antitrust norms in Russia: regulation of trading activity, norms on concerted practice and excessive prices of collectively dominant market participants, norms on discrimination as an abuse of dominant position.

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Key words: Russia, antimonopoly norms, abuse of dominance, discrimination, retail chains, concerted practice, collective dominance, type I errors.

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1. Introduction

The specifics of the Russian economy demand competition policy. The prevalence in the economy of highly concentrated markets, high entry barriers, low protection of property rights, poor market entry incentives, persisting and even growing administrative restrictions to business create conditions for companies to refuse from competition. The anti-crisis policy of 2008-2009 oriented on selective instead of systemic support measures and protection of predominantly large suppliers contributed to the weakening of competition on the Russian markets[i].

At the same time, the consequences of weak competition – high prices, asymmetric price rigidity downward[ii] and weak incentives for innovations– are being recognized as economic policy problems requiring solution. Antitrust prohibitions have traditionally been used as the main competition policy tool in Russia, despite the fact that the contents of the problems of competition restriction call for proactive rather than protective measures.

The role of antimonopoly policy as an economic policy tool has grown dramatically over the recent years. This is manifested both in the growing number of cases and the increase in the amount of penalties paid. The largest companies of Russia's most important oil sector – the "Big Four" (Rosneft, Lukoil, Gazpromneft, and TNK-BP) – will pay more than 15 billion rubles (approximately 375 million Euros) as a result of cases initiated in 2008-2010.

At the same time, some adverse effects have emerged in the application of the Russian legislation, both for business, manifested in a large number of type I errors ("false positives"), and for antimonopoly policy as such. Two direct sources of mistakes are substitution of active competition policy with antitrust bans and excessive expectations regarding ultimate results of antitrust rules application. These two sources of mistakes, typical not only of the Russian antimonopoly policy but of many other areas of the Russian economic policy as a whole, lead to degeneration of the norms borrowed the European antimonopoly legislation in enforcement practice. The purpose of this article is to illustrate the adverse development of antitrust rules in Russia using three typical examples. The first example is the application of antitrust prohibitions on certain conditions of contracts between the suppliers of food products and retail chains. The second is the rules on tacit collusion. Third – the interpretation of damage for counterparties as antitrust violation. We will show that the application of distorted norms can not just fail to work towards the achievement of the competition policy objectives, but directly prevent competition.

The article has the following structure. Section 2 presents a brief overview of surveys devoted to the need for competition policy and problems of antimonopoly law enforcement as a part of the competition policy of transition economies, including Russia. Section 3 describes the specifics in the work of the Russian antimonopoly authority – the Federal Antimonopoly Service – and a brief history of application of the antimonopoly legislation. Sections 4-6 deal with various risks manifested precisely

against the background of more active application of antitrust rules for attaining antimonopoly policy objectives. Section 4 analyzes the possible effects of bans on relations between the suppliers of food products and retail chains. Section 5 is devoted to norms of concerted practices and excessive price of collectively dominant suppliers as a form of tacit collusion. Section 6 reviews the problem of applying antitrust bans to practice which do not harm competition, using the example of the ban on discrimination. The main findings are summed up in conclusion.

2. Need for antitrust enforcement in emerging market economies: an unresolved question?

Paradoxically, contemporary studies of the problems of competition and competition policy lack consensus regarding the intensity with which antitrust legislation should be applied in economies in transition.

On the one hand, development of competition and competition protection institutions was among the basic values of the Washington and Post-Washington Consensuses as programs of economic transformations in countries building a market economy. Within this context, most Russian and international experts have supported and continue to support the opinion that the role of the antimonopoly legislation in Russia should be high.

The need for consistent competition policy is particularly strong not only because of the specific structure of Russian markets: high concentration[iii], high entry costs, and weak threat of entry[iv]. The organization of contracts and mentality of the market participants constituted more serious obstacles to competition. Because of the policy of centralized planning and production placement, a considerable part of producers were locked in contracts where both the buyer and the supplier were each other's single option. Even in 2002, according to the returns of the sample survey of manufacturing enterprises, approximately 25 percent of the General Directors indicated that it was impossible for their enterprises to change the main supplier of input[v].

Persistent traditions of a lack of competition have been deterring competition on the Russian markets for quite a long time now. Certainly, the Russian entrepreneurs have acknowledged the inevitability of competition rather quickly. Judging by the results of the surveys, their overwhelming majority believe that competition makes an impact on their conduct and performance[vi]. At the same time, the ideas of inevitability and even value of competition have not yet taken root within the system of the public authority. In cases where politicians' decisions objectively restrict competition, this does not concern practically anyone except representatives of the interest group.

However, wide use of antitrust bans in economies such as Russia's enjoys far from unquestioning support. At first glance it may seem surprising that apprehensions regarding possible negative effects of antitrust legislation enforcement are expressed first and foremost by experts

specializing precisely in antitrust. A survey of development and enforcement of the antitrust legislation in countries with transitional and developing economies has shown that the probability of type I error is high in those countries – recognizing as illegal the actions which in fact are not aimed at restricting competition[vii]. The weaker are the traditions of the judiciary institutions, the higher is the probability of type I error.

Spreading the norms of antitrust legislation among countries with different development levels and legal systems sometimes is criticized as "decentralized globalization"[viii]. On the one hand, most countries introducing antimonopoly legislation borrow it from two jurisdictions with the most developed application traditions – the United States or the European Union. On the other hand, legal enforcement is in fact unique for each country and hardly harmonized. Decentralized globalization is accompanied by certain risks to business. Uncoordinated solutions based on antimonopoly legislation increase business costs. In a situation of undeveloped traditions of antimonopoly cases the risks of arbitrary solutions grow. Finally, in some cases the national specifics open up the opportunity for passing individual decisions based on protectionist motives. On the whole, the risk of turning antimonopoly legislation into a tool of regulation or quasi-regulation is high in countries with undeveloped traditions of its enforcement.

Many of the abovementioned risks were objectively higher in Russia. The very content of the Russian antimonopoly legislation during the first years of its existence aroused concern of international experts specializing in antitrust. One of the main sources of risks mentioned was the fact that the Russian antimonopoly law – actually, as well as most antimonopoly laws adopted during the same period by countries of Central and Eastern Europe – does not draw a sufficient line between the legality regime for horizontal and vertical agreements and qualifies the infliction of damage on a competitor and/or a counterparty as a form of abuse of dominance[ix]. The first particularity of legislation created conditions for a stricter interpretation of provisions of vertically restrictive contracts than is in fact necessary; second – for prosecuting actions that have nothing to do with competition. It is characteristic that both those risks in contemporary development of the antimonopoly legislation have materialized, and we plan to illustrate it in the following sections.

3. Antitrust legislation and antitrust authorities in Russia: brief recent history

The first law prescribing antitrust bans was adopted in Russia as early as 1991. Control of its enforcement was assigned to the antimonopoly authority set up the year before, which since 2004 has been called the Federal Antimonopoly Service (FAS).

The antimonopoly provisions were based on the content and enforcement experience of European antimonopoly legislation. However, both the law and the powers of the antimonopoly authority were characterized with much wider scope. In addition to provisions outlawing agreements that restrict competition and unilateral restrictions of competition by large companies (abusing

practices), as well as ex-ante control of economic concentrations, the law contained articles on unfair competition, restriction of competition by public authorities, and later – on public procurement procedures.

Since then, the FAS sphere of responsibility has only been extending. FAS is presently responsible for control of compliance with the law on natural monopolies and for sector-specific regulation in electricity sector and retail chain operations. The antimonopoly authority monitors compliance with the public procurement procedures and with the law on advertising. The ex-ante control, in addition to economic concentrations, covers investment in so-called strategic enterprises[x] and provision of state aid.

In addition to a wide scope of responsibility, FAS is characterized with a large number of employees. Along with the central office, FAS has territorial agencies in the RF Subjects. The total FAS staff exceeds 2,500 people, 25 percent of which are employed at the central office.

Before 2004, cases of violation of the antimonopoly legislation played a subordinate role in FAS's activity due to the extremely low amount of penalties that could be imposed. A violator of the antimonopoly legislation could pay a fixed amount of penalty restricted to the maximum of 500,000 rubles (about 12,000 Euros). In the early 2000's, a mere 20-30 million rubles worth of penalties were collected annually on FAS charges. The biggest number of antirust cases involved control over mergers (approximately 20,000 cases annually) and violations of the law on advertising (from 3,000 to 10,000 cases a year).

The new stage in development of the Russian antimonopoly policy began with the creation of FAS and appointment of Igor Artemiev as its head in 2004. The activity of the antimonopoly authority invigorated with the main emphasis being made specifically on the violations of the antimonopoly legislation, above all, the violations committed by companies. Even before the revision of the standards of sanctions, the amount of imposed penalties trebled, topping 80 million rubles in 2007. The threshold of mergers subject to ex-ante control increased dramatically, and FAS received an opportunity to focus on analysis of a relatively small number of cases (around 1,200 in 2010, compared to 20,000-25,000 ten years earlier).

The new Law "On Protection of Competition" was adopted in 2006, introducing new definitions of illegal actions: collective (in contrast to individual) dominance, concerted practices, excessive price.

The amendments to the Code of Administrative Offences adopted in 2007 introduced a system of turnover penalties for violation of the antimonopoly legislation. The amount of penalties charged by FAS has increased to 1.5 billion rubles already next year – in 2008 (Fig. 1). The number of cases initiated against suppliers based both on the elements of coordination and on the elements of unilateral restriction of competition was growing accordingly (Fig. 1).

The autumn of 2008 became truly a turning point in the history of Russia's antimonopoly policy

when cases against the "big four" oil companies (Gazpromneft, Lukoil, Rosneft, and TNK-BP) were initiated, applying the new concepts of the law (collective dominance and definition of excessive price) and new standards of turnover penalties.

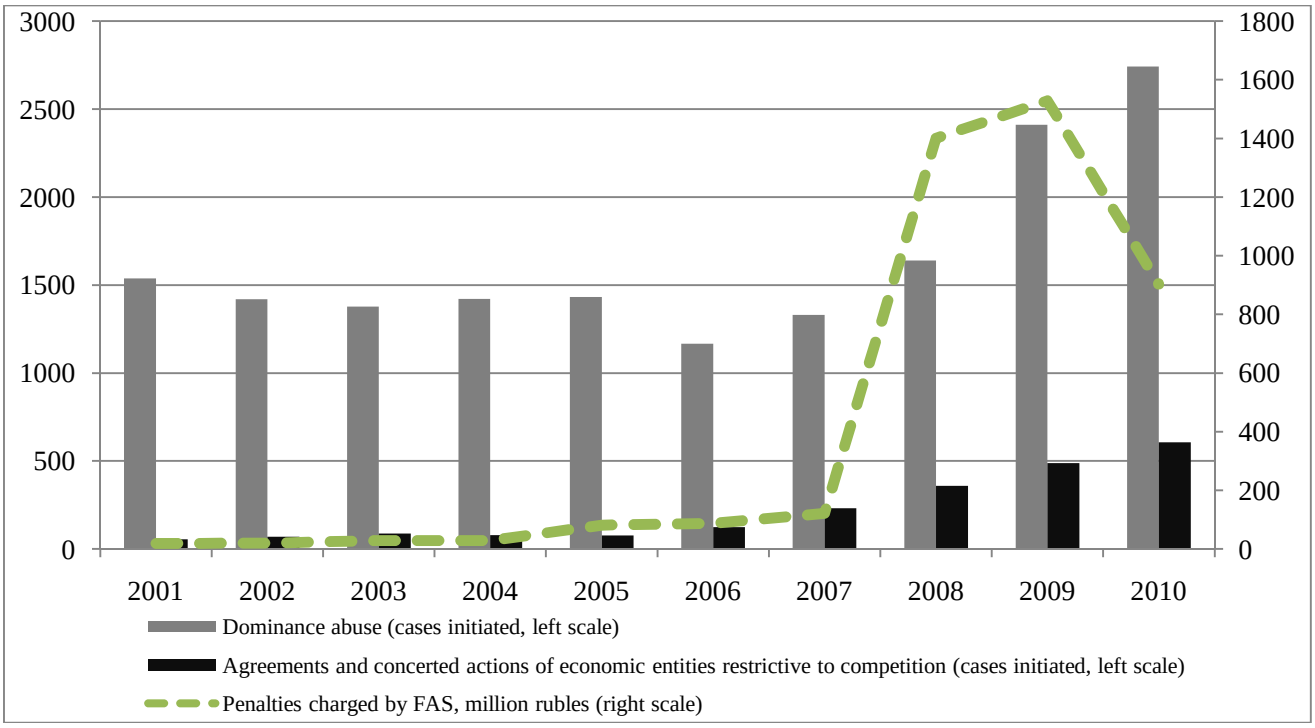

Fig. **1.** Cases of violation of the antimonopoly legislation initiated by FAS RF: some quantitative characteristics
Source: FAS Reports "On the State of Competition in the Russian Federation" and information memos of FAS

In cases initiated in 2008, FAS issued decisions to penalize the "big four" to the amount of 5.4 billion rubles; in cases of the second wave initiated in 2009 – 20.7 billion rubles. The FAS decisions were appealed in various court instances, but after the decisions of the Supreme Arbitration Court in cases vs TNK-BP (May 2010) and Gazpromneft (February 2011) it became apparent that the companies will be found guilty on most of the charges. In the autumn of 2010, the government proposed, and the companies accepted the terms of amicable settlement slightly lowering the amount of penalties imposed on the companies as a result of the first wave of cases.

The activeness of the antimonopoly authorities was growing in cases other than the major ones as well (Fig. 1). The number of cases initiated against collusions and concerted practices increased four times over the past four years. The already large number of cases against abuse of dominance kept growing. Recently FAS initiates about ten times more cases against market players than the European Competition Commission and the US Department of Justice and the US Federal Trade Commission.

The danger consists in the fact that the increased potentialities of FAS are used not only for purposes of preventing and punishing restrictions to competition. The government has assigned the antimonopoly authorities with the task of tackling current problems of economic policy. This is

manifested also in the sector-specific nature of cases of violation of the antimonopoly legislation initiated during the recent years. Approximately 500 cases were initiated during the past three years against oil companies – both by the FAS central office and by its regional branches. The explanation is simple: the price of oil products is one of the indicators of social policy in Russia. Although the prices of gasoline and diesel fuel in the Russian Federation are lower than in the overwhelming majority of European countries, the government views price reductions as an element of support of the population and sectors using oil products (above all, agriculture).

The increase of domestic prices of food products in the summer of 2010 was another reason for initiating cases of violation of the antimonopoly legislation. Over 70 cases are currently under review on the fact of increase of buckwheat prices alone.

FAS orientation on solution of current economic problems combined with the need to achieve immediate results – even if this result consists in the imposition of liability – led to the adoption of provisions of the Russian antimonopoly legislation which not only fails to contribute to the attainment of competition policy objectives, but may directly result in restriction of competition.

4. Goals and measures of competition policy in the Russian retail sector: an example of a blind date

The Law "On the Fundamentals of State Regulation of Trading Activity in the Russian Federation" adopted in December 2009 was a law most actively discussed in Russia during 2008-2009. The provisions of the Law are regarded as antimonopoly regulations developed with account for sector-specific characteristics.

During the elaboration and discussion of provisions of the Law it was expected to address two types of problems involving the abuse of market power by large retail food chains – the use of market power with respect to suppliers and buyers of food products. The difference between the wholesale and retail prices of food products was considered as the main indicator of market power and its use. An additional indicator consisted in the terms of contracts between food suppliers and retail chains known in Russia as "discrimination". Brackets are necessary because of very specific criteria to assess practice as discriminatory in Russia. When contractual terms were qualified as "discrimination," two types of differences were often confused (and continue to be confused): the variation in supply terms depending on the characteristics of the contract and differences in supply terms for equivalent contracts. At least some of the practices qualified by the Law developers as "discrimination" constitute price discrimination which generally does not harm competition. Other practices considered by the Law as discriminatory reflect the genuinely existing problem of asymmetry of bargaining power of food product suppliers and retail chains[xi].

The problems highlighted by developers of the Law objectively exist and obviously need to be

addressed by economic policy methods. However, antitrust rules (or something the developers of the Law themselves believe to be antitrust rules) were selected as the method of addressing the outstanding problems instead of structural policy methods, support of trade formats alternative to retail food chains, development of a voluntarily accepted standard of contract conclusion and support – in spite of the fact that alternative measures were actively proposed both by business and independent experts, specifically, with reference to international experience in this area.

The Law envisages two types of antimonopoly bans intended for adjusting the market structure and suppliers' conduct. Art. 14 of the Law prohibits further extension of a retail food chain if its share on the market within geographic borders of a municipal district has reached 25%. Art. 9 and Art. 13 of the Law introduce a number of bans regarding the contents of contracts between food suppliers and retail chains. It is prohibited to request a volume discount in the amount exceeding 10% of the wholesale price. It is prohibited to return unsold products to their suppliers. It is prohibited to demand that the supplier provide information on terms of contracts with other retailers and include in contracts a most-favored nation clause.

Even superficial analysis shows that the object of the ban is not discrimination as favoritism towards some suppliers to the detriment of others. The so-called antitrust bans are intended for restricting the use of bargaining power edge by retail chains and preventing the redistribution of the quasi-rent created in the process of relationships in their favor.

Most of the introduced rules have only indirect relation to competition issues (if they have). According to the developers of the Law, it's main goal is to restrict market power of retail food chains. It is supposed to stimulate economic performance of the latter and thus promote the growth of the national sector of food production.

Problems arising when antitrust rules are applied in order to regulate vertical contractual relationships which involve specific investment (such as relationships between suppliers and retail chains) are extensively studied[xii]. It is not clear if food suppliers receive any benefits from the Law application: preliminary evidence suggests they do not[xiii].

Moreover some provisions of Law pose quite tangible threats of restriction of competition. For instance, presumably, limiting the operations of retail chain to not more than 25% within geographical markets defined as municipal district may reduce the retail chains' incentives toward competition. The ban on discrimination as variation in contractual terms – and this is exactly how the antimonopoly authorities and the courts in Russia continue to interpret discrimination – may result in objective reduction of competitiveness of new suppliers. If the ban on discrimination means that the suppliers of new products should be granted the same contract conditions as the suppliers of popular product well known to the buyers, retail food chains should either "pay over the odds" to the newcomers or venture the risk of antimonopoly prosecution. The terms of market entry for newcomers as a result of

introduction of the ban on discrimination are not improving, but worsening.

However, some negative effects are registered already. Practically immediately after the adoption of the Law, the contractual practice in relationships between retail chains and suppliers was actually tightened. According to unofficial unconfirmed data, retail chains deprived of a possibility to legally prescribe different contractual terms transferred additional contractual terms into the sphere of unofficial agreements. The threat of disruption of contractual relations in principle is, in turn, used as an enforcement tool. Some major retail food chains were reportedly compelling their suppliers to sign additional agreements on contract termination without specifying the date as private enforcement tool. Apparently, the creation of such a level of uncertainly is not better for suppliers, and maybe is even worse even than the application of any 'discriminatory' contract conditions.

5. Fighting against coordination: concerted practices and excessive prices of collectively dominant companies

Antitrust rules in Russia are applied to tacit collusion as well as overt collusion. The unlawful nature of tacit collusion can be explained by two circumstances. On the one hand, the specifics of the Russian markets – high concentration, entry barriers, and traditions of cooperation between suppliers – increase the probability of coordination instead of competition. On the other hand, the Russian antimonopoly authorities have no right to conduct clandestine investigations[xiv], which complicates the gathering of direct evidence. Both these considerations outweighed the risks of high probability of type I errors in tacit collusion cases.

The Law "On Protection of Competition" contains two types of descriptions of tacit collusion as being illegal: rules on concerted practices and the rules on excessive price of collectively dominant suppliers. Bothe types of norm are known as requiring very sophisticated economic and legal analysis. Even in developed enforcement system application of norms on abuse of collective (joint) dominance, for instance, lacks clear standards of proof and leads to enforcement mistakes[xv].

The Law defines concerted practices as suppliers' conduct in a situation of mutual dependence: *the result of such practices meets the interests of each of the said economic entities only on condition that their actions were known to each of them in advance* (Art. 8). In other words, the elements of coordination do not include contacts between the suppliers as such, and coordination is regarded as totally tacit collusion, unlike the European approach.

Several large players (with a steady share exceeding 50% for three suppliers and 70% for five suppliers) are recognized as collectively dominant on the market with high entry barriers and easily available price information. Excessive price is defined as the price exceeding the price of the comparable competitive market or (if there are no comparable competitive markets) the sum of costs

and profits needed for production. This second part of the definition of excessive price is used in Russian antimonopoly cases more often. Therefore, the difference between concerted practices and collective dominance reflects the difference between coordination as model of decision-making (concerted practice) and definite outcome (excessive price) in the market which structure supports coordination (collective dominance).

The main proof of concerted practices used in legal enforcement is in fact parallel behavior. The resolution of the Presidium of the RF Supreme Arbitration Court issued in 2009 said that a conclusion that suppliers' actions were *known to each of them in advance* and therefore caused strictly by coordination can be made by analyzing their conduct. In other words, the main evidence of concerted practices is nothing more than parallel conduct: setting identical prices or prescribing identical contractual terms. Subsequent comments by Russian lawyers and economists pointed to the fact that this resulted in confusion of cause and consequence in the law of evidence. The standards of proof of concerted practices in the Russian courts still do not include an analysis of the market structure (information transparency, entry costs or even distribution of the market between the suppliers) or an analysis that prices under presumed concerted practice being set over the competitive market prices. In many cases of concerted practices, the annual number of which runs into hundreds, subsequent analysis showed that the prices set by suppliers were not higher than in the comparable markets (for example, neighboring regions) and in some cases even lower.

As far as the proof of excessive price of collectively dominant suppliers is concerned, low standards of proof were established both by individual decisions and guidelines issued by the Supreme Arbitration Court RF. Concentration ratios are in fact the key element of proof used in qualifying the market structure as collective dominance. Analysis of entry barriers remains unsatisfactory in the majority of cases.

The proof of excessive price is based on comparison of prices and the sum total of accounting costs and 'satisfactory' rate of return. The comparison of the price indexes with the dynamics of accounting costs is also often employed.

At first glance, these standards of proof do not directly result from provisions of the Law. The Law uses two equal criteria of excessive price: exceeding of the price over the comparable competitive market price and exceeding of the price over economically justified costs and profits. However, the former criterion did not remain equal vis-à-vis the latter one for long. The dominance of the "accounting" approach was attained both by the definition of comparable markets used in the Law and by default perception of the very notion of comparability. According to the Law, comparability of markets suggests the comparability of such characteristics as the composition of suppliers and buyers, terms of market entry and government regulation conditions. At the same time, the decisions of the antimonopoly authorities and the courts predominantly use the concept of comparability as a binary

variable: markets are either comparable or not. Apparently, with such an approach it is impossible to find a comparable market for any market with a dominant supplier or supplier group, in which case the only criterion left is the exceeding of the price over reasonable costs and reasonable profits. The explanation made by the Supreme Arbitration Court in 2008 allowed to use only the exceeding of the price over economically justified costs and profits for qualifying excessive prices, if analysis does not find comparable markets. Precisely these standards of proof of excessive prices were used in cases against the "big four" Russian oil companies.

Provisions used for qualifying tacit collusion not only lead to type I errors and generate expenses for unjustly accused suppliers. They can also have a negative effect on competition.

For instance, the application of the provision on concerted practices may create incentives for extending vertically integrated companies downstream. The average share of independent retail suppliers of gasoline in the Russian regions is about 20%[xvi]. For many of small retail suppliers, the market price of their business is lower than the amount of penalties payable by vertically integrated oil companies for concerted practices. The risk of being sued for concerted practices can be reduced by buying the business of competitors. However, if competition on the downstream market of oil products is currently viewed as weak, horizontal expansion of the retail business of the Russian oil companies will leave even less room for it.

The negative implications of the ban on excessive prices are even more obvious. In fact, it sets the following standard of legal conduct: if you want to raise the price, make sure to increase the reporting amount of the costs. This suppresses the incentive for cost saving and cutting expenses in favor of strategic overstatement of cost[xvii] – i.e. reproducing inefficiency mechanisms characteristic of tariff regulation.

6. Discrimination as 'exploitative' illegal practice

The ban on discrimination as a form of abuse of dominance is an example of misuse of antimonopoly rules in Russia. Different contractual terms or different conditions of contract conclusion by dominant supplier are qualified as illegal not only if they restrict competition, but also if they inflict damage on the counterparty.

Bans on discrimination by dominant supplier is not accidental. The norms on abuse of dominant position – including discrimination – are used in Russia as an imperfect substitute of a conflict resolution system between the vertically integrated incumbent and new entrants in sectors which are in the process of deregulation. About 40% of cases of dominance abuse are being initiated against companies with legal status of natural monopoly. Such practices are meant to compensate for a lack of competition development as a task of sector-specific law and policy.

However, the perception of dominance abuse and standards of its proof under these circumstances will inevitably be distorted. In sectors with regulated vertical integrated incumbent, abusive practice at the same time restricts competition ("exclusionary practice") and inflicts damage on the counterparty ("exploitative practice"). The infliction of damage on the counterparty by a vertically integrated company actually is a means of restricting competition. It is necessary to mention however, that the policy toward discrimination is not very simple even in regulated sectors, as it is difficult to distinguish favoritism towards the company's own branches from discrimination as variation contractual terms for counterparties with different characteristics, which increases welfare and may not restrict competition[xviii].

But applying this approach to the unlawfulness of discrimination in unregulated sectors is fraught with an extremely high risk of type I errors, especially if there are no clear standards for transaction equivalence. Practice which are not discriminate and do not restrict competition, and even promote competition may be interpreted as illegal. This problem has already been mentioned above, in section 4, in relation to the ban on discrimination in contracts between retail chains and suppliers of food products. However, it occurs in other sectors as well.

Let us consider two of them: a ban on discrimination by vertically integrated companies against wholesale product suppliers and a ban on discrimination by producers against participants of the distribution chain.

'Big four' Russian oil companies have been accused of discrimination of wholesale supplies of oil products (gasoline, jet fuel, and diesel fuel). The proof of discrimination was based on two types of evidence. The first was that the refining subsidiaries of oil companies were selling products to wholesale buyers at different prices. However, no attempt was being made to evaluate the dependence of prices on the purchase volume and moreover – on other buyers' characteristics. The equivalence of transactions –which is a necessary condition for evaluating the difference in actions as discrimination – was regarded as physical equivalence of the transaction object and equivalence of legal form of contract. If two buyers were purchasing oil and concluding sales contracts with the supplier, transactions with them were regarded as equivalent. No attempts were made to evaluate the systematic difference in wholesale prices for different groups of buyers.

Higher prices of supplies to external buyers than to branches of vertically integrated companies were regarded as the second evidence of discrimination. Transactions inside the company and between different companies were viewed as equivalent. The Supreme Arbitration Court supported this position in the case vs TNK-BP (May 2010) and made this approach mandatory in other cases of alleged discrimination as well.

During the qualification of companies' actions as discrimination no attempts were made to assess their impact on the market structure and competition. This reflects the approach of the Russian

antimonopoly authority to the question why discrimination is recognized as illegal. Following this logic, discrimination is illegal not as restrictive practice, but as exploitative practice inflicting damage on the counterparty. With this approach, naturally, the standards of proof become easy to observe: if company supplies the same product at different prices, there is good reason to assert that this infringes the interests of those buyers who pay a higher price.

This approach to the unlawfulness of discrimination creates the risk of restriction of competition. The following standard of legal conduct is actually being created: supply to everyone at the same price, and if you find it unprofitable – don't sell your product outside the company at all. The appeal of in-house transactions grows and incentives for wholesale supplies to independent buyers decrease. Apparently, if different terms of wholesale supplies to vertically integrated companies' subsidiaries and independent buyers weaken competition, it will be weakened even more by growing presence of vertically integrated companies on the downstream market.

The cases against pharmaceutical companies – branches or subsidiaries of multinational companies – in connection with their distribution network policy are another example of rules on discrimination. FAS accused of discrimination the companies posing a set of special requirements to their distributers, including the supplier's right to conduct the company due diligence. The refusal to conclude contracts with distributers who failed to assume obligations on compliance with certain standards of marketing activity and business ethics – on whose complaint the cases were in fact initiated – was qualified as discrimination by the dominant supplier on the market of a particular medical drug. The companies' defense was based, in part, on the argument that the product market was identified inadequately (too narrow), substitution in the market was underestimated. But for the purposes of our analysis it is the motives of the accusations of suppliers of discrimination that are important.

A soft version of the system of selective distribution was regarded as discrimination in those cases. Suppliers used quality criteria of selection of distributers, but did not restrict their number. The applied quality criteria can be characterized as reasonable, not imposing any restrictions on potential distributers other than related to the purposes of introducing those restrictions. The purposes, in their turn, involved ensuring distributers' good faith and compliance with safety and quality standards in the process of product promotion. Suppliers did not develop their own distribution system practically in any of the cases, i.e. they did not compete with the distributers on the downstream market. Presumably, according to the European competition policy standards, the requirements to distributers were recognized as reasonable and lawful. However, the FAS decisions, currently appealed in courts by drug suppliers, qualified the refusal to enter into contract with a distributer who did not accept the proposal to conduct due diligence as illegal discriminatory practice by a dominant supplier. Again, as we can see, discrimination is regarded as illegal not because it restricts competition, but because it reduces the gains of some counterparties as compared to others. Qualification of discrimination does not take into account

the obvious non-equivalence of those counterparties.

If the approach to the selective distribution system is not reconsidered, it will have negative effects both for the sector's competitiveness, for welfare, and for competition. Firstly, the ban on setting additional requirements to distributers and their due diligence will prevent the introduction of the best business practices or at least reduce the incentives to do it. Consequently, competition between distributers will shift to price competition to the detriment to increasing of non-price increasing competitiveness. Secondly, the ban on selective distribution objectively raises the appeal of in-house transactions and hence – vertical integration. It will be more profitable for branches of international companies to develop their own distribution network than to introduce methods of governance of networks which consists of independent distributers, in spite of numerous advantages of this practice. Thirdly, refusal in a possibility of choosing distributers using a quality criterion will most probably lead to the strengthening of bargaining positions and enhance the market power of the largest distributers on the pharmaceutical market (or any other market where cases on discrimination could be initiated) – those that have considerably larger turnovers and make a much stronger impact on the competition on downstream markets than the producers being accused of discrimination by those distributers.

7. Conclusion

The increase of the scope of application of antitrust norms and tightening sanctions for their violation in Russia is accompanied not only by the of incentives to refrain from restrictions of competition.

Demand for antimonopoly policy as an anti-crisis tool resulted in strengthening the risks inherent in the content of Russian antimonopoly legislation that have remained in force for twenty years. In turn, many new legislative rules aim cannot protect competition, but are quite capable to weaken it.

The ban on extension of retail food chains beyond the 25% market share obviously reduces incentives for competition between relatively large suppliers. The ban on discrimination as variation in contractual terms with suppliers of food products objectively creates an edge for major incumbent suppliers and does not at all reduce the cost of entry for new entrants, which had been declared during the adoption of the Law. Recent tightening of the bargaining practice by food chains also reduces probability of entry for new domestic suppliers and lowers incentives for long-term competitiveness increase in the food manufacturing sector.

The ban on excessive prices of suppliers recognized as collectively dominant – applied as a tool against tacit collusion – removes incentives for improving operating efficiency and reducing costs, as well as improvement of the product. All sources of inefficiency characteristic of tariff regulation are being adopted in the non-regulated sectors.

The ban on concerted practices, actually defined as parallel conduct, paradoxically, increases companies' interest in horizontal expansion on the markets where their shares are already high. Consequently, the competitive environment may deteriorate as well.

The ban on discrimination as a means of inflicting damage on the counterparty leads to an increase of comparative advantages of in-house transactions in comparison to supplies through the distribution network. The risk of antimonopoly prosecution for selective distribution directly prevents the adopption of business practices conducive to competitiveness increase.

To conclude, strengthening of enforcement power of antitrust legislation in Russia is not always supported by clear and well-founded content of antimonopoly provisions.

Misuse of antimonopoly bans in Russia may result in restriction of competition owing to two types of effects. First – increased appeal for large companies of a market structure least favorable for competition, involving horizontal and vertical expansion. The second type of effect emerges due to a ban or significant restriction of practices that raise competitiveness. As a result, gains of market participants from competition decrease and, hence, the gains resulting from refusal from competition increase.

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[x] Strategic enterprises in Russia are companies of special status with certain restrictions on redistribution of shares, bankruptcy etc.

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[xiii] *Ernst and Young* company recently issued report on food and beverage industry in Russia in 2010 (available at http://www.ey.com/Publication/vwLUAssets/Food-and-Beverage-survey-2010-RU/$FILE/Food-and-Beverage-survey-2010-RU.pdf, in Russian), containing the results of survey of 31 food producers (including foreign and Russian establishments). Among other, in the survey companies were asked were the terms of contractual relationships with retail chains in 2010 (when Law comes to force) improved or deteriorated. More than ¾ of respondents indicated they remain the same and they do not feel any improvements. Small group (7%) indicates that contractual terms even deteriorated. The same number mentioned the improvements in contract terms.

[xiv] Efforts have been being taken recently to involve forces of the Ministry of Internal Affairs RF in antimonopoly investigations. This is exactly the way evidence of collusion between suppliers on the coal market was obtained at the end of 2010. However, besides additional opportunities such practices involve additional risks connected with the evidence gathering procedures.

[xv] See, for instance: Gudofsky J., Kriaris E.L., Vital L. Abuse of joint dominance; is the cure worse than the disease? Canadian Bar Association, 2010 Report at Annual Competition Law Conference, Available at: http://www.cba.org/cba/cle/PDF/COMP10_Gudofsky_paper.pdf

[xvi] Based on the surveys of the regional markets of motor gasoline conducted by FAS regional branches in 2008-2010.

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