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Two arguments for a limited implementation of antitrust standards for IPR-related deals in emerging market economies

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Antitrust, IPR Protection and Economic Development on the Agenda

- Innovations matter for the economic development
- Antitrust and IPR matter for innovations

	Antitrust on IPR-related markets	IPR Protection
Positive effect	Promotion of open and equal access to previous achievements	Main incentive for the innovator
Negative effect	Regulatory pressure on the innovator	Restriction on the access to previous achievements

- The answer in the developed economies: no general exceptions - only some reservations
- What about the developing economies?

Antitrust, IPR Protection and Economic Development: Literature

- Old discussion on the best market structure for innovations: (Schumpeter, 1942) v. (Arrow, 1962) and their successors
- Modern developments by Tirole (1994), Aghion and Griffith (2005), Etro (2007), Shapiro (2012) and others: elaborating best antitrust standards and approaches for IPR-related markets
- Considerable set of works on IPR protection and its role in the economic development, e. g. (Greenhalgh, Rogers, 2010), (Odagiri et al., 2012)
- Very few opinions concerning antitrust on IPR-related markets in the context of economic development

Why developing economies (EMEs) should be considered separately?

- Specific features of IPR protection legislation and enforcement
- Higher risk of errors (especially I type due to asymmetry of negative deterrence effects) in the absence of due experience

Extreme cases of the regulatory framework

- *Stronger antitrust, weaker IPR* – to promote free universal access to knowledge and technologies
- *Stronger IPR, weaker antitrust* – to promote foreign direct investment (FDI), to encourage domestic innovations

How to make antitrust standards more FDI-friendly?

- To replicate the US approaches or the EU standards – to reproduce customary investment climate
- To weaken Western antitrust solutions in order to:
  - Obtain a competitive advantage over other jurisdictions
  - Compensate other imperfections of the institutional environment

What is actually done: case of China

- Large but not very clear exemption for IPR from the Antimonopoly law of PRC (art. 55) adopted in 2008 (signed in 2007):

> This Law **does not govern the conduct of business operators to exercise their intellectual property rights** under laws and relevant administrative regulations on intellectual property rights; however, business operators' conduct to eliminate or restrict market competition by abusing their intellectual property rights shall be governed by this Law.

- 2014-2015: an attempt to clarify the antitrust policy by creating guidelines including “safe harbours”

What is actually done: case of China

- August 2015: “Provisions on the Prohibition of the Abuse of Intellectual Property Rights to Exclude or Restrict Competition” containing
  - Set of explicitly formulated antitrust offences, which are forbidden if they are committed “without justification”
  - “Safe harbours” for agreements (limited market shares, presence of competing technologies)
  - The presumption of the absence of market dominance only on the base of IPR
- However, overseas companies face severe antitrust presence (e. g., Qualcomm sentenced to a fine of $975 mln. in 2015)

What is actually done: case of Russia

- Large exemptions for IPR: the articles concerning abuse of dominance and various types of competition restricting agreements do not extend to actions and relationships concerning IPR (Law “On Competition Protection”, part 4 of article 10 & part 9 of article 11).
- 2012-2015: attempts of Federal Antimonopoly Service to withdraw those exemptions - unsuccessfully

The first argument for the conservation of exemptions

- The industrial policy
  - Structural distortions are not unusual in developing economies

Table 1: Profitability of sales and assets in Russian industries, 2013 (Rosstat)

Industry	*Profit Margin, %*	*Return on Assets, %*
Extraction of mineral resources	22.1	11.3
Fishery	16.5	8.1
Operations with real estate	10.4	0.7
Transport and communications	9.7	4.4
Manufacturing	**8.8**	**4.5**
Construction	8.3	5.6

  - The support of more innovative and IPR-intensive industries, especially manufacturing, may involve stronger IPR protection without antitrust-based restrictions

The second argument for the conservation of exemptions

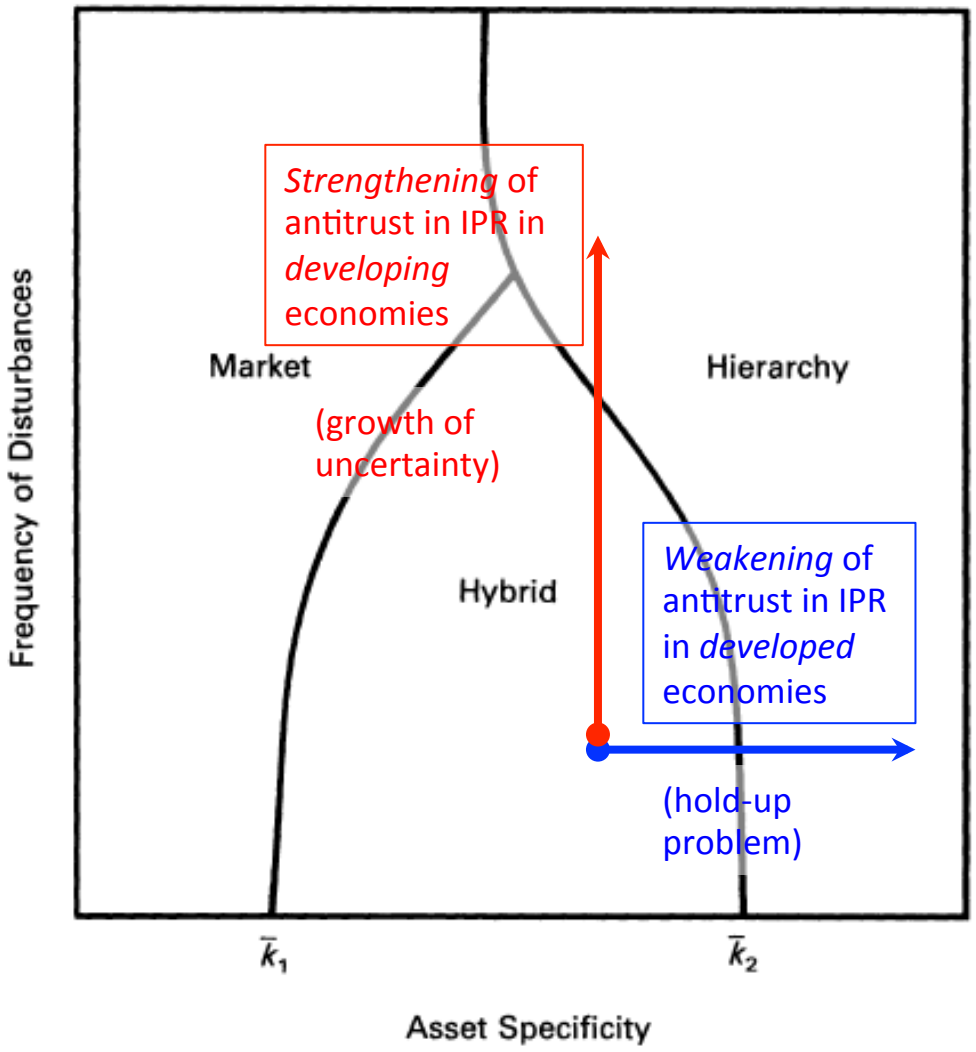
Case of developed countries

- Weakening of antitrust standards in IPR relations, if they existed before and the level of uncertainty was low, may lead to unfavourable change in governance structures (e. g. vertical integration of innovators and producers of IPR-intensive goods)

Case of developing countries

- But if there were no IPR-related antitrust and the level of uncertainty was high enough without it, the conservation of status-quo (i. e. non-implementation of «best practices» standards) may be preferable: governance structures will not deteriorate.

How can opposite changes lead to the same undesirable outcome in different countries



Source of the basic diagram: Williamson O. Comparative Economic Organization: The Analysis of Discrete Structural Alternatives // *Administrative Science Quarterly*, Vol. 36, No. 2 (Jun., 1991), pp. 269-296

Lessons for public policy

- The process (of hybrid arrangements crowding out) does matter NOT LESS than resulting mechanisms of governance (integration)

Conclusion

- Imports of foreign institutions in the area of IPR-related antitrust may not be beneficial for the developing economy.
- The opposite decision can help to promote industrial policy and FDI, encouraging manufacturing, and, unlike in developed economies, it will not deteriorate governance structures.

Thank you!