

International Workshop
COMPETITION ANALYSIS AND COMPETITION LAW ENFORCEMENT

MAY 29 – MAY 31, 2018

Moscow, Higher School of Economics National Research University

Economics for Antitrust in Russia: from “nothing” to now

Andrey Shastitko,
MSU, RANEPa, NRU-HSE

Basic ideas

- Now economics for antitrust in Russia is in demand, but it was not always so in contemporary Russia
- The structure of this demand is quite specific (as compared with developed countries) due to antitrust agenda specificity
- The features of capacity of economics for antitrust are also specific due to path-dependency effects and the presence of regulatory bias
- Demand for complex economic concepts is accompanied by its straightforward and oversimplified interpretation and usage.
- Economics for antitrust depends not only on the state of object but also on design of legal rules.

Why economics is important for antitrust? – Just to remind...

- Economics doesn't work for market competition directly
- Competition law contains so-called evaluative norms (dominance, abuse of dominance, collusion, market sharing, price discrimination etc...)
- Evaluative norms are enforced based on evidence which might be acquired (sometimes exclusively) due to economic concepts' implementation
- The way we use economics in antitrust might explain (to some extent) the jurisdictional specificity of antitrust...

Motivation : why economics in particular country (Russia)?

- To get a high quality cross-country study on antitrust issues it is important to have knowledge about the context, trends and details of evolution of the subject matter
- The main subject matter of this presentation is the role of economics in Russian antitrust from the very beginning - the early 90s - till now (May, 2018)
- The idea is to show the main milestones in the implementation of economics in Russia for antimonopoly law enforcement as well as the fundamental features of this phenomenon sustained for more than 25 years.

The aim

- To explain the past, present and predict probable future of economics for antitrust in Russia

Important disclaimer

- We discuss how economics has been used during the rather short Russian history of antitrust BUT NOT the economics of Russian antitrust
- Although a periodization of Russian history of antitrust is presented here, so far there is no more or less conventional criteria to distinguish the first phase from the second, the second from the third etc...

PAST AND PRESENT...

Periodization for explaining the evolving role of economics for Russian antitrust

- 1990(91) – 2006: from adoption of the law “On competition and monopolistic activity deterrence on goods markets” and establishment of antitrust agency to so-called First Antimonopoly Package;
- 2006 – 2010: from hidden revolution in Russian antitrust to the decision of Higher Arbitrage Court on oil company TNK-BP (case of “Big Four”)
- 2010-2016: from the “Order-220” (reglamentation of market analysis for antitrust enforcement) to two-levels antitrust
- 2016-present: “digitalization of antitrust” (“digital” cases and fifth antimonopoly package)

The context at the start

- The very beginning of the 90-ies is a period of attempts to import institutions (“good practices”) in Russia
- Antitrust is not exclusion
- Moreover, it was considered as an important conditionality of IFOs loans for structural reforms and macroeconomic stabilization
- BUT: Import of legislation (with or without participation of international consultants) doesn’t mean import of institutions!
- Mechanisms of enforcement matter and they are much more country specific...

Weak incentives to use economic analysis at the very beginning came from...

- High quality economic analysis is costly (*Spending money to get trivial/un-understandable results? – CEO thinks. – No, thanks*)
- Low maximum levels of administrative fines (not more than the rouble equivalent of 25 000 USD)
- No working criminal sanctions (in spite of presence of art. 178 in Criminal Code)
- No working harm compensation mechanism

Lack of capacities to use economic analysis

- There were very few (if any) educated persons understanding IO and its applications for antitrust in Russia (Many persons working for antitrust agency come from Goskomtsen – Central agency for pricing in USSR)
- Data appropriate for economic analysis were not available
- Zero experience economics implementation for purposes of antitrust
- ... and due to requirements of Russian legislation (e.g. rules of merger control in the 90s and in early the 2000s – more than 10 000 cases each year)

Kinked trend

- *Incentives*: Changing balance of costs and benefits due to a reform of the Administrative code: turnover-based fines (Increase of potential fines more than 1000 times)
- *Capacities*: Increase of thresholds for merger control (dropping number of cases)
- *Capacities*: Accumulation of human capital for economic analysis in antitrust (TEMPUS in 90-ies, WB project etc.)

Indirect evidence of the new realities in the second half of 2000s

- Market of economic consultancy on antitrust issues
- Formalization of market analysis for purposes of antimonopoly law enforcement (O.108 and O.220)
- Court requirements to abide (at least minimum) standards of economic analysis in antitrust cases (lessons from study by Avdasheva, Shastitko, Dubinicheva, 2011)

Almost unified framework of economic analysis for purposes of law enforcement (Order-220) but uneven intensity of particular aspects usage

- Market: -
- Time interval: -/+
- Product boundaries: +
- Geographic boundaries: +
- Participants: +/-
- Market volume and market concentration: +
- Entry barriers: -
- Intesiveness of discussion on particluar issues+

Mixed changes but ONE tendency

- The problem of “Pikalevo syndrom”: antitrust instead of (horizontal) industrial policy (Shastitko, 2012)
- Collective dominance and the “big four” case: anti-economic counter-revolution... (Shastitko, 2011)
- Permissible pricing/commercial practices (Radchenko, Avdasheva, Kurdin, Shastitko, 2013 – in Russian)
- Bilateral monopoly issues (Shastitko, Menard, Pavlova, 2018 - forthcoming)

REGULATORY BIAS FROM EARLY 90-IES TILL NOW

Pikalevo (Leningrad region) - 2009

- Crisis in company-town. This crisis had been managed by prime-minister based on antitrust authority intervention
- Source: Absence of positive industrial policy just after privatization of unified industrial complex part by part (planned chaos - Blanchard, Cremer, 1997)
- Pikalevo syndrom: Attempts to manage structural problems of economy by antitrust tools (abuse of dominance prohibition – stop delivery of by-products to independent company)
- Big company had been nominated to bear the burden of the industry non-restructuring consequences

Permissible pricing/commercial practices

- Meaning: Reglamenteed commercial practices (policies) instead of antitrust compliance: mechanisms of pricing and other significant aspects of contracting
- The scope: Almost all big companies exporting goods and trading also in domestic market
- Justification: Disciplining of regional officies of FAS = necessity to provide consistency of enforcement, safe harbor.

Enforcement of norms on Collective dominance in Russia: this is not what you think about

- In Russia collective dominance is mainly for abuse of dominance but not concerted practices, collusions or merger control (EU: mergers control, USA - no)
- Specific feature: opportunity to abuse dominance individually disregarding what other collectively dominating entities do on the relevant market (Higher Arbitrage Court decision on TNK-BP case)
- The problem: obstacles to use oligopoly models to enforce legal norms

Bilateral monopoly

- Multiple cases of bilateral monopoly (or quasi-BM)
- Economics of bilateral monopoly
- Discrete structural alternatives in antitrust enforcement
- Institutional competition

Future

Visible challenges for economics in antitrust: nearest future

- A reflection of the digitalization of relationships in economic analysis: first signs
 - Google-Yandex case,
 - Microsoft-Kaspersky antivirus case (Shastitko, Kurdin, 2017 – in Russian),
 - Yandex-Uber agreement on JV,
 - Bayer-Monsanto merger (Tsarikovsky, Ivanov, Voynikanis, 2018)

Visible challenges for economics in antitrust: nearest future (cont.)

- Necessity of economic analysis of relations in the area of mobile advertising for mobile devices, social networks and ways to identify relevant market for purposes of antitrust law enforcement
- Potential competition of jurisdictions (FAS vs Eurasian Commission, NLMC case): from competition protection on domestic market to inter-border competition protection

Conclusion

- Now economics for antitrust in Russia is in demand, but it was not always so in contemporary Russia
- The structure of this demand is quite specific (as compared with developed countries) due to antitrust agenda specificity
- The features of capacity are also specific due to path-dependency effects and the presence of regulatory bias
- Demand for complex economic concepts is accompanied by its straightforward and oversimplified interpretation and usage.
- Economics for antitrust depends not only on the state of object but also on design of legal rules.

Thank you!