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Concerted practice enforcement in Russia: How judicial review shapes the standards of evidence and number of enforcement targets

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Abstract

A judicial review of the infringement decisions of the competition authority substantially affects the standard of evidence in competition enforcement as well as the structure of cases that the competition authority takes. Enforcement against concerted practice in Russia represents a case-study of interaction between commercial courts of first instance, the Highest Court, the competition authority as enforcer, market participants and the legislator to influence the standards of liability under investigation of concerted practice. We examine the judicial review of infringement decisions on concerted practice and track the evolution of legal definition and sufficiency of evidence in such cases. We show, first, that in Russian enforcement, the ability of the Highest Court to influence the criteria of first instance courts is limited (in contrast to the ability of the first instance court to influence the strategy of enforcement by the competition authority). Second, the increase in the burden of proof motivates the competition authority to refrain from an investigation of concerted practice, in accordance with the prediction of the model of the selection of enforcement target by reputation-maximizing authority.

Keywords: competition enforcement, legal standards, judicial review, tacit collusion, concerted practice, Russia.
JEL classification: K21, K23, K49.

1. Introduction

Judicial review of decisions is an important part of administrative law enforcement. Judicial decisions influence actual and future enforcement in several ways. First, being appellate instance for administrative decisions and serving as an instrument of error-correction, judges directly reduce the probability of wrongful

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convictions (Shavell, 1995). Second, by reviewing decisions of relevant authority, judges provide valuable information on the sources of weak evidence and wrongful convictions (Type I legal errors). In this regard, outcomes of judicial review affect authorities and suspects. Observing standards of evidence, suspects concentrate their efforts on providing evidence in their favor.

The administrative authority also adopts the course of actions under the influence of the outcomes of judicial review. Adaptation of the authority towards judicial review takes different forms. The authority might make efforts to develop standards of evidence in order to meet the burden of proof established by the judges. Alternatively, the authority may try to persuade judges that standards of evidence applied by the authorities allow to distinguish between legal and illegal conducts. However, the authority may also adapt to the standards established by the courts by simply refraining from investigating the conduct, which requires great efforts to discover and prove the infringement. The effects of judicial review may substantially differ. They are, however, important not only for short-term adaptation of the authority but also for the evolution of evidentiary standards.

Among others, development of evidentiary standards is of special importance for competition law. Concepts of competition law — monopoly power, collusion and dominance — reflect widely accepted economic theory. The description of illegal conduct in competition law over the globe is also more or less harmonized. At the same time, targets and effects of competition or antitrust law enforcement differ a lot. Exploitative conducts are important enforcement targets in EU, but not in US. In Russia, the number of investigations on abuse of dominance exceeds other countries in Global Competition Review Enforcement Rating by more than one hundred times. BRICS countries apply very different approaches to distinguish between *per se* illegality and rule of reason for potentially illegal conducts (Avdasheva et al., 2020). At the same time, competition regimes outside US and EU increase their enforcement records, including the amount of penalties applied.[1] This fact makes explanation of the difference in enforcement approach increasingly important.

For a long time, explanations of the difference of the approach to antitrust/competition enforcement used the "out-of-economics" arguments, including specific legal traditions, constitutional goals (Giocoli, 2009; Gerbrandy, 2019), or evolution of legal transplants (Gal, 2007; Lee, 2005).

This article, by contrast, is based on the model that explains the legal standard as an optimal choice of the competition authority facing conditional probability of annulment of an infringement decision under judicial review (Katsoulacos, 2019). In the model, the competition authority chooses the legal standard maximizing objective function (that is generally weighted average of total welfare effects or consumer welfare effects and "reputation" of the authority) under budget constraint. There are different implications for the model tested using data from Russian competition enforcement. One implication is that the reputation-maximizing authority tends to select "cheap cases" (in terms of efforts and time spent under investigation) in contrast to "expensive ones" if the contribution of two groups of cases in the objective function does not differ (Avdasheva et al.,

[1] See Connor (2016) for sanctions on international cartels.

2019a). Another one is that authorities avoid application of sophisticated instruments of economic analysis if their application increases the probability of annulment (Avdasheva et al., 2019b).

In this article we show another specific way to approach the enforcement target. The competition authority, after revealing the high cost of increasing legal standard, together with the high probability of annulment when using the highest legal standard available, refrains from the enforcement of specific provision. The competition authority's inability to keep the balance of wrongful convictions and wrongful acquittals under a constraining budget — and citing this as a reason to abandon the enforcement of a particular rule — is not specific to Russia. Ribeiro and Mattos (2018) explain how the inability to adopt a reasonable standard of evidence motivated Brazilian competition authority Conselho Administrative de Defesa Econômica (CADE) to exclude the illegality of excessive pricing from competition legislation. In this respect, our article contributes to the existing literature in three ways. First, we track changes of the approach in enforcement in terms of the application of specific description of illegal conducts and explain these changes by comparison of cost and effects on enforcement. Namely, we show that the increase of the requirements for evidence in concerted practice cases vis-à-vis horizontal agreements explains the reduction in the number of investigations under this type of conduct. We do that by quantitatively applying metric for effect-based competition enforcement developed by Katsoulacos et al. (2019) to the sample of infringement decisions issued by the Russian competition authority, the Federal Antimonopoly Service (FAS hereafter), in 2008–2015. Second, we show the role of different levels of commercial courts in the development of enforcement path. Russian experience of enforcement demonstrates the important impact of first instance courts and appellate courts vis-à-vis Highest Court (Supreme Commercial Court in our case). The decisions of first instance courts effectively overruled the approach suggested by Highest Court. The history of concerted practice enforcement illustrates the important role of disputes between appellants and competition authorities in courts. Third, our article contributes to describing the toolbox of competition enforcement against non-explicit agreements (tacit collusion).

The structure of the article is the following. Section 2 notes again the problem of competition enforcement against concerted practice worldwide. Section 3 highlights specific features of competition enforcement (as part of administrative enforcement) in Russia, with implications for testing the prediction of the model of optimal choice of reputation maximizing authority. Section 4 describes the evolution of definition and evidentiary standards of concerted practice as anticompetitive conduct in Russian competition law. Section 5 provides statistical data regarding the judicial review of the decisions on concerted practice vis-à-vis decisions on price-fixing and market-sharing. Section 6 concludes.

2. Concerted practice as a challenge for legal standards in competition enforcement

Deciding on the illegality of concerted practice as a target of competition enforcement, the legislator and competition authority face a trade-off between

(negative) welfare effects of market power enhancing conduct and balance of Type I and Type II legal errors (wrongful convictions and wrongful acquittals). Trying to prevent welfare losses by enforcing antitrust prohibitions on concerted practice, the authority should take the burden of complicated process to prove concerted practice. If the authority refuses to take this burden, it becomes unable to prevent welfare losses, which result from the anticompetitive conduct. This is true for both definitions of concerted practice, relevant for Russian competition enforcement, including "tacit collusion" and "agreements without direct evidence."

Modern theory suggests that under certain circumstances (few sellers, homogenous product, publicly available information on prices, frequent price changes etc. — market structure known as tight oligopoly) tacit collusion might be sustainable[2]. Moreover, in addition to experimental studies there is empirical support for the statement that tacit collusion affects market prices in the real world (Albæk et al., 1997; Green et al., 2014; Lean et al., 1985).

On the other hand, legal enforcement against tacit collusion is a problem. There is no satisfactory set of evidence sufficient to make a judgment if the practice in question represents tacit collusion or not. In contrast to explicit collusion, tacit collusion does not provide hard evidence. If a legislator decides to consider tacit collusion as illegal, it should make a choice of what kind of proof is sufficient to make judgment on law violation.

In the legal practice, there is no definitive answer to the question of sufficient evidence to prove tacit collusion. There were several attempts to design legal rules on illegal tacit collusion. One of them was to expand the meaning of agreement (illegal under Sherman law) on close communication between parties that have the intent to increase prices by refusal to compete. This option was close to that historically important US Supreme Court decision on the *American Tobacco* (1946) case. However, only a few years later, a decision on *Theatre Enterprises* (1951) took the completely opposite path, considering conscious parallelism as insufficient evidence of agreement. In legal literature, discussion between Turner and Posner reflects two opposite views on the very possibility of capturing tacit collusion within the framework of a particular legal concept (Wagner-von Papp, 2013).

EU competition law applies an alternative approach by defining concerted practice as conduct that reflects most features of tacit collusion. Article 101 of the Treaty on the Functioning of the European Union (TFEU) prohibits concerted practice together with agreements that restrict competition. For the first time in Europe, a decision on concerted practices was made in 1969 against dyestuff suppliers — the Dyestuff Case (Jones and Sufrin, 2007). Evidence of tacit collusion was the three waves of simultaneous price hikes for dyestuff across European countries between 1964 and 1967. The decision of the European Commission's Competition Directorate, upheld by the European Court of Justice, pointed out that despite the non-existence of an agreement between the sellers, their conduct significantly differed from the conduct that was typical of the competitive market. That was the case in which the term "concerted practice" was first defined as "a form of coordination between undertakings

[2] See Ivaldi et al. (2003) for review.

which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition."

The most notorious concerted actions case in the practice of the European Commission's Competition Directorate was the Wood Pulp Case (1984) when antitrust charges were brought against bleached pulp producers. The exchange of information on prices was the key component of the sellers' actions: they announced price increases on a quarterly basis at the same time following, in price growth rates, the market leader, i.e. the largest supplier. Price announcements on the bleached pulp market established the upper limit, and then thereafter individual negotiations started to reduce the price.[3] After several years of appeals, the European Court of Justice annulled the decision of the Competition Directorate. The first reason for annulment was that the court was ready to agree to a hypothesis that simultaneous announcements about future prices restrain competition only if all other hypotheses are disproved. The second reason was that the court doubted that future price announcements could restrain competition where such announcements only referred to the upper limit of prices and individual negotiations were possible and were followed by price decreases for individual customers.

A recent case whereby the competition authority applied a concept of concerted practice concerned an investigation into international container shipping companies where practice of "general rate increase (GRI)" is a reason for concern about refusal from competition in favor of tacit collusion. However, since investigations in 2016 resulted in settlement instead of an infringement decision, it is impossible to assess whether there is an evidence of anticompetitive effect of GRIs, or the evidence on GRIs themselves is sufficient to render a conclusion on concerted practice, or in the particular case competition concern is enough to elaborate remedies as a part of the settlement.

To summarize, European competition enforcement does not provide clear guidance on the appropriate legal definition of concerted practice. EU experience of enforcement towards concerted practice is contradictory. That is why this path of competition law development requires further analysis and assessment.

However, the issue of concerted practice is even more complicated because the enforcer can interpret this illegal conduct in a slightly different way: not as tacit collusion, but as agreement that should be prohibited without direct evidence. In 2006, OECD Roundtable "Prosecuting cartels without direct evidence"[4] found that the international practice of enforcement understanding of concerted practice as a provision targeted against the cartels for which direct evidence is impossible to find, is not a rare exception. Treating concerted practice as an agreement for which the competition authority is unable to find direct evidence makes the issue of the balance of Type I and Type II errors more urgent. In Russia, decisions of competition authorities, including Central Office and regional subdivisions, most often considered concerted practice as tacit collusion. In some cases, concerted practice allegation was applied for the "unproven agreement" as well.

[3] Detailed description is set out in Motta (2004).

[4] https://www.oecd.org/daf/competition/prosecutionandlawenforcement/37391162.pdf

3. Choice of legal standard by reputation-maximizing competition authority in the Russian context

3.1. Choice of legal standard as optimization decision

Model of reputation-maximizing authority by Katsoulacos (2019) interprets optimal choice of legal standard by the competition authority by explaining the difference between socially optimal legal standard in investigation and actual legal standard chosen by the authority. Reputation-maximizing authority[5] acting under judicial review chooses legal standard by maximizing the expected number of non-annulled decisions under given budget constraint. For a particular decision, the probability of non-annulment depends on conditional probability of being annulled (conditional on the probability of being appealed and being annulled when appealed). The probability of annulment under appeal depends, among other factors, on the legal standard as belonging to continuous interval from *per se* (object-based) to rule of reason (full effect-based) standard. The cost of investigation and litigation under judicial review positively depends on the legal standard. There are two opposite effects of the legal standard on the probability of annulment. One depends on the difference between the legal standard that the court expects and the competition authority undertakes. First is: if court expects[6] higher legal standard than she observes in the decision, the larger is difference between what court considers as proper and what competition authority presents, the larger is probability of annulment under review. The second effect is that the probability of annulment positively depends on the legal standard because every additional block of economic analysis increases the disputability of the decision.

One of the predictions of the model is that if the court expects a very high legal standard in a particular group of decisions, the reputation-maximizing authority refrains from taking these decisions for investigation. The competition authority might make investigations under a lower standard than demanded by courts and refrain to comply when the court moves to a higher and more befitting legal standard. In this paper, we illustrate this prediction using the example of enforcement against concerted practice in Russia. To do that, we firstly track the history of enforcement informally and, secondly, analyze the changes in legal standards applied in the infringement decisions statistically using specially developed metrics. The metrics (Katsoulacos et al., 2019) assign values from 1 to 6 for subsequent blocs of economic analysis, where 1 corresponds to the discussion of the nature of conduct without contextual analysis, 2 to the analysis of the market to support the predictions of likely effects of conduct, 3 to the contextual analysis of market power enhancing effect or exclusionary effect of particular conduct, 4 to the contextual analysis of harm to consumers etc. The sample under analysis contains infringement decisions on concerted practice that were appealed in commercial courts dur-

[5] The model also explains the choice of the authority, for which objective function is weighted average of social welfare and private benefits derived from "reputation."

[6] As a "legal standard expected by court" one may consider legal standard that courts expect with certainty, but also it is possible to consider "expected legal standard" as expected value, taking into account that in every particular case the legal standard required by the court may differ from the expected one.

ing 2008–2015. The observations are taken from the dataset constructed by the Laboratory of Competition and Antitrust Policy, HSE Institute of Industrial and Market Studies (LCAP dataset hereafter). In our sample, the authors of the article assign values themselves.

3.2. The review of competition infringement decisions in Russia: The role of courts, parties and evidence

Commercial courts in Russia play an important role in the administrative adjudication. The rules of decision-making in commercial courts responsible for deciding on claims to annul administrative decisions provide the courts with significantly decisive power, combined with easy access of the parties to the courts. In the four-stage court system (first instance court, appellate court, cassation instance, and the Highest Court) only the Highest Court has the discretion of whether to take the case or not.

The most important characteristic of the system of claims to annul administrative decisions in Russia is that the burden of proof is imposed completely on the authority. In order to annul the infringement decision, the convicted party only has to persuade the judge(s) that the infringement decision is not sufficiently substantiated and supported by legal facts.[7] There are additional factors, which support claims to annul administrative infringement decisions. Fees for case submission in three instances are negligible. There are no restrictions on representation. Judges are highly motivated on timely decisions and cannot postpone decisions at their own discretion. At the same time, judges have the discretion to attach new evidence to the case files. In this sense the Russian system is a system of open judicial review of administrative decisions (Asimow, 2015). Attachment of new evidence to a case is the most important reason for postponement of the decision. In spite of the fact that no decision of any instance is binding for later decisions on the same matter, there is active exchange of information among judges and parties in different cases. It is supported by a unified system of information on the decisions of commercial courts that provide an extensive summary of the evidence and reasoning of the judges in the decisions. It is not surprising that the number of claims in the Russian commercial courts is very large. It almost doubled during the last ten years. This is also true for competition enforcement. Among a large number of infringement decisions on competition legislation in Russia (Avdasheva et al., 2019a), a great many of them are appealed and annulled in the courts. For instance, in 2018, there were 7,267 claims to annul infringement decisions made by the FAS in first instance commercial courts, of which 2,221 decisions (about 30%) were satisfied; in addition, there were 2,444 claims to annul decisions on penalties, of which 1,047 (43%) were satisfied. The high level of annulment rates has remained stable since the adoption of recent competition law in Russia in 2006. Using reasoning of annulments, Russian commercial courts exert influence over the legal standards of the judiciary. Because of the very short time of consideration of the case (a case may

[7] This is the most important explanation of massive litigation against executive authorities in Russia, see Trochev (2012).

get rulings in all four instances in just one year), this influence of the courts on legal standards set by the competition authority can be noted over a short time frame.

Another reason that makes the Russian context suitable for illustrating the predictions of the model of reputation-maximizing authority is that the FAS is extremely strongly motivated on the number of decisions not annulled by the courts. Enforcement success assumes a more important place in the performance assessment in Russia than in other countries (Avdasheva et al., 2019a).

4. Concerted practice in the Russian competition law: Changes of definition and penalty regimes under the influence of court litigation

Russia is among the countries that borrowed the European concerted practice concept as a specific type of illegal conduct. The Russian experience contributes to the assessment of viability of this approach for several reasons. First, in Russia, competition enforcement is large-scale. Competition authority is organized as a network of regional offices (regional subdivisions, about 80 in total). Every regional subdivision makes decisions on the results of investigations in regional markets. The responsibilities of regional subdivisions are similar to those of the competition authorities in the Member States in the EU. The substantial difference is that competition authorities in the Member States act under the national competition legislation, while regional subdivisions of the FAS decide under the one law — Federal Law "On the protection of competition." Central Office of the FAS obtains the responsibility of antitrust enforcement over the markets in geographical boundaries of the Russian Federation. At the same time, Central Office has the right of legislative initiative. Legislative initiative of the FAS necessarily depends on the outcomes of enforcement.

In this context, the development of legal definition and legal standards applied by the courts, as well as the strategy of the FAS towards concerted practice as enforcement target, is divided into two periods: from 2006 to 2011 and from 2012 onward. The borderline between the two periods was marked by amendments to competition law entered into force in 2012. These were adopted following pressure from the business and expert community.

Optimal legal standard to decide on the infringement like concerted practice is close to full effect-based (rule of reason). As Carlton et al. (1996, pp. 424–425) say on the exchange of information as an instrument to sustain tacit collusion: "In the absence of direct evidence to form a 'naked' cartel to restrict output or to raise price, the appropriate legal standard to judge the flow of information is the rule of reason. Courts… should analyze how a specific type of communication did in fact affect prices and output in a specific market setting… Using the sledgehammer to attack such communication without analysis of context or effect, by trying to label it an 'illegal agreement,' is not helpful and, in our judgment, is not wise." However, Russian competition enforcement starts from the approach close to *per se* illegality. After the amendments of 2012, the shift to more effect-based legal standard was accompanied by a sharp decrease in the number of decisions on concerted practice.

4.1. Legal rules and legal standards in 2006–2011

The first Russian competition law "On Competition and Limitation of Monopolistic Activity in Commodity Markets" was introduced in 1991. This law, attempting to harmonize competition rules with the EU approach, mentioned the "concerted practices" as a particular type of law violation, but did not include any explicit definition of concerted practice. In 2006, a new Russian Competition law (Law "On protection of competition," Law-2006 hereafter) was introduced. The definition of the concerted practice was given in the Article 8:

"Concerted practices are actions of several undertakings in the market under absence of the agreement, which meet the following requirements:

- the result of such actions meets the interests of each of these [participating in concerted actions] economic entities only under the condition that their actions are known in advance to each of them;
- actions of each of these economic entities are caused by the actions of other economic entities and are not the result of circumstances equally affecting all economic entities on the relevant market, including changes of the regulated tariffs, changes of the price of inputs for production, changes of the prices in the world commodity markets, substantial changes in demand during the period not less than a year or during all life-cycle of the commodity market if commodity market exists for less than a year."

The first part of the definition contains a short explanation of a grim trigger strategy except for the words "only under the condition" and "known in advance to each of them," which explicitly refer to the communication between the parties under collusion. The second part contains alternative explanations of the parallel behavior that the competition authority should exclude in order to render a conclusion on concerted practice.

Highest Court (at that time — The Supreme Commercial Court of the Russian Federation) stresses the difference of concerted practice from the agreements, which are to be documented with hard evidence. On 30 June 2008, the Plenum of the Supreme Commercial Court of the Russian Federation in a resolution "On some issues arising in connection with application by commercial courts of the antimonopoly legislation" states: "Commercial courts should take into account that actions might be concerted in the absence of documentary confirmation of presence of agreement to commit them. The conclusion about the presence of one of the conditions to be established for the recognition of action to be concerted, namely: that each of the undertakings knew about committing such actions in advance — can be done based on the actual circumstances of their commit. For example, among other circumstances, the fact that actions are made by different market participants relatively uniformly and synchronously in the absence of objective reasons may indicate the presence of concerted practices."

Clarification enables enforcers to look merely for parallelism and communication to prove concerted practices. The Supreme Court did not answer whether it is necessary to look at concerted practice as tacit collusion (first approach mentioned above) or infringement agreement decided without direct evidence, only using indirect proof.

The following examples illustrate the legal standards taken by Russian competition authorities.

4.1.1. Decisions on retail markets of motor fuel

The infringement decision against *Rosneft–Stavropol* and *Lukoil–Yugnefteproduct* (regional subsidiaries of two of four largest domestic oil companies)[8] on concerted practice in the gasoline retail market of Stavropol region in October 2007—November 2007[9] is typical of many decisions (Avdasheva and Golovanova, 2017). Parallel retail pricing for petrol and diesel made by the companies in November 2007 was considered to be anticompetitive conduct. According to the FAS, the increase of retail prices by larger vertical integrated companies was subsequently picked up by other (smaller) market participants. The conclusion was that *Rosneft–Stavropol* and *Lukoil–Yugnefteproduct* expected such a reaction and took it into account when pricing their products (price leadership was qualified as an evidence of concerted practice). Based on this information, the FAS found the companies guilty of concerted practices "that have led or could lead to the establishment (maintenance) of retail prices for petrol and diesel fuel." The decision was appealed and was then confirmed by the court of the first instance (2008), and the evidence was found to be correct and complete. The acquitted companies made further efforts to reverse the infringement decision. At the end of the "first circle" of judicial review (first instance—appellate instance—cassation instance) the cassation court found that the decision violated the rules to analyze concerted practice and sent it back to the first instance. The infringement decision was also finally supported (2011). The main evidence analyzed consisted of shares in the retail markets and changes in retail prices. Similar arguments are used by the FAS in numerous cases on concerted practices initiated against Russian oil companies.[10]

4.1.2. Concerted practice in regional buckwheat markets

The competition authority of St. Petersburg accused the largest grocery retailers in the city of concerted practices in the retail market of buckwheat during August-September 2010[11] (evidence was collected for slightly less than two months). The main evidence in favor of anticompetitive conduct was the simultaneous increase in retail prices while wholesale supply prices were raised at different rates for different grocery retailers. Supporting evidence that was extensively discussed in the decision and later in the court was that due to the large total share in retail market (> 45%) grocery chains are able to sustain collusion and affect the market price.[12]

The convicted companies tried to explore the following arguments. The period under investigation is too short, and price movements during the period are ir-

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[8] Court decision: see case No. A63-444/2008 at: http://kad.arbitr.ru/ (in Russian).

[9] It is not the only example, in which the period under investigation was extremely short; on the contrary, as other examples show, it is common for Russian concerted practice investigations.

[10] See, for example, case No. A13-4029/2009 against Lukoil-Volganefteproduct and Enticom-Invest, case No. A47-5499/2009 against Lukoil-Uralnefteproduct and Orenburgnefteproduct, case No. A03-826/2011 against Rosneft-Altaynefteproduct and twelve unbundled retailers, case No. A32-44622/2011 against Lukoil–Yugnefteproduct and Rosneft–Kubannefteproduct at: http://kad.arbitr.ru/ (all in Russian).

[11] Buckwheat is among the most demanded products in Russia, because of national traditions. In summer 2010 there was a severe drought that caused decrease of supply and price increase. The competition authority suspected that price increase outrun the effect of decline in supply and tried to explain that by tacit collusion among grocery retailers, or in some instances—among grocery retailers and suppliers.

[12] Case A56-6636/2011 at: http://kad.arbitr.ru/ (in Russian).

regular and cannot be predicted by the collusion hypothesis.[13] Price coincidence is not parallel pricing; without any collusion, prices can coincide on certain days. Collusion is not sustainable in the market when defined as retail market of one item (even committing to collude on price of buckwheat, groceries can compete by prices on milk etc; for that reason, grim trigger strategy cannot be Nash-equilibrium). Commercial courts supported infringement decisions, in spite of all arguments presented by convicted parties.

In general, legal standards applied under court litigation on concerted practice infringement decisions may be assessed as low. Parallel pricing (and more precisely, price increase) was the most important evidence. Courts were satisfied with the evidence of parallel pricing during a very short period of time. There was no evidence on "communications" among market participants involved. Analysis of market structure (including facilitating practices etc.) was very basic. Though alternative explanations of coincidence in pricing were presented, their explanatory power was never tested. The discriminatory power of concerted practice hypothesis was also not tested.

However, in spite of non-annulments (or rare annulments) of infringement decisions on concerted practice during 2008–2010, litigations influence the perception of proper legal standards by judges. The very fact that opposite party (defending party in the first instance, competition authority) cannot reject the importance of contextual features of the affected market was an important reason for the courts to ask for theories of harm based on the analysis of market structure. Over time, judges expect more and more contextual analysis in spite of the fact that Clarifications of the Supreme Commercial Court do not require it.

4.2. Legal rules and legal standards since 2012

In December 2011, Law-2006 and related regulations on penalties were amended by several rules. The most important changes for our analysis was the division of law violations into two groups: those that limit competition and those that only harm consumers or counterparty.[14] Concerted practice is definitely in the group of violations because of restrictions of competition. This fact allows convicted parties to pronounce the need for comprehensive theory of harm in order to prove the restrictions of competition in the specific context.

The definition of concerted practice was changed as well. First, the definition was amended by the clarification that "actions are known in advance to each of the participating economic entities because of the public announcement by one of them to commit such actions." Importance of communication to sustain collusion, explicit or tacit, is one of the crucial take-outs of theoretical research models (Awaya and Krishna, 2016; Harrington and Ye, 2019; Boshoff et al.,

[13] Companies were trying to attract expert testimony to prove, using econometrics, that data do not support the collusion hypothesis. However, they decided not to do that at the end, because experts were unable to provide any definitive conclusions because of the lack of data (time series are too short). So this part of the evidence was not presented in the court.

[14] Division between two types of violations is close to the distinction of "exclusionary" and "exploitative" abuse of dominance. There are several differences, however, the most important one that under Russian law agreement between undertakings might be considered as competition violations because of harm imposed, without the evidence of exclusionary effects.

2018) and analysis of specific cases. For legal standards, the important thing is not the reference to communication, but the reference to the causal relationship between communication and commitment to follow specific pricing strategy.

Second, by the same amendment, concerted practices are completely separated from agreements and contained in Article 11.1. Third, the legislator introduces a kind of *De Minimis* notice: a hypothesis of concerted practice is excluded as the joint share of market participants does not exceed twenty percent, and the share of each of the participants does not exceed eight percent. Changes and amendments in the Law-2006 reflect non-satisfaction of competition authority in the discriminatory power as an ability to distinguish legal and illegal actions that rules introduce.

After amendments, most investigations and decisions on concerted practice target relatively large market participants, the interaction of which goes beyond purely tacit collusion.

4.2.1. Concerted practice of MTS and Vympelkom in the market of IPhones[15]

MTS and Vympelkom, which are the largest telecom operators in Russia, were accused in the concerted practice in the retail markets of IPhones (IPhone 4.16 GB and IPhone 4.32 GB). Evidence in favor of the conclusion on concerted practice consists of two parts: (1) identical retail prices on selected days during the period under investigation (from September 2010 to April 2011) and (2) the interview given by a manager of Vimpelkom to the newspaper in which he confirms that "The company will set the prices on IPhones… exactly the same as MTS." Companies did not oppose the conclusion on concerted practice and reached a commitment decision with competition authority.

4.2.2. Concerted practice on the market of liner shipping services

In 2014, the Russian competition authority, following the similar action of European Commission, opened an investigation against international liner container shipping companies, including Müller-Maersk, Evergreen Marine, Hyundai Merchant Marine, CMA CGM, Orient Overseas Container Line Limited, and nine more. This investigation centered on pre-announcements of pricing on shipping services in the form of a General Rate Increase (GRI). GRI was considered to be a tool of communication between competitors that supported tacit collusion. After the FAS adopted the infringement decision, the convicted companies submitted claims to annul it.[16] Appealing the decision in the court, the companies provided a set of arguments in order to prove that the FAS overestimated the ability of GRI announcement to limit competition in the context of the particular market structure. At the end, container shipping companies and the FAS reached a kind of commitment agreement. In addition, the competition authority imposed a set of remedies about the provision of information in the market.

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[15] Competition authority decision: https://br.fas.gov.ru/documents/471f02f8-20cf-430d-954a-0935074e1e87/ (in Russian).

[16] Competition authority decision: http://solutions.fas.gov.ru/ca/upravlenie-po-borbe-s-kartelyami/ka-75528-15 (in Russian); court decision see case No. A40-54700/2016: at: http://kad.arbitr.ru/ (in Russian)

To conclude, investigations and decisions after 2011 have demonstrated that the competition authority has avoided serious errors in the motivation of infringement decisions. Contextual analysis of the market is normally present, as well as an explanation of strategic pricing in a particular case. However, the discriminatory power of the criteria applied is still weak. Applying more and more economic analysis, the FAS still seldom persuades judges about the sufficiency of arguments in favor of a conclusion on concerted practice.

In the next section we show how all these developments in commercial courts influence the choice of competition authorities on concerted practice as enforcement target.

5. Judicial review of decisions on concerted practice: Cost and benefits of economic analysis

In this section we want to explain the decision of the FAS to take concerted practice cases vis-à-vis other horizontal agreements cases, and legal standards applied under investigation of law violation, in the framework of the choice of legal standards by reputation-maximizing authority (Katsoulacos, 2019). Changes in legal standards expected by courts and applied by the FAS (see previous section) may by summarized in the following way. Before 2010, especially after Clarification of Supreme Commercial Court, judges and competition authorities expected a fairly low legal standard. The model of reputation-maximizing authority predicts the competition authority to undertake a large number of investigations and make a large number of infringement decisions on concerted practice, with relatively low annulment rates and low costs. Table 1 provides information on how the number of appealed decisions on concerted practice and horizontal agreements illegal *per se* changes over time.

Using horizontal agreements illegal *per se* as a benchmark we understand that FAS decisions for this type of conduct are not error free (see Pavlova and Shastitko, 2016). We also understand that there might be elements of effect-based analysis, in particular decisions on price-fixing and market-sharing in spite of the fact they are, *per se*, illegal. This is exactly the case for the decisions on anticompetitive agreements in Russia, especially under judicial review (Makarov, 2019). However, we presume that investigations of price-fixing and market-sharing require a lower legal standard than concerted practice unless the competition authority applies *per se* approach to this type of conduct.

While we present data for the whole period, an informative comparison of the data for two types of anticompetitive conducts is possible only until 2011 (for annulments — until 2013, taking into account the timing of judicial review), when the number of decisions on concerted practice dramatically drops. During this period, data on the analysis undertaken by competition authorities and correspondence between the type of analysis and legal standard allow us to derive conclusions on FAS approach.

Before 2011 the number of decisions on concerted practice is relatively large — as large as the number of decisions on price-fixing, market-sharing and bid rigging. The number of instances that measures the costs of litigation for the parties is not significantly higher for concerted practice, in contrast to horizontal agreements illegal *per se*. As for litigation in Russia in general (Shastitko, 2018),

Table 1
Judicial review of concerted practice cases vis-à-vis horizontal agreements illegal per se, 2008–2015.

		2008	2009	2010	2011	2012	2013	2014	2015
Claims to annul	Horizontal per se	No	28	75	23	28	37	87	56
	Concerted practice	21	46	31	31	12	0	1	1
Number of instances that consider a case, average (st. dev. in parentheses)	Horizontal per se	No	3.6 (1.9)	2.5 (1.2)	3.0 (1.3)	3.6 (1.6)	3.3 (1.8)	2.6 (1.1)	2.4 (1.0)
	Concerted practice	3.2 (2.1)	3.1 (1.5)	3.5 (1.4)	3.0 (1.4)	2.8 (1.3)	–	4	4
Number of days to consider a case, average (st. dev. in parentheses)	Horizontal per se	No	384 (291)	302 (145)	428 (290)	564 (304)	472 (308)	311 (143)	270 (139)
	Concerted practice	530 (353)	365 (206)	417 (184)	460 (261)	442 (276)	–	691	454
Share of the decisions submitted to the Highest Court for supervisory review*	Horizontal per se	No	0.29	0.19	0.30	0.46	0.14	0.05	0.02
	Concerted practice	0.29	0.24	0.39	0.29	0.42	–	1.00	0.00
Share of the decisions annulled in the first instance concerted practice	Horizontal per se	No	0.71	0.61	0.57	0.57	0.59	0.40	0.20
	Concerted practice	0.19	0.37	0.61	0.35	0.67	–	0.00	1.00
Share of the decisions finally annulled	Horizontal per se	No	0.68	0.60	0.57	0.43	0.54	0.39	0.25
	Concerted practice	0.14	0.33	0.58	0.35	0.67	–	0.00	1.00

* Highest Court: before 2014 — The Supreme Commercial Court of the Russian Federation, since 2015 — The Supreme Court of the Russian Federation.
Source of data: LCAP database.

the number of instances predicts the duration of the litigation in days. The annulment rate for concerted practice decisions in first instance as well as in final instance is not higher than for *per se* prohibited horizontal agreements.

At the same time, convicted parties make significant efforts to persuade the judges to apply higher legal standards than Clarification of the Supreme Commercial Court implies. An important indicator is the share of the decisions, which were submitted for the Highest Court for supervisory review. The share of decisions is extremely high both for horizontal agreements illegal *per se* and concerted practice. However, the targets for challenging the evidence are different in these cases. For the agreements illegal *per se* the target for critique is the reliability of hard evidence. For concerted practice decisions, the target for critique is low legal standards. Table 2 illustrates the last point. We see that for the infringement decisions on concerted practice the share of finally annulled decisions decreases if the competition authority in its decisions pays attention to market structure that supports presumed tacit collusion (0.44 in contrast to 0.67), and then decreases if the competition authority proves market power enhancing effects (0.32 in contrast to 0.44 and 0.67). Additional blocs of economic analysis contribute to the probability of non-annulment under the appeal of concerted

Table 2
Blocks of economic analysis and annulment rates before and after the changes in Law-2006

		2008–2010			2011–2013		
		Number of instances	Share of finally annulled decisions	Obs.	Number of instances	Share of finally annulled decisions	Obs.
Only nature of the conduct	Horizontal per se	2.76	0.79	34	2.77	0.62*	13
	Concerted	3.00	0.67	12	1.75	1.00*	4
Market boundaries and market structure	Horizontal per se	3.33	0.66	3	3.29	0.71*	7
	Concerted	3.44	0.44	16	3.11	0.32*	19
Market power enhancing effect	Horizontal per se	3.71	0.59**	17	4.56***	0.56	9
	Concerted	3.54	0.32**	56	3.00***	0.44	16
Theory of harm to consumers	Horizontal per se	2.25	1.00	4	4.67	1	1
	Concerted	No	No	No	No	No	No
Total	Horizontal per se	3.03*	0.74***	58	3.56	0.66*	32
	Concerted	3.44*	0.39***	84	2.92	0.44*	39

Notes. Periods are divided not according to the year of adoption of the changes of Law-2006, but according to the introduction of these amendments for public expertise. Only cases with subsequent blocks of economic analysis are indicated. For example, we exclude observations where the competition authority develops analysis of market power enhancing effect without the analysis of market structure. Significance of difference between group of horizontal agreements and concerted practice: for the number of instances according to *t*-statistics and for shares according to and $\chi 2$: *** $p < 0.01$, ** $p < 0.05$, * $p < 0.1$.
Source: LCAP dataset.

practice. This is not the case, however, for horizontal agreements illegal *per se*. An important observation is that commercial courts reward additional economic analysis in concerted practice cases, increasing the probability of non-annulment, in spite of SCC Clarification that does not require any contextual analysis in addition to parallel pricing.

Still, during the first period, the annulment rate in concerted practice decisions is, on average, lower than for horizontal agreements illegal *per se*. As a result, the number of decisions on concerted practice is high enough.

In 2011–2012, the environment surrounding the investigation, and decisions, on concerted practice, changed under the influence of at least three factors. First were changes in Law-2006, which stressed the importance of the effect on competition as a reason for infringement decision. Second were amendments of Law-2006 towards concerted practice, which highlighted the impact of an explicit announcement of further strategy by either party. After these amendments, the causal relationship between announcement and presumed concerted practice became a necessary part of the evidence. Third was accumulated experience of the discussion of the evidence of market power enhancing effects in first instance, appellate and cassation courts. As a result, legal standards expected by courts increased. Table 2 shows that in 2011–2013, all the appealed decisions on con-

certed practice made without contextual analysis of the market were annulled. Significantly, competition authorities did not make substantial efforts to challenge the decision (average number of instances is less than 2 for the decisions where only the nature of the conduct is discussed). Courts did not only ask for a higher legal standard; it seems that the assessment of evidence under higher legal standards became more demanding. The share of annulled decisions for the group of cases where competition authorities analyzed market power enhancing effect, increased in 2011–2013, as compared to 2008–2010. Table 1 shows the overall increase of annulment rate for the decisions on concerted practice in 2012, when it exceeds for the first time the annulment rate for horizontal agreements.

In terms of modeling the choice of legal standard by reputation-maximizing authority, these changes can be interpreted as two shocks: one is the change of legal standards expected by courts, and another is the increased cost of applying legal standard. It is worth noting that the increase of legal standards applied by commercial courts took place not *due to* the Clarification of Highest Court, but instead *in spite of* the content of the special Clarification. During a relatively short period, Russian commercial courts overcame the effect of initially imposed legal standards, which contradicted economic logic and internationally recognized best practice.

For comparative statics, the model predicts either an increase of legal standards applied by competition authorities or a decrease of the number of enforcement targets. Statistics on the number of decisions on concerted practice (Tables 1 and 3) confirms the second type. The number of infringement decisions after 2012 rapidly decreased. After two-digit number of decisions, during the last five years reported in Table 3, the FAS, with regional subdivisions, investigated only a few cases, during last three years — without any convictions.

At the same time, Russian competition authorities did not forget about the threat of concerted practice as tacit collusion and/or agreement to be prosecuted without direct evidence. An important observation is the increase in the number of

Table 3
Investigations and decisions on concerted practice in Russia, 2008–2018.

	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018
Number of investigations	n.a.	n.a.	n.a.	n.a.	31	11	8	5	3	5	2
Number of infringement decisions	n.a.	n.a.	n.a.	n.a.	23	2	4	4	0	0	0
Number of precautions issued by the FAS	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	5	2	4	1	19
Number of appealed infringement decisions	21	46	31	31	12	0	1	1	0	0	0

Note. FAS statistics separates concerted practice from other types of horizontal agreements only after the changes in the legislation in 2011.
Source: Number of claims in commercial courts to annul infringement decisions on concerted practice — LCAP dataset; number of FAS investigations, infringement decisions and precautions issued on concerted practice — FAS annual reports 2013–2019.

precautions[17] issued by the FAS. Use of precautions allows to affect suppliers' conduct without meeting the requirements of legal standard under full-format investigations.

Overall, since 2012, the approach of the Russian competition authority towards concerted practice does not substantially change. It is still considered as tacit collusion, or implicit agreement, to be proved by the analysis of strategic interaction between companies. There is little or no progress in deciding what evidence meets the burden of proof. The FAS concentrates on specific remedies (for example, the ban on price announcements or price forecasts by sellers or authorities). However, it is not clear if the evidence of forecasts together with contextual market analysis and parallel pricing are sufficient for infringement decision.

6. Conclusion

Enforcement against concerted practice illustrates the specific path of enforcement development in recent competition jurisdiction, when the *increase* of legal standards expected by courts, and followed by the competition authority, results in the *decrease* of the number of enforcement targets instead of the *increase* of the quality of enforcement. It revealed that, under higher legal standards, the cost of investigation exceeds the effects of enforcement perceived by the competition authority.

Even in the infringement decisions against motor fuel suppliers (2008–2009), which obtained highest political and public opinion support, competition authorities hardly succeeded in persuading judges that infringement decisions were properly proven. Changes in competition law, which identify the concerted practice as a violation of competition law only because of the restriction of competition, makes the proof of market power enhancing effect necessary part of the infringement decisions.

Dissatisfaction with the outcome of judicial review results, first, in the attempts to narrow legal definition, and, second, in the sharp decrease in the number of investigations and decisions towards participants of concerted practice. The introduction of "public announcement" as a necessary evidence of concerted practice in order to avoid legal errors does not help to collect proofs for power-enhancing effect of conduct.

Statistics of the enforcement supports prediction of the model of legal standards in particular cases (group of cases) as a decision of reputation-maximizing authority.

From a legal point of view, Russian experiences demonstrate the difficulty, first, in finding a legal definition of concerted practice as tacit collusion, and, second, in obtaining sufficient evidence to prove tacit collusion.

The evolution of legal definition and standards of evidence for concerted practices in Russia highlights the important role of judicial review in development of legislation and enforcement practice, and, in particular, the importance of first instance courts. Especially interesting is the role of lower (first instance

[17] *Precaution* (preduprezhdeniye) is a specific enforcement instrument that combines characteristics of statement of objection and remedy. Like statement of objection, precaution contains only hypothesis on law violation. At the same time, it prescribes the company to modify the conduct under the threat of full investigation and infringement decision.

and appellate) courts. Under the enforcement of concerted practice, decisions of lower courts overcome relatively low legal standard established by the decision of the Supreme Commercial Court.

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