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Competition Law in Transformation:

**Impact of Transplanted Competition Law on the Effectiveness of
Competition Policy as Economic Institution in Russia**

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1. Introduction

As the process of transformation in Russia began at the end of 1989, there was no consensus about the range and the sequencing of reform to successfully accomplish the transformation process with a free market economy established. Nowadays Russia is recognised worldwide as a free market economy. However, the complex institutional change is not yet fully accomplished. This is evident by the analysis of the competition policy, one of the most important economic institutions to protect the free market. Only now, after 17 years of transformation, the effectiveness of Russian competition policy starts to grow, what certified the journal “Global Competition Review” for 2005 and 2006. The picture of Russian competition policy can be described as: the old producing structures sustained despite the privatisation, markets are mostly characterized by high concentration and abuse of dominant market position, the existing competition law and the law enforcement procedure are characterized by low effectiveness and can hardly provide a long-term positive effect. The latest competition law reform of 2006 starts finally to change the situation.

The paper analyses critically the impact of competition law on the effectiveness of competition policy as an economic institution. The neoclassical economic theory considers institutions as exogenous factors. According to this approach to transfer or transplant successfully working institutions from developed countries is sufficient to ensure their effectiveness in a new, a different institutional surrounding. The transformation process in Russia reveals weaknesses of this. The paper examines the process of introduction and development of the competition policy in Russia, based on transplanted competition law, from the beginning of transformation until the last extensive reform of competition law in 2006. Drawing upon a range of existing theories that explain institutional change mechanisms, the paper analyses how new institutions could be successfully established and what approach of rule setting is appropriate for rapidly changing institutional environment like in transformation countries. The main question is to what content a transplantation of a law body can support economic transformation and how far or to what content the experience of developed countries in establishing of competition policy can be used in Russia.

2. Competition Law within the Institutional Transformation Process

2.1 Competition Law and Competition Policy as Institutions

At the starting point should be clarified what we assume to be an institution. In a broad sense, institutions are sets of rules that reduce uncertainty restricting and canalising behaviour of economic and social actors. It can be distinguished between formal and informal institutions. Formal or codified institutions involve organisations, law, and economic agents themselves and are generally defined as the law sphere, with constitutions, regulations and organisations. Formal rules are directly connected to the political-economy structure such as governance, property rights, and judiciary system. Thus, the legal system bears

responsibility for the reinforcing of the formal institutions. Besides, there are informal or not-codified institutions such as behavioural rules, social norms, conventions, moral values, religious beliefs, traditions and other behavioural norms that have passed the test of the historical evolution and that determine the individual's behaviour as well as organisations in pursuit of their aims. This last type of institutions represents cultural heritage of a community, and results from the dynamic evolution of the society. Furthermore, these rules are self-reinforcing through mechanisms such as imitations, traditions and other form of teaching. Fears to be not accepted in a community or even be excluded from it facilitate the self-reinforcing process.¹

An institution as set of rules might be based on "rule of law" as well as on "case by case" decisions. These two approaches have advantages and disadvantages. Case by case decisions are more flexible and can better respond to variety of individual situations, appear, however, to have a lower stabilising effect on behaviour of economic actors than rule of law. In opposite rule of law provide a higher reliability, first in ensuring democratic legitimacy of institutions through an equal treatment for everyone, and second in promoting more stability in expectations building by economic actors.

Constitutional economics define law sphere as institutions which contains "constitutive rules". These are stressed as quite significant as a scope for action made up by human decisions and deliberation. An effective legal system is not only a system of written rules but also a system of standards of conduct. Standards of conduct however are influenced by prescriptive or informal institutions also by cultural heritage (by terms as "morality", "goodwill behavior", "decency"). Both, formal and informal institutions are not exogenously defined and unchangeable. Any change and particularly a fast change of rules cause instability and uncertainty by economic (and political) actors, so that institutions need to show a high grade of stability and persistence. A certain resistance against changes is, therefore, characteristically for institutions. Notwithstanding, they change in the run of time and adapt to the new economic data. This process can be described as institutional change and is inherent to every institutional system.

„Competition policy“ in its broad meaning is an essential institution established in order to protect and promote economic activity. It determines the place of the state in the economic life through defining of the activities the state will be involved in and which will be left to private sector. To further goals of competition policy could be counted: the delivering of goods and services to domestic consumers at the cheapest sustainable prices; the encouraging of innovation and technological development; the increasing of productivity and the engaging of participation in trade and competition on international markets. However, the aims of competition policy are not confined to the economic. They also affect social objectives, including equity, the welfare of consumers and the enhancement of the quality of life of all. A sound competition policy can provide the basis for economic development and enhances country's living standards, which leads

¹ Tridico (2004), pp. 4-6.

to social development. Competition policy should prevent formation of a strong economic power which can negatively affect political processes. Besides, when the institutions designed to promote competition policy are weak, corruption erupts and can flourish.

Institution of competition policy also has certain social functions. Competition law in broad sense is established to build and sustain public confidence in institutions, and so, as rule of law, can help underpin the stability of democracies. And this is the key to an effective market economy. For all these reasons, “a well-thought out “competition policy” in its totality can give substance to a country’s vision of what it wants be”, as Transparency International brings it to the point.²

In developed countries the competition policy as economic institution has its legal basis in competition law. Competition law contains rules for competitive rivalry that are aimed to constrain the strategies available to firms. The directives of competition law in general seek to prevent behaviour targeted either to reduce the rivalry of firms, or to exert monopolistic power. The primary objective of this law is to prevent the anti-competitive business behaviour which is defined by the theoretical conception of desired competition (perfect competition, workable competition, efficiency-led competition etc.). As an economic institution competition law owes, more than any other body of law, its existence to economics. However, ‘enhancement of welfare’ is not explicitly adopted as objective of this law.³ In short, competition law represents the stable core of competition policy through persistent rules and its content is defined by political targets. Competition law with its well defined rules and the standards of conduct directly influences the effectiveness of competition policy as an institution.

2.2 Determinants of Effectiveness of Institutions

The effectiveness of competition policy as effectiveness of every other kind of policy/politics can be measured, first, in terms of reaching the desired political goals and, second, how far the rules itself are accepted by economic and social actors. Both terms are directly connected with each other. Only working with the final goal coherent rules ensure the success of a policy. Thus, it’s important to expose the determinants of an effective institution as set of rules.

On the constitutional level the effectiveness of institutions is determined by the relationship between de-facto rules (the rules in fact applied in a community) and de-jure rules (the rules included in the written right law or also codified rules). If the de-facto occurring decision-making processes correspond to the de-jure rules, an institution is effective.⁴ No state can impose the formal law against the will of the citizens for a long time

² Transparency International (2000), p. 260.

³ Audretsch et al (2001), p. 614.

⁴ Voigt (1999), p. 8, und Berkowitz/Pistor/Richard (2003), p. 166.

(except country ruled by a dictator and at very high costs). The law enforcement is based to some content on informal institutions such as individual values, private rules and traditions. Therefore, the effectiveness of institutions depends on the consistence of formal and informal institutions.⁵ All in all, the new implemented institutions are not automatically effective and their adjustment succeeds only under particular conditions.

Particularly important for the success of institutional adjustment and, thereby, for a high effectiveness of institutions are the three following components:

1) Legitimation by social actors

The demand for the institutions is important for the legitimacy of the institutions. The social actors must be convinced by the necessity of the new formal set of rules.⁶ Generally said, at the constitutional moment (the formation of the constitution) shall exist a social consensus about the necessary institutions.

2) Familiarity with new rules in the society

The familiarity with the new implemented rules could be expected in cases, if a country in its recent history was already confronted with institutions of the same legal family or with a similar set of rules. Here, the so-called "cultural border" could play a central role.⁷ Some of researches confirm that the effectiveness of the newly enforced institutions in a country is higher, if it was once in its history familiar with basic principles of such institutions. In such case, the social actors can better understand the means of rules and, therefore, make better use of them. Here, the formal rule of law is supported by informal institutions.⁸

3) Adjustment of formal and informal institutions

The inconsistency of institutional development can theoretically be removed by the adjustment or adaptation of the new formal rules to the informal institutions. One conceivable possibility could be an "informed choice" between different models of institutional change. These models are the result of the comparative studies that take into account all the cultural and the historical features of the relevant country, with other words, considering its informal institutions.⁹ Such an adjustment is at least theoretically possible, since formal institutions in contrast to informal could be changed relatively easily. Moreover, the adaptation success would be presumably higher if more relevant actors and especially more domestic specialists (in relation to foreigners) would participate in the process of institutions establishing because they naturally know at best the informal institutions of the own country.

Furthermore, also the adjustment of informal institutions to formal might be conceivable. In such case, the adaptation would possibly take longer because informal institutions cannot be changed overnight by political decision. However, the dynamics of institutional change would increase as social actors recognise or

⁵ Voigt (1999), pp. 15-22.

⁶ Adamovich (2004), pp. 270-271.

⁷ Pistor/Raiser/Gelfer (2000), pp. 336, 346.

⁸ Berkowitz/Pistor/Richard (2003), p. 175.

⁹ Berkowitz/Pistor/Richard (2003), p. 180.

experience the long lasting advantages of the new formal institutions as, for example, increasing national and international competitiveness of domestic enterprises respective improvements of quality or of product's cost-benefit relation for consumers.

Depending on how strong the inconsistency between formal and informal institutions appears the effectiveness of a new institution can be negatively influenced. An institution can be considered effective if this fulfils the functions and reach scheduled goals.

2.3 Transformation as Institutional change

Institutional change is a generic term for every kind of institutional alteration, including partial reshaping of a single institution, institutional innovations as well as redesigning of entire institutional framework. The last one is a most complex task which involves not only changes of institutions but also the relations between all elements of a system as well as relations of economic/social actors with and within the system.

Institutional change can occur as evolution, transformation or revolution. Evolution is a natural development¹⁰ which follows the inner principle and dynamics. A revolution means a rapid significant change which is caused by strategic decision and may result in a major alteration in socio-political institutions, in a culture or economy.¹¹ Thus revolutions destroy existing institutional framework and move in extra constitutional way the power to different political, economic or social actors. A violation to foregoing political institutions is recognized to be a distinguishing element of a revolution. Transformation either means institutional change by strategic decision, however without the elements of violence. Transformation can ensue in a more or less rapid way.

Economic and legal transformation can be considered first of all as a form of institutional change. Dependent on economic, political and legal preconditions a transformation can be more or less extensive. It can be distinguished three possible strategies of transformation:

- First, there is a way to simply copy or to transplant existing and successful institution from other jurisdictions without any changes. The reason for choosing this strategy might be high speed of institutional change or low level of experience or lack of knowledge by the decisionmakers.

¹⁰ The term is taken from biology because of the similarity of processes.

¹¹ Jeff Goodwin gives two definitions of a revolution. A broad one, where revolution is "any and all instances in which a state or a political regime is overthrown and thereby transformed by a popular movement in an irregular, extraconstitutional and/or violent fashion"; and a narrow one, in which "revolutions entail not only mass mobilization and regime change, but also more or less rapid and fundamental social, economic and/or cultural change, during or soon after the struggle for state power." Goodwin (2001), p.9.

- The second strategy is carried out through the informed choice when transplantation process is supplemented by adaptation of existing successful institutions to national conditions. Supporters of this strategy underline especially the point, that institutional framework is influenced by many different factors. New institutions are not implemented on an empty spot. Moreover they need to fit in an existing system of different institutions or to find the place in it in order to develop their effect as an institution. Still existing and functioning formal and informal institutions can influence the effectiveness of a new institution in a positive as in a negative way. Therefore, it is strongly requested not only to transplant or to copy the institutions, which work effectively in other jurisdictions, but to adapt in a new institutional environment under the observation of institutional peculiarities of concerning country.
- The third strategy generally rejects an imitation of other successful institutions. This position is based on the assumption that each institution can be effective in only one given institutional surrounding. Also the smallest differences in institutional framework can already have unpredictable effects on the effectiveness of new institution. The representatives of this strategy are often led by aspiration to be able to develop an alternative and a better institutional framework. Hence, we can speak here of developing of institutional innovation, based mostly on theoretical assumptions.

Every transformation process is characterized by path-dependence. The concept of path-dependence in the institutional economics implies that initial coincidences can determine an evolutionary path in developing of institutions. Caused by the self-reinforcing characteristics of this process, the taken path cannot be left again so easily. Cultural heritage of society and existing habits and traditions strongly influence the decision making. Specific events in the past provide that certain institutions become chosen. However, that path is not necessarily the best. If one of several alternatives asserts itself, the solution can be efficient or inefficient. The development can lead also to suboptimal results.

The conception of path-dependence means that a historic institutional heritage restricts the variety of possibilities by institutional innovations. Institutional alterations admittedly are not determined in advance but also do not happen by pure chance.¹² Positive feedbacks such as profits, which result from the prosecution of the chosen way by individuals, increase continually, and the costs of way abandoning such as learning and adapting costs, possibly exceed the benefits caused by a path-change.¹³

A system transformation shows some particular characteristics like high autonomy of political actors, more or less high level of inconsistency of institutional development and high uncertainty of process itself as of its outcome. The first both characteristics determine to a high degree the last one.

¹² Leipold (2000), p. 11.

¹³ Polster (2001), pp. 21-23.

The high autonomy results from rapid constitutional changes. The decisionmakers often act on the basis of the old still existing legitimation. Before the approval of a new constitution there is no functioning mechanism of a formal political control. On the other hand, the constitutional situation is characterized by uncertainty for society and for political actors themselves. As individuals, which virtues were shaped by the previous formal and informal institutions, they have no experience with new formal rules and often less clear idea of process outcome. In this way created new formal rules can be problematic for different reason: “they may have low legitimacy, they may be deprived of robust complementary with other formal institutions, or they may produce unexpected and undesirable consequences”¹⁴.

The increase in inconsistency of institutional development is unavoidable by a complex transformation like a system change. The institutional development involves two processes, which strongly interplay: the change of formal and informal institutions can occur simultaneously, consecutively or divergent. From the view of the path-dependence a slow, gradual institutional development is advantageous, because it takes into account the inner dynamics of an institutional change. The attempts to establish new formal institutions rapidly or to transfer them from another jurisdiction and to implement them in own country disclose the risk that the development of formal and informal institutions diverges too strongly, because the informal institutions are not yet prepared for such a change. This inconsistency in the institutional development leads to problems by the acceptance and, thus, by the enforcement of the new formal rules.¹⁵ With a rise of inconsistency grow also transaction costs (i.e. costs of information, learning, enforcement and not at least costs of control). A higher inconsistency of formal and informal institutions can slow down the institutional change significantly. Discrepancies between the quick realization of new formal rules and a gradual path-dependent development of informal rules such as traditions and norms of conduct create conflicts between these institutions. Thereby, the result of a rapid or an extreme institutional change becomes hardly predictable.

2.4 Important factors

However, if the inconsistency between formal and informal rules is present, it would cause high transaction costs. These manifest themselves in such activities as lobby-work, formation of power-clusters, increasing corruption, waste of time and financial expenditures to the reduce uncertainty. The bigger the discrepancies in the institutional development, the higher are transaction costs and their influence on the economic development.

High transaction costs are explained by the theory of public-choice. Every development of new rules in a community always would be influenced by the old rules of conduct and the social groups profiting by them.

¹⁴ Chavance (2007), p.9.

¹⁵ Streit/Mummert (1996), p. 12.

Thus, it is almost inevitably that through the change underprivileged and therefore this change rejecting groups would try to protect their interests through formation of lobby-groups and rent-seeking behaviour.¹⁶ The different norms (the old ones and the new ones) will not only coexist but also compete with each other.¹⁷ If it would succeed to bring in agreement the development processes of formal and informal institutions, the norm nonconformity might be reduced and thereby the enforcement process of new rules facilitated.

Examining the recent research literature on issues of system transformation as a form institutional change (Voigt/Wagener 2002, Murell 2001, Boulanger 2002) the following factors can be constituted, which might influence the process of transformation in a positive way.

Strong Government

Creation of a new institutional framework is characterized by high complexity. The decisionmakers have quasi-monopoly of the interest articulation.¹⁸ Regarding the problems of institutional inconsistency as well as the fact that in the initial period of transformation activities of changes rejecting groups could increase rapidly, a strong to reform committed government is necessary to enforce the new institutional setting. The new emerging interest group may try to influence decisionmakers through rent-seeking behavior. Even the political actors themselves might act in order to achieve higher rents from own decisions if there is no mechanism of control. A government, which possesses the power to impose, to supervise and to operate the reform processes, determines through an effective enforcement the pace of institutional change and the effectiveness of new institutions.

Transparency

Last, the high level of uncertainty requires also high transparency of all governmental activities involving the outlook on the future steps of institutional change. Transparency helps to boost the trust by population and helps decisionmakers to stick to their proclaimed goals. Transparency makes the institutional system itself and the political actions/decisions accessible publicly and therefore rather understood. It is difficult to justify publicly and to maintain a system that permits abuse and corruption.¹⁹

High universality of rules

Next, as the system transformation is characterized by high level of uncertainty and the decisionmakers have little experience with new institutions and with their function principles it is necessary that rules are less differential as possible. With other words, in initial period of transformation universal rules are advantageous. First, this approach ensures better understanding of new rules by political and social actors and, thus, could ease the proceeding of their enforcement through the administrative bodies. The core of a new institution may build the appropriate law – as a scope of universal rules, which are resistant to

¹⁶ The change rejecting individuals are rather willing to pay more in order to maintain the old framework. They could build a representative lobby or a political party to secure advantages of their particular positions.

¹⁷ Streit/Mummert (1996), pp. 14-18.

¹⁸ Wiesenthal (2001).

¹⁹ Voigt/Engerer (2002), p. 172.

discretionary changes. Besides, it should be still place for case by case decisions as a necessary reaction of the proceeding economic and political development.²⁰

Concluding should be underlined that a system transformation is a complex and difficult task. On one side, the existing institutional structures cannot be replaced by new one overnight. It means that for the period of transition the old institutions coexist with the new ones (as formal as informal) and affect the effectiveness of the last. This impact might be rather positive when new institutions can be based on the elements of the old system. Otherwise their functions are impeded by old formal or informal rules. Even well formulated directives or system of rules lose their effect in a different institutional environment if they have no elements to base on. A transplanted competition law suits theoretically to the in general similar institutional framework and to the similar political targets. However, if there are no functioning standards of conduct the rules would rarely have the same restrictive impact on the individuals as in another institutional system. That is why this approach could be questioned and offers an interesting object for further analyses.

3. Preconditions for Introduction of Rule of Law in Russia

Before the analysis the strategy of transformation which Russia followed after 1991 it is important to see what institutional and legal situation it started from. Most important appears the fact that both economic and political structures differed strongly from those of western developed countries. On one hand, institutional framework was build on the basis of necessities of a planned economy where the state controls means of production and marketing and is involved in all planning activities. No processes run without a centralized control. On the other hand, legal framework was dominated by socialistic ideology. Only a short period of time, before the October Revolution, Russia tried, though had not enough time to develop a legal system divergent from monarchy. The first constitution was promised by Zar Nikolai II in autumn 1905 and came into force in 1906. This constitution, however, confirmed Russian monarch in his role. In the years before the Revolution many of legal system took place in Russia, though the country did not have enough time to build fundamentals for a legal culture or tradition. The attempt to implement basic elements of constitutional state failed and after the October Revolution of 1917 the first socialistic state was founded.

The state based on the fundamentals of socialism was considered as a part of transitory period to communism. In the ideology of Marxism-Leninism law means a system of norm that is created by the state and reflects the norms of the ruling class.²¹ A general universal idea of the law (for example natural law) does not exist. The law resembles itself only in dependence on relations of productions (Produktionsverhältnisse). Post-revolutionary times were marked by the idea that law possess primarily

²⁰ For discussion regarding advantages and disadvantages of more universal per se rules versus rule of reason see Christiansen/Kerber, (2006).

²¹ Jawitsch (1982), p. 65.

'bourgeois' character and has to be rejected per definitionem.²² The ordinary state and the law should in communism perish. The communistic law shouldn't exist, but only organizational measures or the administration of matters/objects, with other words, only rules that are merely functional.²³ In socialistic period as a transition to communism the law of dominating class should be retained. The socialistic law is established by the legislator and is sanctioned by the state. It is appointed to the construction of the communism and obeys the will of the ruling class, the proletariat.^{24 25}

The following elements characterized the central planned socialistic system:

Legitimacy by Communist party

The Communist Party was decisive institution everywhere. On one hand, the party possessed the knowledge of objective social principles and was competent to interpret them in the right manner.²⁶ On the other hand, the party had the assignment of right to publicly articulate interests of the lower class. It claimed to act in sense of huge mass of people.²⁷ In cases, when single individuals or a social proclaimed different interests, they were accused of "inadequate or even wrong consciousness"²⁸.

Principle of power separation

The socialistic state was administrated and controlled by the centrally organized Communist Unity Party, which could impose its decisions on all level of the state. The relationship between the party and the state were theoretically absolutely clear. The party prevailed, but didn't reign. The state and its organs reigned, did not possess the power, however. Members of the government necessarily were all party members. Hence, the Communist Party of the Soviet Union had an outstanding influence on all legal functions of the state.²⁹

Socialistic constitution and primacy of politics

The socialistic constitution³⁰ was not intended for a direct application. The constitutional rights generally did not provide any basis for a claim, although norms of application were standardized to some extent. Beside the semantic function, the socialistic constitution was a political document, which reflected the achievements and at the same time sets goals and programs for the future. All in all constitution in a socialistic state had many different functions, thereby normativity of the document was least important.³¹

²² Lenin (1972), p. 481.

²³ Golunski (1961), p. 1552.

²⁴ Kelsen (1955), p. 118.

²⁵ Mögelin (2002), pp. 164-171.

²⁶ Kosing (1986), p. 335.

²⁷ Klenner (1954), p. 57.

²⁸ Kosing (1986), p. 207.

²⁹ Mögelin (2003), p.208-212.

³⁰ There were four of them: in 1918, 1924, 1936 and 1977.

³¹ Mögelin (2003), pp. 214-218.

Law as an instrument of politics

The principle of the legality was inseparably interconnected with the principle of the partiality. The applicable law could substantially not develop any autonomy from the politics. The difference between law and politics was partly eliminated. The tight linkage to the social basis committed the law to a permanent content alteration. However, the formal procedures of the law modification were not fast enough and too complicated for this scope. Consequently, the executive substituted the legislator. Thus the influence of political convenience was statutory regulated.³² For example, certain legal norms (task-norms) only stipulated targets. The guarantee of fundamental rights was subject to political interests. The consequence was the displacing of law normativity by goal and purpose determination. To bring to the point: the law sanctioned the lawlessness.^{33 34}

To summarize the socialistic state was ruled by individuals or rule of man and thus could not develop any legal tradition in common democratic sense before 1991. Moreover, by the end of 80ties the system lost capacity to act due to economic and political problems. The fact that the basis of the framework was destroyed, did though not mean the elimination of all formal and informal institutions. Most of them sustained and preceded their existence either nominal, as there was no replacement yet available or real continuing to restrict behavior of individuals. All in all there were no elements at hand to build a system based on rule of law.

4. Competition Law and its impact on Russian economy in 1991-2004

4.1 Establishment of the Competition policy as an Institution

The competition law has been already introduced to Russia in the first years of transformation following the example of the competition law of the western market economies. However, the Russian competition law was not copied from one western country but different traditions in competition policy became integrated into the Russian legislation.³⁵ On the administrative side in 1991 was established the competition authority in form of a ministry for Antimonopoly politics (MAP). The status of “ministry” determined advantages and disadvantages. On the one hand, it should place the political signal that the highest priority was granted to the competition policy. In the practical realization, however, strong political dependence was established, because the competition authority had to coordinate all decisions with the other ministries and could be sanctioned of them. This often led to conflicts with the sector-specific ministries due to the strong divergence of interests. The legal action against central and regional state authorities became with it impossible.³⁶

³² Ioffe (1985), p. 202.

³³ Yakovlev (1995), p. 18.

³⁴ Mögelin (2003), pp. 205-207.

³⁵ OECD (2004), pp. 19-43.

³⁶ OECD (2004), pp. 43-44.

Nevertheless, the strengthening of the competition policy belonged to the most important political tasks in the first years of transformation. This changed rapidly after the exchange of the gradual transformation-strategy to Big-Bang.³⁷

Due to social tensions in 1994 came the decision to abandon the steady development of the new framework. From that time emphasis was put on fast privatisation and reformation of the state structures, with other words on building and development of markets themselves. Later the major political task became the overcoming of finance crisis. Protection and advocacy of the competition moved into political background. This quickly manifested itself in a sinking reputation of the competition authority. Its financial and personal sources shrank (especially during the finance crisis of 1998) while at the same time its task catalogue became even more extensive. Instead to concentrate mainly on advocacy and protection of competition, competition authority was overloaded with different task. It had to deal with structural and institutional problems and to solve them as well as to develop general market conduct rules. Moreover, the legal action against undesirable activities of market participants belonged to its tasks. Relatively fast changes in the structure of the authority as well as in its tasks, regular alterations of the anti-monopolistic legislation regarding the scope of tasks and duties impeded the development of legal standards and used up the resources to carry out the most important tasks of the competition policy.³⁸ Since 2004 some significant changes took place in administrative structures. The competition authority became at least formally more independent from politics by foundation of the FAS (Federal Antimonopoly Service). As the first important step the FAS started its work projecting an extensive competition law reform. Moreover, the activities of the authority became both more transparent and information accessible for everyone as an internet based presence emerged. It is yet too early to value the changes in full, though developments on administrative side look brighter and are promising.

4.2 Measures included in Competition law

The competition legislation in Russia is very similar to the basic European Communities' conception of how to combat restraints of competition. Three areas are particularly essential to protect competition activities: cartel legislation, prohibition of abuse of economic power position and merger control. In addition, the antimonopoly legislation also contains special regulations that are characteristically for Russian. As it is not yet possible to examine the impact of the new competition law, which commenced to act on November 25, 2006, the following descriptions are focused on the old competition law.

Prohibition of Competition Restrictive Agreements or Concerted Actions

The Article 6 of the "Law on Competition" and the new regulated the handling of restrictive agreements. The law distinguished between horizontal and vertical agreements. The Law specifically prohibited (Article 6.1)

³⁷ Big-Bang is a radical program which aims to exchange the most important economic elements in the shortest time.

³⁸ OECD (2004), p. 8.

horizontal agreements concerning prices or any element of price policy (make-ups, discounts), market division, restriction of market access, elimination of participants from the market or boycott.³⁹ Previously, finding any of these violations required a combined market share on the part of the violators of at least 35% of the relevant market. The later amendment eliminated the previously existing exception for the violators with a combined market share less than 35% of the relevant market and also made them per se violations by removing the possibility for approval by the competition authority on the basis of positive effects.⁴⁰ Other types of horizontal agreements are prohibited if they prevent, restrict or eliminate competition (or may do so) and infringe upon the interests of other economic subjects (Article 6.2). Horizontal agreements were particularly intensive controlled as the disposition to restrictive agreements is in Russia, determined by historical development, notably high.⁴¹

Vertical agreements were prohibited “between economic subjects not competing on the corresponding market, receiving and supplying goods”⁴² if such agreements prevent, restrict or eliminate competition (Article 6.3).

Article 6.4 of “The Law on Competition” contained exception cases. No block exemptions were provided in the law. However, in exceptional circumstances, the competition authority was authorised to allow specific horizontal or vertical agreements (except horizontal cartel agreements listed in Article 6.1), if it is shown that “their positive effects outweigh their negative effects, or if the specific type of agreement is provided for by federal law”⁴³. Such specific agreements are related particularly to the socioeconomic area. To these effects belong, for example, the increase of the competitiveness of Russian exports in the world markets and the support of the technical and scientific progress (industry-political aspects).⁴⁴

Abuse of Dominance

In accordance with the Article 5 of the “Law on Competition” dominance was defined as an exclusive position of an economic subject that gives the ability to exert decisive influence on the conditions of circulation of the relevant goods or to obstruct access of others to the market. Therefore enterprises with a share of the market equal to 65% or greater were dominant unless the enterprise proves the contrary,⁴⁵ while those with a share of 35% or less may not be found to be dominant under any circumstances.⁴⁶ Between the two percentage numbers, firms might be found also to be dominant if the competition authority can prove this fact by evidence.⁴⁷ In Article 5.1 abuse of dominance is defined as “actions (inaction) of an economic

³⁹ FAS (2005a), Art. 6.1 of the “Law on Competition”.

⁴⁰ OECD (2004), p. 22.

⁴¹ Butyrkin (2004), p. 45.

⁴² FAS (2005a), Art. 6.3 of the “Law on Competition”.

⁴³ FAS (2005a), Art. 6.4 of the “Law on Competition”.

⁴⁴ Dillenz (1999), p. 78.

⁴⁵ FAS (2005a), Art. 5 of the “Law on Competition”.

⁴⁶ Tkatsch (2005), p. 21.

⁴⁷ OECD (2004), p. 27.

entity (group of entities) occupying a dominant position, which result or can result in prevention, restriction or elimination of competition and (or) infringement of the interests of other persons”⁴⁸. Both acts and failures to act were specifically covered. As in case of restrictive agreements the law, however, permitted the FAS to recognise specific actions as acceptable if the firm proved that the positive effects of those actions exceed the negative consequences for the market.

Merger Control

Merger control provisions were to apply to both mergers and similar combinations of entire firms (Article 17) and to transactions involving acquisitions of shares or transfers of control (Article 18). Basic thresholds are calculated on the basis of the most recent balance-sheet value of the assets of the companies involved, without reference to the value of the transaction itself or to the amount of economic activity currently conducted by the company. The provision included pre-merger notification; however permission could be refused in case, if for decision significant information were not correct. On the other hand, a transaction might be approved, if the petitioners showed that positive effects of the transaction exceed the negative consequences. The law also here specifically included socioeconomic effects among those to be considered by decisionmakers.⁴⁹ Post-merger notification was required within 45 days after merger was completed.

After a pre- or post-notification the competition authority had 30 days of time to take a decision. This term might be extended for a maximum of another 20 days.⁵⁰

Interesting is the fact that the law (Article 19) provided for the possibility of breaking-up of commercial firms or non-commercial entities engaged in commercial activities, if the entity was dominant and engage “systematically” (twice in three years) in monopolistic activities, defined as the abuse of a dominant position or participation in restrictive agreements. However, this provision of the law has rarely been used.

Restrictive Action to Competition of Administrative Bodies

One particular provision of Russian antimonopoly legislation referred to the behaviour of the state. The Law of Competition specifically prohibited acts, actions and agreements of state bodies (central and local) that prevent, restrict or eliminate competition (Article 7 and 8). This provision was included into the Law on Competition due to the historical presence of a strong state power, which could be still observed in many areas of economic activity (in political enforcement as well as in ownership).⁵¹ From a regulatory point of view such a provision seems paradoxical. The state usually creates competition legislation in order to protect competition against powerful private enterprises; in the situation of Russia it protects competition from its

⁴⁸ FAS (2005a), Art. 5.1 of the “Law on Competition”.

⁴⁹ FAS (2005a), Art. 17.4 and Art. 18.5 of the “Law on Competition”.

⁵⁰ FAS (2005a), Art. 17.2 of the “Law on Competition”.

⁵¹ FAS (2005a), Art. 7.1 of the “Law on Competition”.

own actions.⁵² However, the case analysis of violations against the “Law on Competition” clearly shows that too often state bodies are involved.⁵³

The Article 7 contained also a general prohibition on the combination of commercial activity with the exercise of the state power. Only exceptions were cases, where such combinations are authorised by federal “legislative acts” (may include not only laws but also presidential edicts, acts of the Government and other federal regulations). However this broad exception had permitted numerous state bodies at various levels to engage in commercial activities, resulting in monopolisation of the relevant services and in some cases leading to a tying of the commercial services to the performance of state functions.⁵⁴

The Article 8 prohibited state bodies from engaging in agreements or coordinated actions (among themselves or with firms or organisations) if these have or may have as result the prevention, restriction or elimination of competition. The Article 9 of the “Law on Competition” defined “antimonopoly requirements for the conduct of competitive bidding“. Such cases included prohibition on the creation of advantages for some participants, granting of access to confidential information or reduced fees for participation, improper restriction of access to participation and any coordination of the activities of the participants by the organiser of the competitive bidding.⁵⁵

4.3 Violations of the competition law

In order to valuate the effectiveness of the competition law it appears useful consult the statistics of the law violations. The highest rate of the competition law’ violations are identified by mergers, by restrictive actions to competition of administrative bodies as well as by abuse of dominance. According to the reports of the FAS in 2004 1.332 cases of violation to the “Law on Competition” regarding merger were revealed, what made up 49% of all investigations undertaken in this area of the competition law.⁵⁶ More than the half of the law infringements came from the businesses of the energy industry (electricity 22%, gas 6%, oil 2%), of the transports (26%), of the post and telecommunication (9%).⁵⁷ Negative to remark is that in 2005 the cases of the abuse of dominance had increased by 110,5 % and the cases of the restrictive actions to competition of administrative bodies had risen by 477,2% respect to 1996.⁵⁸ These percentage numbers clearly provide the central problems of the competition law application.

⁵² Dillenz (1998), p. 106.

⁵³ FAS (2005b), p. 4.

⁵⁴ OECD (2004), p. 36.

⁵⁵ FAS (2005a), Art. 9 of the “Law on Competition”.

⁵⁶ FAS (2005c), chart. 1.

⁵⁷ FAS (2005d).

⁵⁸ From 1996 to 2005. Official statistics of FAS (2005b), p. 4.

5. Conclusions

The competition legislation transplanted from the western countries covered all significant areas. However, it can be stated that unfortunately significant legal and structural problems still reduce the ability of the competition authority to effectively apply and enforce competition rules. On one hand, tasks of the competition administration were too broadly defined and did not allow focusing authority's attention on concrete matters of competition. On the other hand, sanctions, also for serious violations of the competition law, were insignificant and the enforcement authorisation of the competition authority strongly restricted. This shows that the sole transplantation of the competition law and establishing of competition authority is not sufficient for an effective competition policy. Not the rules itself, but the standards of conduct including mechanisms of enforcement are playing a crucial role by creating of effective institutions.

At the end it can be concluded that Russia chosen the way of transplantation of competition law from other jurisdiction following the institutional benchmarks. This approach was the only one possible at that time for different reasons:

1. Russian system transformation was neither an evolution nor a revolution. In 1991 the Soviet Union reached the condition of disability to act. The process of glasnost' and perestroika initiated by Mikhail Gorbachev in 1988 made political and economic processes more transparent. This step revealed the dreadful political conditions and economic decline, which were hardly to be ignored. The Communist Party lost the trust by population and thus was incapable to lead the state politically. The old fundamentals of system lost their legitimation. All this problems made a slow transformation impossible as they give no time to search for new ways targeted by establishment of a Russian form of capitalism or develop new approaches partially. Fast solutions were requested as for economic as for political reasons. Making decisive visible steps of transformation to market economy promised to boost the trust of population to political decisionmakers and to avoid political chaos. After the break-down of a central planning and controlling authority the economic sector needed to be put "under control" of "invisible hand" to abolish the spreading economic disorder. With other words, it was necessary to establish self-regulating markets, which seemed to be the highest priority at that time.
2. Second reason for institutional transplantation was the lack of legal tradition as well as culture of competition in Russia. On one hand, the legacy of socialistic period gave no sustainable foundation to implement a legal system based on value of individual freedom. Moreover, no working standards of legal proceeding were to be traced due to strong dependence of judiciary from political leader (the Communist Party) in the socialistic system. On the other hand, the competition law and policy had no adequate elements of old system to be transformed into a new institution. Economic competition, which is based on freedom to decide and to act in individual way, was not compatible

with the system of central planning. Acting on own initiative posed the threat to the entire structure of the centralized system. The concept of “socialistic competition” had no economic nature and was targeted to substitute the lack of external and in the first instance economic motivation of individuals. The winners of “socialistic competition” were awarded by not economic means such as for example a place in the gallery of honor. Moreover, the winners were obligated to help those who were weaker, less capable or less effective. With other words, the term ‘competition’ meant that initiative is permitted within given standards only and competitive acting does not harm anyone. This rules created an informal institution which lead to two different consequences in human behavior after the break-down of the centralized system. One by far more numerous part of population disapproved those who were willing to compete. The other part (individual that close to the leading political structures or belonged to them) saw the advantages of competitive behavior in opportunities to improve individual economic conditions and thus acted true to the motto “the winner take it all”. Both parts neither recognize the necessity nor were really interested in implementing of competition regulating principles. Only within the scope of establishment or the movement to the economy based on free market was possible to transplant competition law as it is recognized in the western world to be one of most important elements to promote economic growth.

3. The third reason why there were no alternatives to a transplantation of the law concerns the economic structures to the moment of transformation itself. To adapt the new institution to national circumstances in the moment of transplantation was also hardly possible. The Competition law is aimed to protect markets and to combat undesirable restraints of competition. As in Russia to begin of transformation process there were no functioning markets the decisionmakers had nothing to adapt to. They could just hope that both process – adaptation of rules and emergence of markets – would go simultaneously. This explains the fact of ongoing modifications of the competition law.

To summarize can be underlined that this particular conditions left Russia no alternatives to the transplantation of competition law at that concrete historical point. For effectiveness of competition policy this approach appeared to be not sufficient, however, its importance cannot be denied.

This experience proves that a set-up of new institutions is a very complex process, which outcome cannot be anticipated exactly. It is a difficult task to implement new institutions, transplanting them from other jurisdictions, in a way that they also in a new environment keep effective. The process must be carefully thought through and carried out. The most important determinant of the success is a strong on enforcement political power as well as dedication of decisionmakers to reform process. Moreover, additional factors must be taken into account as country’s economic-historical heritage, the legal tradition and as well as existing informal institutions as those might impede institutional development significantly. The consideration of all these factors yet admittedly does not guarantee a success, though it increases considerably the chances for a more successful implementation of new institutions.

References

- Adamovich, I. B. (2004): Entstehung von Verfassungen, Tübingen.
- Christiansen, A./Kerber, W. (2006): Competition Policy with Optimally Differentiated Rules Instead of 'Per se Rules vs. Rule of Reason', *Journal of Competition Law and Economics*, No. 2, pp. 215-244.
- Audretsch, D./ Baumol, W./Burke, A. (2001): Competition Policy in Dynamic Markets, in: *International Journal of Industrial Organization*, Vol. 19, pp. 613-634.
- Berkowitz, D./ Pistor, K./Richard, J.-F. (2003): Economic development, legality, and the transplant effect, in: *European Economic Review*, Vol. 47, pp. 165-195.
- Boulanger, C. (2002): *Recht in der Transformation – Rechts- und Verfassungswandel in Mittel- und Osteuropa*, Berlin.
- Butyrkin, A. J. (2004): *Teorija i praktika antimonopol'nogo regulirovanija w weduschich stranach Zapada i Rossii (Theory and Practice of Antimonopoly Regulation the Western Countries and in Russia)*, Moskwa.
- Chavance, B. (2007): Formal and Informal rules in Postsocialist Transformation, the presentation at 16th National Scientific Conference in Parma, Italy.
- Dillenz, O. (1999): *Das russische Wettbewerbsrecht: Recht gegen den unlauteren Wettbewerb und Kartellrecht der Russischen Föderation*, Wien.
- FAS – Federal Antimonopoly Service: <http://www.fas.gov.ru>.
- FAS (2006): The Law “On Protection of Competition” (2006), available from <http://www.fas.gov.ru/competition/443.shtml>.
- FAS (2005a): The Law on Competition of Russian Federation (1991), available from <http://www.fas.gov.ru/law/1363.shtml>.
- FAS (2005b): Osnovnye zadatschi FAS Rossii 2005-2008 (Main Tasks of Russian FAS in the Period of 2005-2008) – Speech of the FAS' Head Mr. Artemjew, J. on the 50th anniversary of the competition authority, available from http://www.fas.gov.ru/files/2880/art_collegue1.ppt#1.
- FAS (2005c): Predvaritel'nye itogi dejatel'nosti antimonopol'nych organov v 2002-2004 gg (Provisional Report of the Competition Authority for the Period of 2002-2004), available from http://www.fas.gov.ru/files/1501/Predvaritel_nye_itogi_2004_g..doc.
- FAS (2005d): Praktika antimonopol'nogo sakonodatel'stva trebuet izmenenij (Antimonopolistic Practice requires Changes), available from http://www.fas.gov.ru/news/n_2031.shtml.
- Golunski, S. A. (1961): Zum Begriff der Rechtsnorm in der Theorie des sozialistischen Staates, in: *Recht und Staat*, No. 8, pp. 1545-1562.
- Goodwin, J. (2001): *No Other Way Out: States and Revolutionary Movements, 1945-1991*, Cambridge Studies in Comparative Politics, Cambridge.
- Ioffe, O. S. (1985): *Soviet Law and Soviet Reality*, Dordrecht et al.

- Jawitsch, L. S. (1982): *Wesen des Rechts*, in: I. Wagner (eds.): *Probleme des objektiven und subjektiven Rechts*, Leipzig, pp. 48-103.
- Kelsen, H. (1955): *The Communist Theory of Law*, London.
- Klenner, H. (1954): *Der Marxismus-Leninismus über das Wesen des Rechts*, Berlin.
- Kosing, A. (1986): *Wörterbuch der marxistisch-leninistischen Philosophie*, Berlin.
- Lenin, W. I. (1972): *Staat und Revolution (1917)*, in: Institut for Marxism-Leninism (eds.): *Werke*, Vol. 25, Berlin, pp. 393-507.
- Moegelin, C. (2003): *Die Transformation von Unrechtstaaten in demokratische Rechtsstaaten*, Berlin.
- Murell, P. (2001): *Assising the Value of Law in Transition Economies*, Michigan.
- North, D. C. (1990): *Institutions, Institutional Change and Economic Performance*, Cambridge.
- North, D. C. (1988): *Theorie des institutionellen Wandels*, Tübingen.
- OECD (2004): *Competition Law and Policy in Russia – An OECD Peer Review*, Paris.
- Pistor, K. / Raiser, M./ Gelfer, S. (2000): *Law and Finance in Transition Economies*, in: *Economics of Transition*, Vol. 8, pp. 325-268.
- Polster, D. (2001): *Finanzintermediation und institutioneller Wandel*, Aachen.
- Streit, M. E. / Mummert, U. (1996): *Grundprobleme der Systemtransformation*, Diskussion Paper, No. 9, Jena.
- Tkatsch, A. (2005): *Kommentarij k zakonu RSFSR „O konkurenczii i ogranitschenii monopolistscheskoj dejatel'nosti na towarnych rynkach“* (Comment on the Law on Competition of the RSFSR), Moskau.
- Transparency international (2000), *Confronting Corruption: The Elements of a National Integrity System*, TI Source Book, pp. 259-269, available from www.transparency.org/sourcebook/26html.
- Tridico, P. (2004): *Institutional Change and Economic Performance in Transition Economics: The Case of Poland*, Working Paper, No. 74, Sussex European Institute, Sussex.
- Voigt, S./ Engerer, H. (2002): *Institutions and Transformation – Possible Policy Implications of the New Institutional Economics*, in: K. F. Zimmermann (eds.), *Frontiers in Economics*, Berlin et al, pp. 127-184.
- Voigt, S. /Wagener, H.-J. (2002): *Constitutions, Markets and Law - Recent Experiences in Transition Economies*,Cheltenham.
- Voigt, S. (1999): *Choosing how to Choose – The Narrow Path Between Effective Constitutions and Wishful Thinking in Constitutional Choice*, Diskussionsbeitrag No. 15/99, Max-Planck-Institut zur Erforschung von Wirtschaftssystemen, Jena.
- Wiesenthal, H. (2001): *Gelegenheit und Entscheidung : Policies und Politics erfolgreicher Transformationssteuerung*, Wiesbaden.
- Yakovlev, A. M. (1995): *The Rule-of-Law Ideal and Russian Reality*, in: S. Frankowski/P.B. Stephan (eds.): *Legal Reform in Post-Communist Europe. The View from Within*, Dordrecht et al, pp. 5-19.