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ANTI-COMPETITIVE AGREEMENTS IN RUSSIAN COURTS (2008 - 2012): ANTITRUST LAW IMPLEMENTATION AND INTERPETATION

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ANTI-COMPETITIVE AGREEMENTS IN RUSSIAN COURTS (2008 - 2012): ANTITRUST LAW IMPLEMENTATION AND INTERPETATION[2]

This paper analyses antitrust enforcement practice in Russia (2008–2012), in the area of competition-restricting agreements (horizontal and vertical). The analysis is based on a court decision database of litigation with the Russian competition authority (FAS). The database contains 400 cases, including 236 horizontal agreements (HA), 164 other agreements (vertical agreements (VA), conglomerate and mixed agreements). On the basis of this database important features of the interpretation and implementation of the competition law in Russian practice and the priority areas of the enforcement were identified. Antitrust policy was analysed taking into account the risks of type 1 and 2 errors, including the problem of the flexibility of prohibitions (*per se* vs *rule of reason* (ROR)), standards of proof, the problem of consistency of enforcement.

Key words: competition law, antitrust policy, collusion, vertical agreements, arbitration practice

JEL Classification: K21, L41, L42.

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Introduction.

Russian anti-competitive agreement and cartel legislation has developed significantly in terms of the regulation of economic activities in the competition law, and in terms of sanctions for certain types of violations. (For more about this transformation, see [Avdasheva et al. 2011; Avdasheva, Shastitko 2011b; Makarov, 2014].)

At the same time, the analysis of the antitrust practice shows that in many jurisdictions enforcement, even with more or less similar legal procedures and competition laws, can vary greatly (the use of the principles of *per se* (the absolute prohibition of certain types of agreements) and ROR (a balanced approach, taking into account the current and potential influence of an agreement on social welfare) , different approaches to the agreements of various types (from Hardcore cartels to exclusive dealing), the standards of proof problem and other institutional problems). [see more about ROR and *per se* and other characteristics - Makarov, 2014].

Thus, a crucial role in the antitrust policy plays not only the legislative framework, but also judicial practice, which in the end generates main functions of antitrust system:

- the interpretation and concretization of the legislative norms;
- the classification of observed strategic behaviour according to legislative norms.
- the elimination of type 1 errors in dealing with complaints against competition authority decisions.
- arbitration practice which shows how antitrust norms are implemented in practice and what norms are very rarely used (a good example is the formal criminal responsibility for collusion [Kinev, 2012]).

This article has the following objectives:

- to analyse the competition policy principle (*per se* or ROR) which in practice has been formed in the Russian enforcement (including specificity for certain types of agreements).
- to identify the main causes of type 1 errors, that is, the cases in which competition authority decisions were overturned by the court. We assume that final court decisions are correct and adequate according to competition law, and in this case government accusations can be regarded as type 1 errors.
- to analyse the arguments and standards of proof which were used as the basis for court decisions on claims against the competition authority.

- to analyse the main sectors of the economy and types of agreements which were most frequently discussed in courts, and how litigation practice depends on this.

- to analyse the main factors of successful claims against competition authority decisions.

The paper is organized in the following way. Section 1 contains a brief discussion of Russian competition law and enforcement in the field of anti-competitive agreements. Section 2 provides a description of the database of courts decisions. Section 3 analyses the litigation statistics in relation to different markets and types of agreements. Section 4 analyses the most important sources of type 1 errors in antitrust policy against anti-competitive agreements and provides examples of those risks from courts discussions. Section 5 concludes.

1. Competition law and competition policy in Russia: key features and risks.

Russian antitrust legislation had a long and complicated transformation and currently corresponds to European competition law with certain special features and risks of errors in practice (Avdasheva, Shastitko, 2011b; Avdasheva et al. 2011; Makarov 2014). In enforcement practice in cases of anti-competitive agreements, type 1 and type 2 errors are equally dangerous, which in the first case leads to the punishment of the innocent companies, and in the second case means an agent restricting competition can avoid sanctions [Joskow, 2002]. If the probability of these errors is significant, then it can lead to the complete disorganization of antitrust policy with destroyed agent incentives.

The risk of errors can be significantly reduced, when there are high standards of proof and a sufficient level of economic analysis in litigation. The tendency to analyse the market structure, rather than the company's strategic behaviour, is significant mistake [Avdasheva, Shastitko, 2011c].

Table 1 shows the main features Russian competition law.

Tab.1. Competition law in Russia

Competition law	Federal law from 26.07.2006 135 – FZ "On protection of competition" English text - http://www.apeccp.org.tw/doc/Workshop/w2012/12_cplg1_037.pdf
Regulator	Federal Antimonopoly Service (FAS) of the Russian Federation
Hardcore cartel in legislation	No
De Minimus HA	0%
De Minimus VA	20%
Approach	Primarily PER SE
ROR in legislation	Article 13, similar to EU practice, 2 conditions: 1) perfection of production, sale of goods or stimulation of technical, economic progress or rising competitive capacity of the Russian goods in the world market 2) obtaining by consumers of benefits (advantages) which are proportionate to the benefits (advantages) obtained by the economic entities in the result of actions (lack of action), agreements and concerted practices, transactions, other actions.
Criminal responsibility	Up to 6 years for cartels, actually case rare implementation
Administrative responsibility in collusion cases, corporate monetary fine	1- 15%
Leniency	Yes, was introduced in 2007, no discounts for subsequent companies (Avdasheva, Shastitko, 2011 a)
Private enforcement	Actually no, only formal opportunities
Special courts (or departments) for antitrust issues	No

This article shows the main sources of type 1 errors in Russian antitrust enforcement, on the basis of court decisions where companies were able to successfully win lawsuits against FAS based on the Article 11 (11.1) of the Competition Law.

Type 1 errors can occur for various reasons. First, the competition authority may misinterpret a company's actions and incorrectly regard them as unlawful. A good example in Russia is the problem of how to distinguish between concerted actions and merely synchronous actions of companies, which were caused by objective reasons [Avdasheva 2011; Ivaldi et al, 2003].

The second major problem is the optimal approach to the prohibition of agreements (*per se* vs ROR), the evaluation of not only the behavior of companies, but also the consequences of such behaviour. Sometimes the agreements could lead to adverse effects, but does not actually led to, or even more, led to pro-competitive effects and (or) social benefits. The discussion about the optimal approach is also a discussion about the balance between inevitable risks of type 1 and type 2 errors [Dzagurova, 2012]. This is especially true for vertical agreements (VA). In the history of the enforcement practice in this field up to 2005, we almost have no cases of this type, but after that the *per se* approach mainly was used without any evaluation of positive effects [Avdasheva, Dzagurova 2010].

In 2011 there was legislative reform in the area of concerted actions (public announcement of actions criterion). This played a positive role and improved the standards of proof in cases of concerted action; unfortunately, many of the problems, discussed below, remain actual nowadays.

2. The database

The database of anti-competitive agreements for this article was based on the data collected by the Laboratory of antitrust and competition studies Institute for Industrial and Market Studies (IIMS) at the Higher School of Economics, under the guidance of S.B. Avdasheva (for details about the database and its analysis, see. [Avdasheva et al, 2015, Avdasheva et al, 2016]).

The database contains Arbitrazh court litigation with FAS (or regional FAS offices) for cases of the violation of Article 11 of the competition law. (Litigation results are published on www.kad.arbitr.ru). For each case more information can be found at this site (see Appendix).

The court decision database was based on information published by FAS about their activity on the official website. Sometimes such litigation lasted several years, but the information was collected for 2008–2012, so it represents final results that will not be challenged.

The database contains 400 cases, including 236 horizontal agreements, 164 vertical, conglomerate and mixed agreements. In these cases companies tried to challenge FAS accusations of violations of Article 11 of the competition law (competition restriction agreements, including horizontal agreements (HA) or vertical agreements (VA) or concerted actions). The database includes "classic" cases of antitrust policy with the exception of special, unique cases about other issues (for example, intellectual property rights). We should note that sometimes the FAS takes part in litigations not connected with classical antitrust goals [Avdasheva et al, 2016], such cases were not included in the database.

3. Litigations in Russian enforcement practice (2008 – 2012). Key markets and results.

The following results were obtained from the generated database. In Arbitrazh courts, the Federal Antimonopoly Service (FAS) won 226 cases and lost 174. (Figure 1). We regard as victories the cases in which the FAS won as a whole or in the most important issues (for example, the Court reduced the amount of the fine, but still found the company guilty).

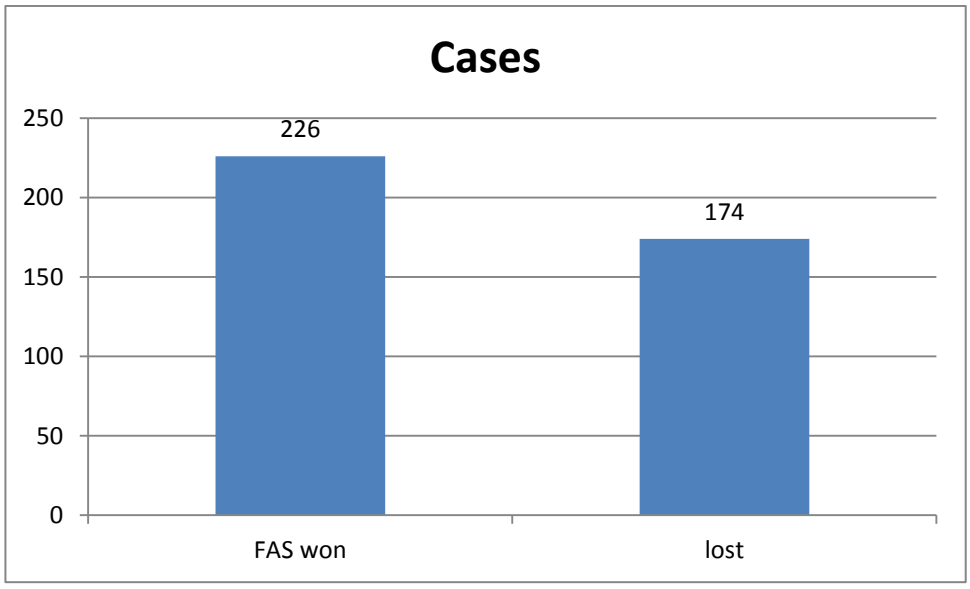


Fig. 1. Courts statistics in general (2008 - 2012).

Source: calculated by the author

It is interesting that the companies were not significantly more successful in challenging vertical agreements violations (most of the "other" group were VA) (Figure 2). According to economic theory and the experience of developed countries, it can be easier to prove and justify the pro-competitive effects and the benefits for social welfare of VA, which may help in the court. [see Pittman, 1997; Verouden 2003; Popofsky, 2006; Crane, 2009; Avdasheva 2010; Sokol, 2014]. However, in Russia the situation is different, first of all this is because the country has developed a *per se* approach in enforcement practice also in the field of vertical agreements (VA).

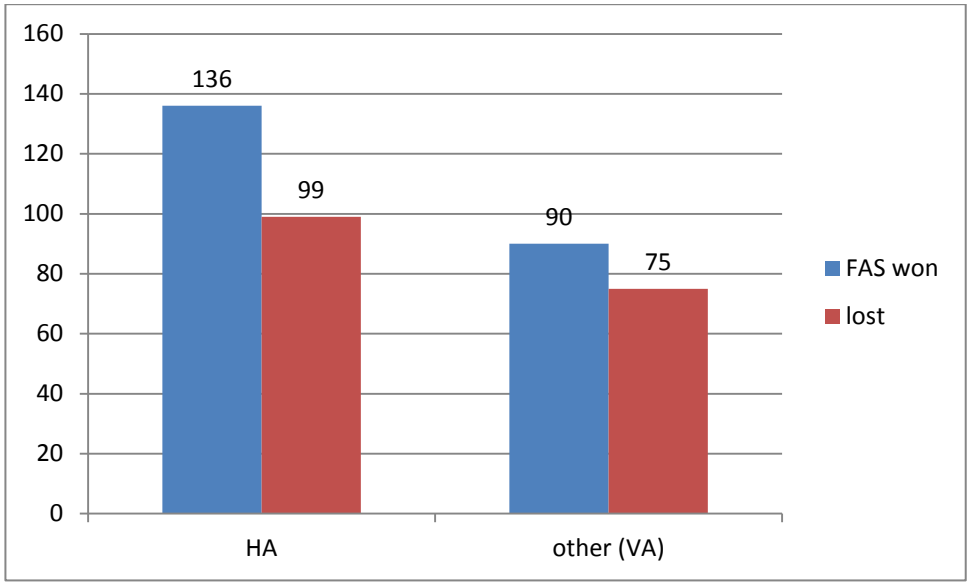


Fig. 2. Courts statistic depending on the type of agreements.

Source: Calculated by the author

Each litigation was discussed in courts on average in three (2,92) court sessions. Figure 3 shows information about the number of court sessions for different cases. Traditionally there may be 4 instances; the first instance, appeal and cassation, and further consideration in the Supreme Court. However, sometimes the court can refer the case back to the previous instance, as a result some cases were discussed in courts up to 8- 9 times. The percentage of cases won by the FAS is shown in Figure 4.

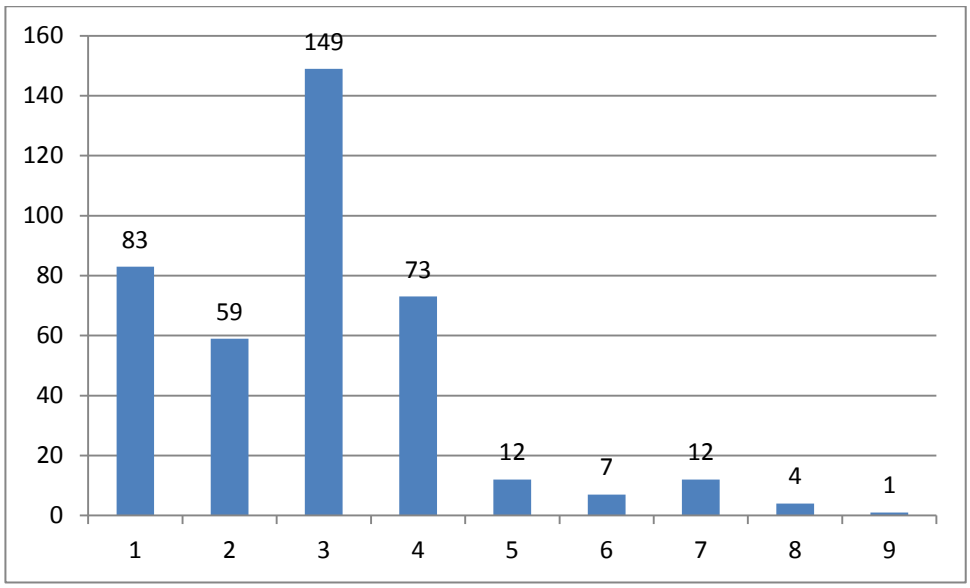


Fig. 3. The number of court sessions for anti-competitive agreements litigations.

Source: Calculated by the author.

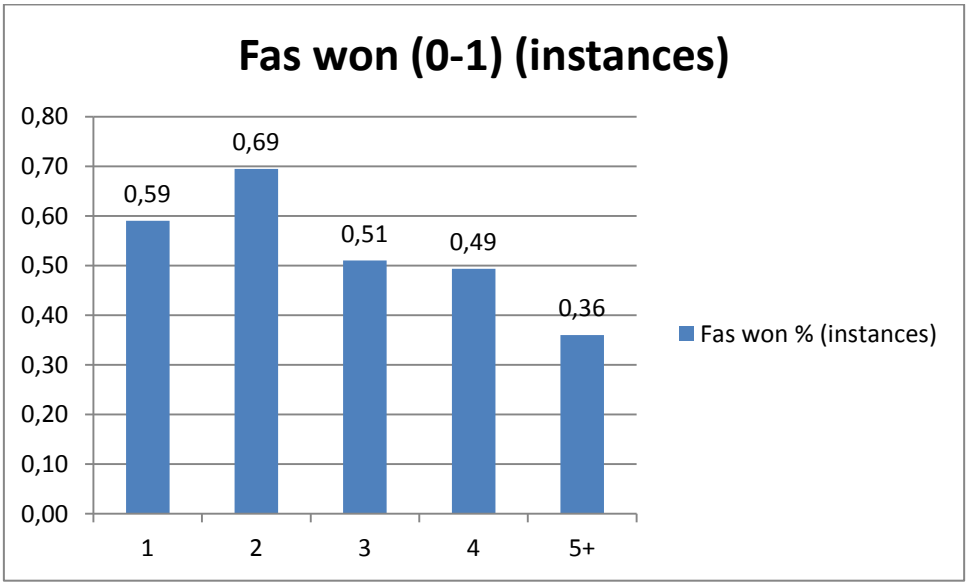


Fig. 4. The FAS victory in Arbitrazh courts, depending on the number of sessions on cases.

Source: Calculated by the author

The database shows, that Russian antitrust enforcement discussed several priority markets that were under close attention of the regulator (Figure 5).

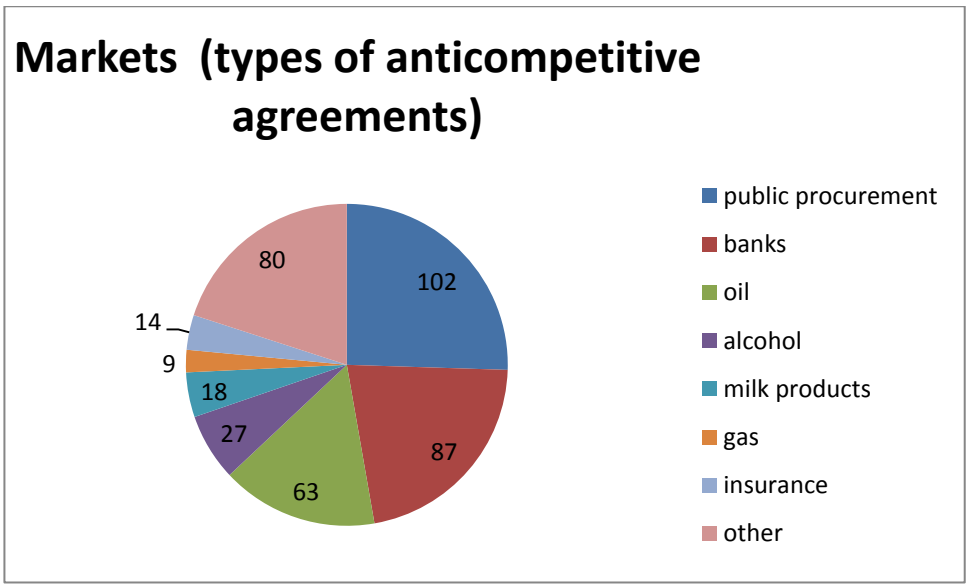


Fig. 5. Cases in courts and economic sectors.

Source: Calculated by the author

Among horizontal agreements there are public procurement cases (including the procurement for various state owned organizations), concerted actions (collusion) in the oil market – 61 cases (2 cases related to VA), also 9 similar gas cases, LPG (liquefied petroleum gas), 15 cases occurred in the alcohol market, often connected with the attempts of local alcohol producers to pursue a coordinated policy in order to prevent the market entry of suppliers from other regions.

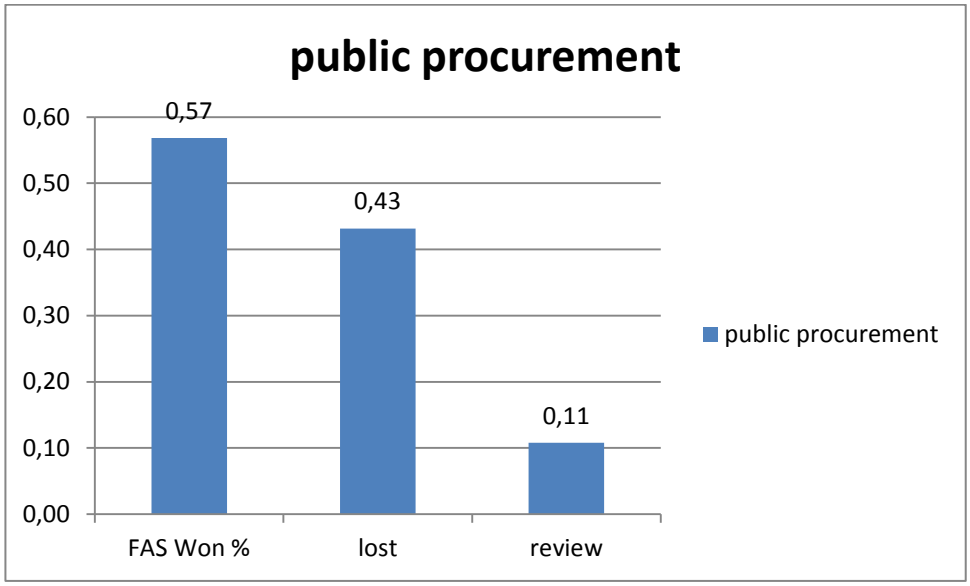
Other agreements formed 4 significant groups. This is primarily a conglomerate collusion of insurance companies and banks (banks - 87 cases)[3], or with other economic agents, such as transport companies (insurance - 14 cases), in which the client was forced to pay for unnecessary services (especially additional insurance), or had a limited right to choose the appropriate company.

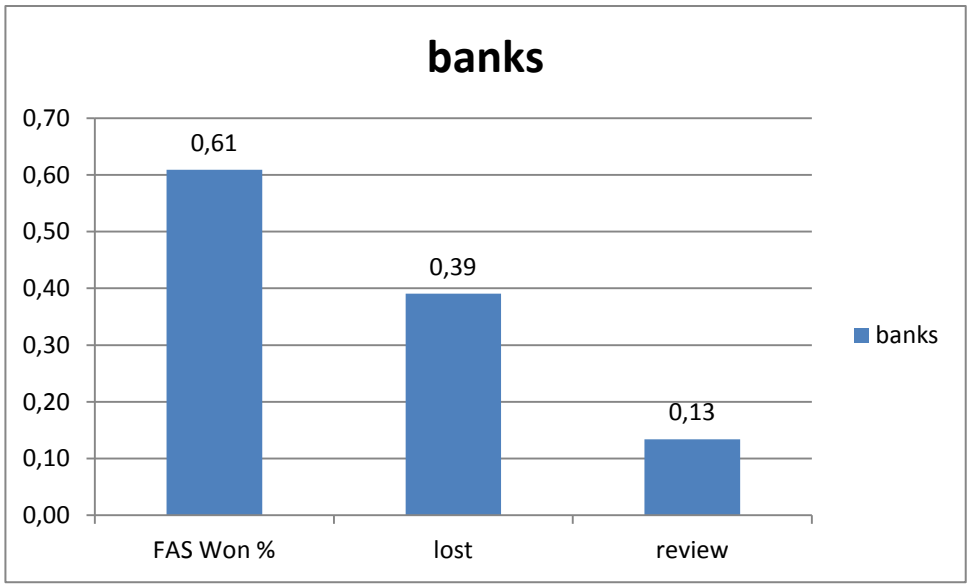
In addition, there are VA connected with dairy products (14 cases) and alcohol (12 cases). In the alcohol sector 8 cases were connected with brewery firm "Baltika", who successfully challenged FAS decisions about concerted marketing agreement actions with various restaurants and bars. In the dairy market there are different types of agreements. There are different contracts between producers and distributors (in particular, cases "Unimilk", for example cases A70-4690/2009, A70-5044/2009), and for example, reserving certain places in

[3] Also were included several cases and of other banking agreements on cooperation, that actually led to the same kind of consequences, such as the case A06-1580/2009 (cooperation between banks and construction firms in deposit placement).

shops for particular products (A48-1211/08), or maintaining low purchase prices for agricultural producers (A65-3151/2010). See Fig. 6–9 for different statistics depending on the market.

The “review” column mean the fraction of cases that changed the result (FAS won → lost or lost→ win). In general 62 cases were reviewed in courts (15,5%), FAS won 32 cases after the first lost, and lost 30 cases after first win.





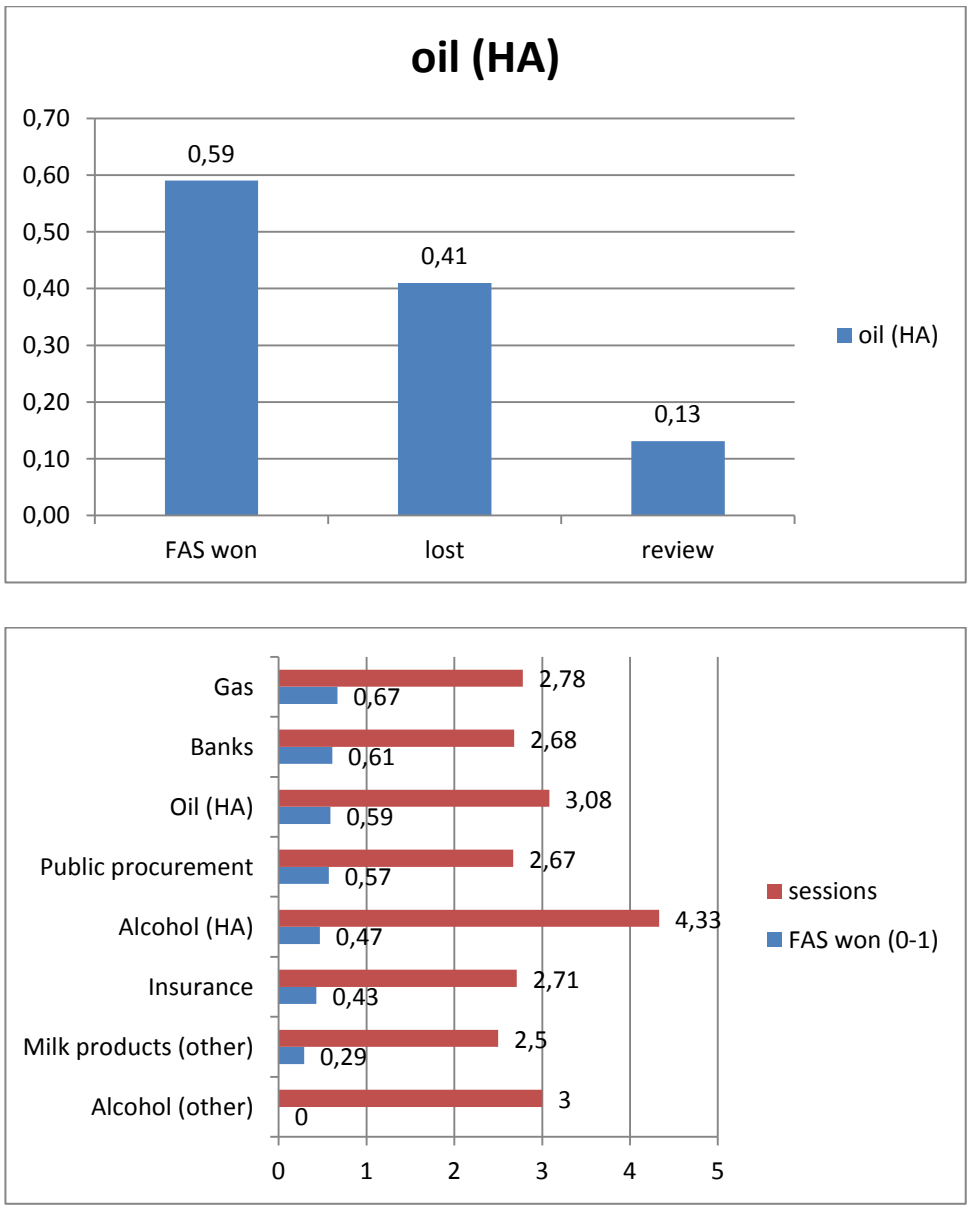


Fig. 6 - 9. Statistics depending on the market.

Source: Calculated by the author

There are different statistics for FAS litigation with companies in different economic sectors. We see that FAS often managed to win in litigation connected with HA in the gas (67%) and oil (59%) markets and in the banking sector (61%), but companies were more successful in courts in the field of VA (dairy products, alcohol, insurance). Standards of proof characteristics, which will be discussed later, played an important role in these examples.

4. Type 1 errors in Russian enforcement: key reasons and risks

After the database analysis the following main causes of type 1 errors can be identified. In this study we estimate type 1 errors as situations when the FAS lost in courts and after litigation company was found not guilty according to the competition law.

Tab.2. The main causes of type 1 errors risks in Russian enforcement

The main causes of type 1 errors risks in Russian enforcement
Problems and legal uncertainty in the use of the ROR principle *Accusations of concerted actions with weak evidence* *The problem of defining market boundaries (product and geographic)* *The regulator's failure to comply with formal procedure*

1) Problems and legal uncertainty in the use of the ROR principle

The database analysis shows that elements of the ROR approach of the competition law (including article 13) are almost unused in enforcement practice. This may be due to the strict conditions of the ROR approach and the lack of methodology of consequence estimation. As a result companies rarely attempt to argue their position with reference to the Article 13, and such arguments are rarely considered in detail in the courts. We see only a few cases, where companies used the logic of the Article 13. For example, the argument that there was increasing competitiveness (A76-15422/2009), the argument that companies developed successfully after the agreement (A33-1952/2010) the argument that there were quality and safety guarantees for consumers (A27-18920/2009) and in case A60-20780/2012 about price limit agreement the court overturned the fine because of the positive effects (market stabilization and price suppression).

Nevertheless, courts abandon serious discussions about social welfare effects, and analyse the legal admissibility of the agreements and formal requirements. For example, in case A70-2074/2010, the court said directly that the agreement may have improved customers

position in terms of services reliability, but concluded that the positive effects should not be achieved by violating the legal requirements[4], thus emphasizing the *per se* approach domination.

Moreover, courts adherence to the *per se* approach is sometimes mentioned directly in the decisions of the court. As a result, if the consequences of the agreement and the potential social benefits are not considered and discussed in courts, it dramatically reduces the incentives for companies to provide information and estimations of the agreement effects, and dramatically reduces the role of economic analysis in decision making.

At the same time, for VA courts, without using directly the Article 13, sometimes take into account the direct effects of the agreement. Companies are able to prove that an agreement should not be considered as a violation of the law, if FAS showed no effects and the actual restriction of competition and/or damage, for example, the "Unimilk" (A62-85/2008) and “Baltika” (A45-15643/2009) litigation.

Companies also tried to prove that the agreement was not implemented in practice. Sometimes, the courts supported this argument. In the case of the alcohol market in Kemerovo (A27-18919/2009), one of the arguments was just that the agreement was not fully implemented, the company proved that they did not conclude the agreement, but only discussed it. In the chlorine case (A40-74596/2011) the court agreed that if the agreement was discussed but not signed and implemented in practice, so this situation cannot be regarded as a violation.

In case A71-13343/2009, representatives of "Rosbank" also pointed out that the restriction of the mortgage borrowers rights in the agreements was not always applied in practice. In case A70-5045/2009, the Court also decided that a signed agreement could not lead to negative consequences if it was not actually implemented. In case A55-17258/2010 the bank won in court and proved that the contract between the bank and the insurance company in practice did not prevent clients with insurance from other companies from obtaining credit, or in case A35-610/2012 bank pointed out that actually a third of customers avoided the imposed insurance. In case A65-5556/2012 the court decided that the conjunction of bank credit and certain insurance was not a violation and infringement, because customers could always terminate the insurance contract in future if they found a better option.

In some cases, the courts, even recognizing the non-fulfilment of the agreement, pointed out that the law prohibits not only agreements which have restricted competition, but which

[4] The bank in this case required the prior approval of the insurance company and pointed out that independent insurance companies often use incompetence of customers and offer them the policies of the companies on the verge of bankruptcy or already bankrupt, or without a license for certain insurance activities, etc.

could lead to a restriction, and therefore the preparation of a potentially anti-competitive agreement, is enough to be recognized as a violation of the law.

There were also cases where the agreement itself does not formally violate the law, but its implementation led in practice to a violation of the legal rights of counterparties. For example, in the case of a dealer agreement A40-50033/10 the court found that dealership agreement was not as dangerous for competition as its maintenance actions in practice. In the case against Johnson & Johnson (A76-15244 / 2010) court (the 3-instance) found that more important than the formal written procedures were their implementation in practice, and the specific facts of discrimination were pointed out.

Thus, Russian court practice has evolved in a complicated and contradictory way.

2) Accusations of concerted actions with weak evidence

The second important feature in Russian enforcement is the tendency for concerted actions accusations tendency with small amount of cartel claims. This situation is understandable, because it is difficult to obtain direct evidence of collusion, about negotiations between companies. In this situation the regulator may prefer to start concerted actions litigation, when direct evidence of coordination and negotiations are not needed (as opposed to a cartel case, with the formalization of agreements). Concerted action suggests that competitors without signing formal agreements and negotiating, in practice, still adhere to the same market strategy (with the absence of objective reasons), unfavourable for social welfare.

For example, in public procurement there are few cases when negotiations (for example, the case A76-10362 / 2010 or the case A60-2435 /2010) were recorded. Other important sources of evidence were the family or business connections of auction participants, or subcontractors, which provide the company benefits of non-participation in the auction (good examples - the case A76-15247/2010 or A53-18636/2011).

There have been cases where companies were able to show that they could not take part in the auction for some legitimate reasons. For example, this could happen due to a lack of the necessary commodities at the time of the auction (A76-13622/2010) or because the company had already won another auction, and did not have the resources to fulfil new contract (A56-18591/2010). There was an unusual case, when companies were unable to participate in the

auction because of the lack of reliable information about the time of the meeting (A69-607/2010).

However, **in the majority of cases** there was no evidence that the actions of the companies were in any way coordinated, or that non-participation of companies in the auction was based on some objective reasons. In fact, the only thing that remains to the court and the regulator is – to observe passive participation in the auction, when a significant number of participants simply do not come to the auction, or come but do not try to reduce the purchase price or bid. The court has to either use the presumption of innocence (denoting that the law does not requires that companies must lower the price), or else to agree with the legal position of the Supreme Arbitrazh Court Presidium (decision of 21.04.2009 N 15956/08), that competition law "can not be interpreted as excluding the possibility of the antitrust authority to prove the existence of concerted actions through their objectified results". In the practice of EU countries and the United States, this approach is, in fact unacceptable, there is a rigid distinction between concerted actions (with a proven exchange of information) and objective interdependence of market participants and in the case of similar market conditions [Avdasheva, 2011].

In Russian practice however most cases of public procurement (and in general, concerted actions) are resolved with the minimum available evidence (a good example is the case A76-14962/2010) through the analysis of an objective result (low or zero prices decrease in the auction). As a result, inevitably type 1 and 2 errors arise, when passive participation in the auction, which may in fact have very different reasons, may with equal certainty be interpreted as a violation of the law or not. An objective obstacle in this situation is the difficulty for FAS employees to obtain evidence that could prove anti-competitive cooperation. For example, in case A71-453/2010 the FAS official tried to become a client of the bank to prove that it violates the law imposing an insurance contract, but the court rejected this evidence, finding that such actions are not permitted by the law.

A rather controversial practice has developed with horizontal concerted actions in the oil and LPG markets. In some cases, cost structure and dynamics were carefully discussed in courts. For example, the significant differences in the purchase price and the same retail price is a strong argument in favour of the fact of concerted actions (A49-795/2010) or strange and unusual market imbalances in comparative pricing (A63-12178/2008). Another important argument (case A33-12094/2009) is the absence of internal company documents on pricing and regulation, in such cases it is difficult to explain the price parallelism in terms of objective economic processes

within the firm. In addition, the oil market is subject to special attention from the government [Avdasheva, Yusupova, 2011].

Still there is a problem when cases with the presence of an obvious price leader and followers are considered in terms of concerted actions. There are examples where companies were able to prove that concerted actions could be maintained only by mutual interest, otherwise the strategy of price leadership and the reactions of small firms that do not fit into the logic of violation would need to be discussed (A69-113/2009, A42-5795/2009 and A34-3924/2010). In such cases the focus on the objective result (similar prices) without market share and cost analysis has a high risk of type 1 error.

However, in Russian experience there is another problem, which has partly a terminological nature: the use of concerted actions to prohibit non – horizontal, but vertical agreements, conglomerate cooperation. This applies to almost all cases of interaction between banks and insurance companies (as A76-16182 /2009), as well as "Baltika" marketing cooperation agreements with a variety of restaurants, bars (good examples - A45-15640 /2009 or A45-13960 /2009).

This practice seems unexpected according to competition law. The law presumed (and after 2011 directly states) that concerted actions may happen when companies are competitors in the same market (horizontal agreements). Nevertheless often before 2011 and sometimes even after 2011 courts regarded vertical and conglomerate agreements as concerted actions. Of course, VA and marketing agreements could lead to adverse effects, but such qualifications charges, initially focused on an entirely different type of economic relations could also significantly raise the risk of type 1 and 2 errors.

3) The problem of defining market boundaries (product and geographical)

Geographical and product market boundaries were often discussed in court. With regard to the geographical market boundaries, there are "qualified" cases using the hypothetic monopolist test (SSNIP) and the analysis of the possibility of customers to replace goods, taking into account transport costs, etc. At the same time, for example, in the case A32-21980/2008, the court found that the geographical boundaries of the market should a priori coincide with municipal boundaries without economic justification or any estimation of the possibility to switch to a new supplier. From the point of view of economic theory and legal procedures, this

conclusion can often be inaccurate and leads to an overestimation of the market share of participants and may result in increased sanctions.

Companies tried to protect their market boundary estimations. For example, in case A47-5499/2009, "Lukoil" was able to challenge the FAS decision, showing that the company had no incentives for concerted actions in a particular municipality, since the pricing policy of the company is determined not on this municipal level. In case A65-14117/2009 the court found that FAS had no right to automatically determine the boundaries of the market in terms of municipalities, and it was necessary to conduct the SSNIP test.

There are also examples of type 1 errors from the misinterpretation of product groups. For example, in the case of the airport "Koltsovo" (A60-3944 /2008) fuel storage and fuel services were recognized as the same market, despite company argumentation that they are two different markets with different actors and cost structures. In case A40-24308/12 the court pointed out that both liquid and solid soda must be taken into account in market boundaries discussion. In case (A71-13063/2008), again, the geographical boundaries were marked by region, and product boundaries were assumed only the cheese of this producer giving a market share of 100%.

In general, the thesis of the incorrect definition of market boundaries was a very important argument for the defence in courts litigation. This argument was broadly used in cases on vertical agreements ("Unimilk", A70-5044 / 2009 or "Baltika"A45-13961/2009). In such cases, as in the case of "Baltika" without correct market boundaries it impossible to determine the effects of anti-competitive agreements, taking into account the risks of creating entrance barriers for competitors, the main threat in such marketing agreements.

4) The regulator's failure to comply with formal procedure

Mixed practice has developed with the use of formal regulation ("Order 220"[5]). This Order provides a regulator with a clear scheme for a full and objective investigation of the market and market activities of companies for suspected violation of the competition law. This order, strictly speaking, is not a requirement, but is a recommendation for anti-competitive agreements.

[5] FAS Russia Order of 28.04.2010 N 220 "On approval of the order of the commodity market competition analysis" (Registered in the Ministry of Justice of Russia 02.08.2010 N 18026)

Companies sometimes appeal to the fact that FAS did not use this procedure (so full and objective investigation of the market was not made), and sometimes courts agreed with this logic (A45-13964 / 2009 or A45-9598/2012), in other cases, the court justified the optional use of the order, for example, in the case A79-109/2009 or A40-109962/2011 the court concluded that, since the considered vertical agreements are subject to *per se* prohibition, that's why 220 Order and all the steps of the procedure are not required. However in the "Coca-Cola" case (A73-7767/2012) the court decided that the regulator had no reason to argue market division if it had analysed only one agreement without a full market analysis.

This problem seems to be rather complicated. A full market analysis can be difficult and expensive, however, in some cases, especially VA, a correct decision is difficult to make without a thorough assessment of market conditions, market strategies, entry barriers etc. Otherwise, as for example in case A08-6564/2011, the strange situation may happen in the court, when classical VA may be prohibited by the regulator in terms of HA. Or as in case A09-9554/2011 when wholesale and retail markets were regarded as the same single market by the regulator. To distinguish between concerted actions and models of price leadership in the market of petrol or LPG it is absolutely necessary to carry out a large-scale analysis of the market and its borders in accordance with the Order 220 (as for example was made by the court in the case A64-1435/2010 or A32-44622/2011 with a dominant firm and consequent price leadership model). Order 220 should be observed taking into account type 1 and type 2 errors.

5. Conclusions.

This article analyses the characteristics and problems of antitrust law enforcement in Russia in the field of competition-restricting agreements (horizontal and vertical) for the period 2008 - 2012.

A database of court decisions involving litigation with FAS was created. The database contains 400 cases, including 236 HA (horizontal agreements), 164 VA (vertical agreements), conglomerate and mixed agreements. Companies were successful in litigation with the FAS in 43,5% of cases and cases were discussed in courts on average 3 times.

Several markets which are often subject to litigation and regulator attention in Russia were identified. In the area of HA, public procurement, the oil, LPG and alcohol markets were often discussed in courts. In the field of other agreements (mostly VA) important cases were with insurance companies (in their interactions with banking, transport and other institutions),

and the dairy product and alcohol markets. The courts most often supported the FAS position in cases of the oil and gas markets and banks agreements, the regulator was least successful in VA cases (alcohol, milk). These major sectors remained more or less stable during the five years under consideration. At the same time, we can conclude that this situation reflects not only the objective importance of these markets for the Russian economy, but also the existing problems in sector regulation, which results in a large amount of litigation.

Two prominent examples are the oil and banking sectors. In particular, the oil market in Russia is becoming more and more monopolized, there are currently only four large companies, in the regional context this means greater monopolization with 2–3 major players or even a price leadership model with a large vertically integrated company and small independent stations. In such conditions it is difficult to expect high price differentiation. Thus, the amount of concerted action litigation could be reduced by recognising changes in the market structure and merger control, nowadays it is a struggle more with the negative consequences of the market structure, rather than with the negative causes.

Also it seems that a large number of court cases connected with interactions of banks and insurance companies, could be reduced. These markets are closely linked, we notice accusations against related structures (such as “Alfa Bank” and “Alfa Insurance”, “Renaissance Insurance” and “Renaissance Bank”), however there is a lack of common understanding of the rules of the game in this field. So in litigation we see a variety of approaches, from absolute *per se* when any recommendations of the bank regarding the insurance companies are considered as a violation, to completely liberal, when the insurance contract is not considered as a burden to the client, because there is the possibility of terminating the contract if a better alternative is found. Such a broad interpretation of the admissibility of a combination of bank loans and a certain type of insurance provokes further agreements of this kind, and later FAS intervention. The amount of litigation could be reduced through the adoption of a new law or a Supreme Court decision establishing clear and unambiguous criteria for the extent of possible cooperation of insurance and banking (and not just banking) organizations.

The analysis shows enforcement features that contribute to additional risks of type 1 errors, situations when the court finds the FAS conclusions invalid and companies not guilty in competition law violation.

• In Russia the *per se* approach was established in practice both for HA and VA, arguments about the possible positive effects of the agreement, taking into account the Article 13 conditions, are not usually considered in courts. This discourages companies in presenting the

arguments in their own defence, and this reduces the role of economic analysis in antitrust enforcement.

• The lack of the use of ROR mechanism was in some way compensated in courts by arguments about the absence of the actual implementation of signed agreements and incorrect definition of the market boundaries. However, the practice of these discussions remains very controversial, which may lead to risks not only type 1 errors, but also type 2 errors.

• In cases of concerted actions relatively weak direct evidence was used and decisions were based on the analysis of the objective results (simultaneous price increases, non-participation in an auction). In cases of this kind there is the problem of quite low standards of proof.

• In Russian legal practice concerted action qualification dominated, including unexpected results for VA and marketing agreements, this situation together with the lower standards of proof in cases of this kind also contribute to the risks of type 1 errors.

• A tendency to use the *per se* approach (a priori prohibition regardless of the effects), especially for VA, led to the ignoring of formal procedures including Order 220 (with full and objective investigation of the market). As a result, in some cases there are significant errors in the analysis of the market conditions, geographical and product boundaries, and market share. This sometimes helped companies to challenge the decision of FAS and could also lead to type 2 errors (when the guilty company managed to win court on formal grounds, for example in case of incorrect geographical market boundaries).

• In cases of price leadership (in particular in the petrol market) non-compliance with Order 220 led to concerted action litigation, based on the analysis of the objective results (similar prices), without consideration of market share and market strategies.

These results describe the situation in Russian antitrust enforcement and the situation may vary greatly in other jurisdictions. Nevertheless, we can assume that the 4 main causes of type 1 errors discussed in this article can occur in other countries, especially countries with transition economies which have had to create completely new antitrust institutions in last decades:

1)problems and legal uncertainty in the use of the ROR principle
2)accusations of concerted actions with weak evidence
3)the problem of defining market boundaries (product and geographic)
4)the regulator's failure to comply with formal procedure

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Appendix

Brief information about courts decisions, mentioned in the article, basic decisions

Reshenie ot 18.08.2009 po delu No. A70-4690/2009 arbitrazhnogo suda Tjumenskoy oblasti po delu po zajavleniiu OOO “Komaks” ob osparivanii reshenia regional'nogo otdeleniia FAS.

Reshenie ot 22.07.2009 po delu No. A70-5044/2009 arbitrazhnogo suda Tjumenskoy oblasti po delu po zajavleniiu OOO “Unimilk” ob osparivanii reshenia regional'nogo otdeleniia FAS.

Reshenie ot 25.03.2008 po delu No. A48-1211/08 arbitrazhnogo suda Orlovskoj oblastipo delu po zajavleniiu OOO “Unimilk” ob osparivanii reshenia regional'nogo otdeleniia FAS.

Reshenie ot 03.06.2009 po delu No. A06-1580/2009 arbitrazhnogo suda Astrahanskoj oblasti po delu po zajavleniiu Akcionernyj kommercheskij bank RF v lice Astrahanskogo OSB №8625 Sberbanka Rossiiob osparivanii reshenia regional'nogo otdeleniia FAS.

Reshenie ot 08.06.2010 po delu No. A65-3151/2010 arbitrazhnogo suda Respubliki Tatarstan po delu po zajavleniiu OAO “Alabuga sote” ob osparivanii reshenia regional'nogo otdeleniia FAS.

Reshenie ot 24.05.2010 po delu No. A76-15422/2009 arbitrazhnogo suda Cheljabinskoj oblasti po delu po zajavleniiu OSAOO “Ingosstrah”ob osparivanii reshenia regional'nogo otdeleniia FAS.

Reshenie ot 12.05.2010 po delu No. A33-1952/2010 arbitrazhnogo suda Krasnojarskogo kraja po delu po zajavleniiu juridicheskaja firma Al Rud ob osparivanii reshenia regional'nogo otdeleniia FAS.

Reshenie ot 27.11.2009 po delu No. A27- 18920/2009 arbitrazhnogo suda Kemerovskoj oblasti po delu po zajavleniiu OOO "Jenzhel Grupp” ob osparivanii reshenia regional'nogo otdeleniia FAS.

Reshenie ot 15.08.2012 po delu No. A60-20780/2012 arbitrazhnogo suda Sverdlovskoj oblasti po delu po zajavleniiu Nekommercheskaja organizacija "Sojuz predprijatij molochnoj promyshlennosti Sverdlovskoj oblasti"ob osparivanii reshenia regional'nogo otdeleniia FAS.

Reshenie ot 27.05.2010 po delu No. A70-2074/2010 arbitrazhnogo suda Tjumenskoj oblasti po delu po zajavleniiu OSAO SK "RESO-Garantija” ob osparivanii reshenia regional'nogo otdeleniia FAS.

Reshenie ot 14.04.2008 po delu No. A62-85/2008 arbitrazhnogo suda Smolenskoj oblasti po delu po zajavleniiu OOO “Unimilk” ob osparivanii reshenia regional'nogo otdeleniia FAS.

Reshenie ot 03.11.2009 po delu No. A45-15643 / 2009 arbitrazhnogo suda Novosibirskoj oblasti po delu po zajavleniiu OAO "Pivovarennaja kompanija "Baltika"ob osparivanii reshenia regional'nogo otdeleniia FAS.

Reshenie ot 23.12.2009 po delu No. A27-18919/2009 arbitrazhnogo suda Kemerovskoj oblasti po delu po zajavleniiu OOO "Alko-Servis" ob osparivanii reshenia regional'nogo otdeleniia FAS.

Reshenie ot 07.02.2013 po delu No. A40-74596/2011 arbitrazhnogo suda goroda Moskvy po delu po zajavleniiu OOO TD "Himprom"ob osparivanii reshenia regional'nogo otdeleniia FAS.

Reshenie ot 03.11.2009 po delu No. A71-13343 / 2009 arbitrazhnogo suda Udmurtskoj respublikipo delu po zajavleniiu OAO AKB "Rosbank"ob osparivanii reshenia regional'nogo otdeleniia FAS.

Reshenie ot 09.09.2009 po delu No. A70-5045 / 2009 arbitrazhnogo suda Tjumenskoj oblasti po delu po zajavleniiu OOO “Unimilk” ob osparivanii reshenia regional'nogo otdeleniia FAS.

Reshenie ot 24.12.2010 po delu No. A55-17258 / 2010 arbitrazhnogo suda Samarskoj oblasti po delu po zajavleniiu OOO “Rusfinans Bank” ob osparivanii reshenia regional'nogo otdeleniia FAS.

Reshenie ot 31.07.2012 po delu No. A35-610/2012 arbitrazhnogo suda Kurskoj oblasti po delu po zajavleniiu ZAO “Rajffajzenbank” ob osparivanii reshenia regional'nogo otdeleniia FAS.

Reshenie ot 25.04.2012 po delu No. A65-5556/2012 arbitrazhnogo suda Respubliki Tatarstan po delu po zajavleniiu OAO "Rosgosstrah Bank"ob osparivanii reshenia regional'nogo otdeleniia FAS.

Reshenie ot 31.08.2010 po delu No. A40-50033/10 arbitrazhnogo suda Goroda Moskvy po delu po zajavleniiu OOO TEHNONIKOL"-STROITEL"NYE SISTEMYob osparivanii reshenia regional'nogo otdeleniia FAS.

Reshenie ot 12.11.2010 po delu No. A76-15244 / 2010 arbitrazhnogo suda Cheljabinskoj oblasti po delu po zajavleniiu OOO "Dzhonson i Dzhonson" ob osparivanii reshenia regional'nogo otdeleniia FAS.

Reshenie ot 13.09.2010 po delu No. A76-10362 / 2010 arbitrazhnogo suda Cheljabinskoj oblasti po delu po zajavleniiu OOO "Okonnaja manufaktura “ ob osparivanii reshenia regional'nogo otdeleniia FAS.

Reshenie ot 22.04.2010 po delu No. A60-2435 /2010 arbitrazhnogo suda Sverdlovskoj oblasti po delu po zajavleniiu ZAO "Stroitel'noe predprijatie "SMU-30"ob osparivanii reshenia regional'nogo otdeleniia FAS.

Reshenie ot 20.10.2010 po delu No. A76-15247 /2010 arbitrazhnogo suda Cheljabinskoj oblasti po delu po zajavleniiu OOO "Promtehsistema"ob osparivanii reshenia regional'nogo otdeleniia FAS.

Reshenie ot 16.02.2010 po delu No. A53-18636/2011 arbitrazhnogo suda Rostovskoj oblasti po delu po zajavleniiu OAO "Chistyj gorod"ob osparivanii reshenia regional'nogo otdeleniia FAS.

Reshenie ot 10.09.2010 po delu No. A76-13622/ 2010 arbitrazhnogo suda Cheljabinskoj oblasti po delu po zajavleniiu OGUP "Oblastnoj aptechnyj sklad “ ob osparivanii reshenia regional'nogo otdeleniia FAS.

Reshenie ot 24.06.2010 po delu No. A56-18591/2010 Arbitrazhnogo suda goroda Sankt-Peterburga i Leningradskoj oblasti. po delu po zajavleniiu OOO “Leks” ob osparivanii reshenia regional'nogo otdeleniia FAS.

Reshenie ot 10.06.2010 po delu No. A69-607/2010 arbitrazhnogo suda Respubliki Tyva po delu po zajavleniiu OOO "Strojservis"ob osparivanii reshenia regional'nogo otdeleniia FAS.

Reshenie ot 17.11.2010 po delu No. A76-14962 / 2010 arbitrazhnogo suda Cheljabinskoj oblasti po delu po zajavleniiu ZAO “Lekrus” ob osparivanii reshenia regional'nogo otdeleniia FAS.

Reshenie ot 18.06.2010 po delu No. A71-453 / 2010 arbitrazhnogo suda Udmurstkoj respubliki po delu po zajavleniiu ZAO "Guta-Strahovanie"ob osparivanii reshenia regional'nogo otdeleniia FAS.

Reshenie ot 31.05.2010 po delu No. A49-795 / 2010 arbitrazhnogo suda Penzenskoj oblasti po delu po zajavleniiu OOO “Navigator -2000” ob osparivanii reshenia regional'nogo otdeleniia FAS.

Reshenie ot 24.05.2010 po delu No. A63-12178/2008 arbitrazhnogo suda Stavropol'skogo kraja po delu po zajavleniiu OOO PKP "Stavpromkomplekt" ob osparivanii reshenia regional'nogo otdeleniia FAS.

Reshenie ot 13.10.2009 po delu No. A33-12094 /2009 arbitrazhnogo suda Krasnojarskogo kraja po delu po zajavleniiu OOO "Gazpromneft'-Krasnojarsk" ob osparivanii reshenia regional'nogo otdeleniia FAS.

Reshenie ot 28.05.2009 po delu No. A69-113/2009 arbitrazhnogo suda respubliki Tyva po delu po zajavleniiu OAO "GAAO-2" ob osparivanii reshenia regional'nogo otdeleniia FAS.

Reshenie ot 26.10.2009 po delu No. A42-5795/2009 arbitrazhnogo suda Murmanskoj oblasti po delu po zajavleniiu ZAO "Jeksponeft"'ob osparivanii reshenia regional'nogo otdeleniia FAS.

Reshenie ot 29.10.2010 po delu No. A34-3924/2010 arbitrazhnogo suda Kurganskoj oblasti po delu po zajavleniiu ZAO "Sibgazservis"ob osparivanii reshenia regional'nogo otdeleniia FAS.

Reshenie ot 27.10.2009 po delu No. A76-16182 /2009 arbitrazhnogo suda Cheljabinskoj oblasti po delu po zajavleniiu OAO "KIT Finans strahovanie" ob osparivanii reshenia regional'nogo otdeleniia FAS.

Reshenie ot 23.10.2009 po delu No. A45-15640 /2009 arbitrazhnogo suda Novosibirskoj oblasti po delu po zajavleniiu OAO "Pivovarennaja kompanija "Baltika" ob osparivanii reshenia regional'nogo otdeleniia FAS.

Reshenie ot 05.10.2009 po delu No. A45-13960 /2009 arbitrazhnogo suda Novosibirskoj oblasti po delu po zajavleniiu OAO "Pivovarennaja kompanija "Baltika" ob osparivanii reshenia regional'nogo otdeleniia FAS.

Reshenie ot 17.03.2009 po delu No. A32-21980/2008 arbitrazhnogo suda Krasnodarskogo kraja po delu po zajavleniiu OOO "Lukojl-Jugnefteprodukt" ob osparivanii reshenia regional'nogo otdeleniia FAS.

Reshenie ot 14.01.2010 po delu No. A47- 5499/2009 arbitrazhnogo suda Orenburgskoj oblasti po delu po zajavleniiu OOO "LUKOJL-Uralnefteprodukt" ob osparivanii reshenia regional'nogo otdeleniia FAS.

Reshenie ot 05.11.2009 po delu No. A65-14117 / 2009 arbitrazhnogo suda Respubliki Tatarstan po delu po zajavleniiu OAO BAVLYNEFTEPRODUKT ob osparivanii reshenia regional'nogo otdeleniia FAS.

Reshenie ot 05.05.2008 po delu No. A60-3944 /2008 arbitrazhnogo suda Sverdlovskoj oblasti po delu po zajavleniiu OAO "Ajeroport Kol'covo" ob osparivanii reshenia regional'nogo otdeleniia FAS.

Reshenie ot 26.12.2012 po delu No. A40-24308/12 arbitrazhnogo suda goroda Moskvy po delu po zajavleniiu PAO "Himprom" ob osparivanii reshenia regional'nogo otdeleniia FAS.

Reshenie ot 18.03.2009 po delu No. A71-13063/2008 arbitrazhnogo suda Udmurtskoj respubliki po delu po zajavleniiu OAO "Mozhgasyr" ob osparivanii reshenia regional'nogo otdeleniia FAS.

Reshenie ot 22.07.2009 po delu No. A70-5044 / 2009 arbitrazhnogo suda Tjumenskoj oblasti po delu po zajavleniiu OOO "JuniMilk"ob osparivanii reshenia regional'nogo otdeleniia FAS.

Reshenie ot 18.09.2009 po delu No. A45-13961 / 2009 arbitrazhnogo suda Novosibirskoj oblasti oblasti po delu po zajavleniiu OAO "Pivovarennaja kompanija "Baltika" ob osparivanii reshenia regional'nogo otdeleniia FAS.

Reshenie ot 21.09.2009 po delu No. A45-13964 / 2009 arbitrazhnogo suda Novosibirskoj oblasti oblasti po delu po zajavleniiu OAO "Pivovarennaja kompanija "Baltika" ob osparivanii reshenia regional'nogo otdeleniia FAS.

Reshenie ot 23.05.2012 po delu No. A45-9598/2012 arbitrazhnogo suda Novosibirskoj oblasti po delu po zajavleniiu OOO ""Sibgaz" ob osparivanii reshenia regional'nogo otdeleniia FAS.

Reshenie ot 13.03.2009 po delu No. A79-109/2009 arbitrazhnogo suda Chuvashskoj Respubliki po delu po zajavleniiu OOO "JuniMilk" g. Cheboksary ob osparivanii reshenia regional'nogo otdeleniia FAS.

Reshenie ot 13.06.2012 po delu No. A40-109962/2011 arbitrazhnogo suda goroda Moskvy po delu po zajavleniiu OSAO " Ingosstrah " ob osparivanii reshenia regional'nogo otdeleniia FAS.

Reshenie ot 27.08.2012 po delu No. A73-7767/2012 arbitrazhnogo suda Habarovskogo kraja po delu po zajavleniiu OOO "Koka-Kola JejchBiSi Evrazija"ob osparivanii reshenia regional'nogo otdeleniia FAS.

Reshenie ot 16.10.2012 po delu No. A08-6564/2011 arbitrazhnogo suda Belgorodskoj oblasti po delu po zajavleniiu OOO "OVERO"ob osparivanii reshenia regional'nogo otdeleniia FAS.

Reshenie ot 25.05.2012 po delu No. A09-9554/2011 arbitrazhnogo suda Brjanskoj oblasti po delu po zajavleniiu ZAO " Korporacija " GRINN "ob osparivanii reshenia regional'nogo otdeleniia FAS.

Reshenie ot 03.05.2012 po delu No. A64-1435/2010 arbitrazhnogo suda Tambovskoj oblasti po delu po zajavleniiu ZAO "Tambovnefteprodukt" ob osparivanii reshenia regional'nogo otdeleniia FAS.

Reshenie ot 21.06.2012 po delu No. A32-44622/2011 arbitrazhnogo suda Krasnodarskogo kraja po delu po zajavleniiu OOO "Lukojl-Jugnefteprodukt" ob osparivanii reshenia regional'nogo otdeleniia FAS.

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