Competition Law in the BRICS Countries

Edited by
Adrian Emch
Jose Regazzini
Vassily Rudomino

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The Antitrust Committee forms working groups to study major international competition policy issues and to submit comments to regulators on proposed new and reformed legislation. The Antitrust Committee also works with the Global Forum for Competition and Trade Policy Committee and the Trade and Customs Law Committee to form the Antitrust and Trade Law Section. The Committee meets at the IBA Annual Conference and also has a specialist antitrust conference each year, together with regular seminars and events organized by the Committee’s local country chairs.
Adrian Emch is counsel at the Beijing office of Hogan Lovells, and is a lecturer of competition law and member of the faculty of Peking University’s IP School.

He practices antitrust law, with a focus on China. He has broad experience in all aspects of competition law, including merger control, cartel investigations, abuse of dominance cases and antitrust counseling.

Prior to joining Hogan Lovells, Mr. Emch completed an internship with the Directorate-General of Competition at the European Commission and was in private practice in Brussels and Beijing in the field of competition law.

Jose Regazzini is a partner at TozziniFreire Advogados in São Paulo, where he co-chairs the Antitrust Group. Mr. Regazzini is the present co-chair of the IBA’s Antitrust Committee; he was vice-chair of IBRAC—Brazilian Competition Institute for the period 2000–2005 and chair of the Legislation Committee of the American Chamber of Commerce in Sao Paulo during 2005–2007. Mr. Regazzini advises clients on all areas of competition law including mergers, cartel and unilateral conduct cases, leniency and compliance, and speaks and writes frequently on competition matters in Brazil and worldwide.

Vassily Rudomino is a Senior Partner at ALRUD Law Firm, Chair of ALRUD College of advocates, and Head of ALRUD Competition / Antitrust practice. Mr. Rudomino graduated from the International Commercial Law Department of the International Law Faculty, Moscow State Institute of International Relations of the Ministry of Foreign Affairs of the Russian Federation. Mr. Rudomino is a recognized expert in antitrust legislation; experienced in investment projects in all stages of their implementation; expert in corporate law; he also garnered unique experience in company M&A transactions and dispute resolution, including competition dispute resolution.

Mr. Rudomino is a member of the Noncommercial partnership “Competition Support Association” focusing on maintaining close cooperation of businesses with the Federal Anti-monopoly Service and improving the competition law practice. He is a co-founder and a Head of Council of the Noncommercial partnership “Competition Support in CIS countries.” Mr. Rudomino is a member of the FAS Russia Expert Council
on competition development in retail business, and member of the FAS Russia Expert Council on oil and oil products market.

As a foremost recognized expert, Mr. Rudomino leads international conferences and workshops devoted to antitrust regulation issues in Russia, the CIS and BRICS countries. He is one of the initiators and active organizers of the annual Russian conference Antitrust Regulation in Russia—one of the most significant and valuable events in this area. Mr. Rudomino is a member of the IBA and the American Bar Association.
List of Contributors

Igor Artemyev is the Head of the Federal Anti-monopoly Service of the Russian Federation.

Mr. Artemyev was born in Leningrad, Russia. He has PhD in Science and two Degrees from the St. Petersburg State University—one of them in law. He is the author of 43 scientific articles and patents, 6 monographs on issues of budgeting and economics.

Mr. Artemyev is actively involved in politics since 1989. In 1992 he was elected as Leningrad Assembly Deputy. Since 1995 Mr. Artemyev was Chairman of the Budget Committee of Saint-Petersburg Assembly and Chairman of Ecology and Municipal Services Commission. In 1996 he was appointed first Vice-Governor of Saint-Petersburg, Chairman of the Finance Committee of the Administration of Saint-Petersburg.

Since 1999 Mr. Artemyev is the Head of Economic and Political research Center “EPIcenter—Saint-Petersburg”.

In 1999 Mr. Artemyev was elected the Deputy of the State Duma of the Russian Federation. During his deputy term he was Vice Chairman of the Committee of the Credit Organizations and Financial Markets. He also held the position of Vice Chairman of political party “Yabloko.”

Since March 10, 2004 Mr. Artemyev is the Head of the Federal Anti-monopoly Service.

Mr. Artemyev participates in various Commissions and Councils by the Government of the Russian Federation covering competition related issues.

Mr. Artemyev is the Head and the Professor of the Department of the FAS Russia in the Higher School of Economics (National Research University).

In 2009 Mr. Artemyev was granted the title of Honored Economist of Russia.

Marcelo Calliari is a partner at TozziniFreire Advogados in São Paulo, where he co-chairs the Antitrust and International Trade Groups. A lawyer and economist, Mr. Calliari has a Ph.D. degree in International Law from the Law School of the University of São Paulo, and an LLM degree from Harvard University. Mr. Calliari is vice-chair of the Trade and Customs Law Committee of the IBA and a member of the Editorial Board of CLI—Competition Law International, an IBA antitrust journal. He is also a former commissioner of the Brazilian antitrust commission—CADE—and former chair of IBRAC—the Brazilian Competition Institute. Mr. Calliari advises clients on all areas of competition, including leniency, cartel and unilateral conduct cases, mergers and
Olavo Zago Chinaglia was a commissioner and acting President of CADE during the period 2011/2012. Mr. Chinaglia has a Ph.D. in Commercial Law from the Law School of the University of Sao Paulo. He is a professor of Economics and Corporate Law at the Armando Álvares Penteado Foundation since 2005. Mr. Chinaglia is author of the paper entitled “Brazilian antitrust enforcement” published by the London Corporate Finance Magazine and several other publications. He is responsible for reviewing the Competition Law Magazine and has participated in several seminars and congresses representing the Brazilian commission before the OECD.

Vinícius Marques de Carvalho is the President of the Brazilian Antitrust Commission—CADE. Mr. Carvalho was a commissioner CADE between 2008 and 2011, and Secretary of Economic Law for the period 2011/2012. From 2006 to 2010, Mr. Carvalho was Chief of Staff of the Special Secretariat of Human Rights of the President of the Republic. Mr. Carvalho has a Ph.D. in Commercial Law from the Law School of the University of Sao Paulo and also a Ph.D. in Comparative Law from University of Paris I (Panthéon-Sorbonne). He is the author of papers and books published in several Brazilian and international publications.

Sébastien Evrard is a partner in Jones Day’s Beijing office. He handles complex antitrust matters in China, the European Union and the Asia Pacific region, including merger control, non-merger investigations, and litigation. His practice also focuses on the antitrust aspects of intellectual property rights. Mr. Evrard is coauthor of Antimonopoly Law and Practice a treatise on competition law in China, and of multiple articles on competition law. Before moving permanently to China, he practiced law in Brussels and New York. He obtained his law degree from the Katholieke Universiteit of Leuven and a LL.M. from Columbia University where he was a class valedictorian.

Dr. Seema Gaur is a federal government senior economist belonging to Indian Economic Service with more than 25 years of experience in various economic Ministries of Government of India. Apart from economics, Mrs. Gaur is also having a degree in law. Mrs. Gaur has presented papers in many international conferences; published papers in peer reviewed journals and authored chapters in books on economic issues.

Mr. Guimarães has worked in complex leniency applications, cartel and unilateral conduct/regulated sectors investigations and health care mergers, and has authored/organized a book and articles on antitrust, regulation, legislative reform and public policy.
List of Contributors

Thomas Janssens is a partner in Freshfields Bruckhaus Deringer’s antitrust, competition and trade group, based in the Brussels office. He specializes in EU and Belgian competition law and has particular experience in the telecommunications, media and technology; energy; consumer products; and healthcare sectors. He represents clients on the full range of antitrust matters including merger control, cartel investigations and abuse of dominance, with an emphasis on practice before the European Commission and national competition authorities.

Thomas is an officer on the IBA’s Antitrust Committee. He has spoken and published on a variety of EU competition law topics and is co-consulting editor of Getting the Deal Through: Dominance, a guide to the regulation of dominant firm conduct in 39 jurisdictions worldwide.

William E. Kovacic is the Global Competition Professor of Law and Policy and the Director of the Competition Law Center at the George Washington University Law School. Kovacic joined the George Washington faculty in 1999.

From January 2006 to October 2011, Professor Kovacic was a member of the Federal Trade Commission (FTC). He chaired the agency from March 2008 until March 2009. From January 2009 to September 2011, he served as Vice Chair for Outreach of the International Competition Network. Professor Kovacic was the FTC’s General Counsel from 2001 through 2004, and also worked for the FTC from 1979 until 1983, initially in the Bureau of Competition’s Planning Office and later as an attorney advisor to former Commissioner George W. Douglas.

Professor Kovacic was a member of the faculty at the George Mason University School of Law from 1986 to 1999. From 1983 to 1986, he practiced antitrust and government contracts law with Bryan Cave’s Washington, DC, office. Earlier in his career, he spent one year on the majority staff of the U.S. Senate Judiciary Committee’s Antitrust and Monopoly Subcommittee.

Chantal Lavoie is a senior knowledge management lawyer in Freshfields Bruckhaus Deringer’s antitrust, competition and trade group, and is based in the Brussels office. Mrs. Lavoie has wide-ranging experience as a practicing EU competition lawyer having worked previously in private practice, in-house and as special adviser to the deputy commissioner’s office at the South African Competition Commission. She has lectured and published several articles on a range of EU competition law topics.

Mrs. Lavoie qualified with the Paris Bar and the Quebec Bar and is a member of the Brussels Bar. She obtained her law degree from Laval University in Quebec (Canada) and holds an LL.M. degree from Harvard Law School and from the University of Exeter (UK).

Robert Legh is a partner at Bowman Gilfillan, where he founded the Competition Law Practice Group in 1999. He holds B.Com LLB MBA degrees from Wits University and has been a partner since 1992. His primary focus is restrictive practice and cartel litigation and general antitrust advisory work. Clients include SABMiller, Sasol, Pretoria Portland Cement Company and Cape Gate. He co-authored South Africa’s first text book on competition law, and is the editor of Competition Law Sibergramme, a bi-monthly electronic journal on recent cases and developments in the law. He also practices in the fields of M&A and industry specific regulation.

Ludmila Merzlikina is an associate with the competition/antitrust practice in the ALRUD law firm. Ms. Merzlikina graduated from the international law faculty of the All-Russian Academy of Foreign Trade in 2006. Since 2007 Ms. Merzlikina actively participates in development of the antitrust practice in ALRUD and provides advice on
all aspects of competition law, including merger control, horizontal and vertical restraints, abuse of dominant position, competition law compliance, etc. Ms. Merzlikina is a member of the Non-Commercial Partnership “Competition Support Association” and a member of the IBA. She is the author of several legal publications on antitrust matters in different foreign sources.

Radmila Nikitina is an acting head of the antitrust law group of the Yust law firm in Moscow, Russia. Ms. Nikitina graduated from St. Petersburg State University and received Master Degree in European Private law from Amsterdam University.

Ms. Nikitina advises clients on various aspects of Russian competition law including restrictive agreements and concerted practices, abuse of dominant position, clearance of M&A transactions, compliance with strategic investment and public procurement law.

She represents the clients in administrative proceedings before the Federal Anti-monopoly Service and in litigation in state arbitration courts on competition law matters.

Ms. Nikitina has extensive experience in advising clients on corporate law matters including corporate structuring of business, formation of joint ventures, investment activity and corporate governance as well as other corporate law matters. She also represents the clients in corporate litigation matters.

Anna Numerova is an associate with the competition/antitrust practice in the ALRUD law firm. Ms. Numerova graduated from the law faculty of the Moscow University of Humanities in 2000. She has LL.M. from the Russian School of Private Law (Moscow, 2008) and LL.M. in International Business and Economic Law from the Georgetown University Law Center (Washington, DC, 2011). Since 2007 Ms. Numerova actively develops the antitrust practice in ALRUD. She has broad experience in all aspects of competition law, including vertical restraints, concerted practice, abuse of dominance, IP in antitrust, etc. Ms. Numerova is a member of the General Council in the Non-Commercial Partnership “Competition Support Association” and a member of the “Competition Support Association in the CIS.” In 2011 she was awarded by the FAS Certificate of Honor for development of competition legislation and promotion of competition policy. She is a regular speaker on legal conferences in Moscow and the CIS and the author of numerous legal publications on antitrust matters. Ms. Numerova is a member of the American Bar Association where was selected a country representative in its International Committee’s Antitrust Section and a member of the IBA.


Shan Ramburuth is Commissioner of the South Africa Competition Commission. He was previously the CEO and Registrar of the South Africa Competition Tribunal, a position he held from the inception of the institution in 1999 until April 2005.

During 1994–1999, Mr. Ramburuth worked at the National Economic Development and Labour Council (NEDLAC), a statutory institution that negotiated post-apartheid economic policy between government, business and labor. He was responsible for facilitating trade and industry policy development, notably competition policy,
the South Africa-EU and SADC trade negotiations, skills development policy and environmental management policy.

Prior to 1994, Mr. Ramburuth worked for non-governmental organizations involved in education and health. He was the national coordinator of a primary health care AIDS program during 1992–1994. Mr. Ramburuth graduated from the University of the Witwatersrand with a BSc (Biochemistry) in 1989 and a Masters Degree in Public Policy and Development Management in 1997.

Michael Reynolds is Vice-President of the IBA. Mr. Reynolds worked with the European Commission’s Legal Service before opening Allen & Overy’s Brussels office in 1979 and has been based in Brussels since then. He has represented major UK, US, Japanese and other international clients in a number of major cases before the European Commission and European Court of Justice. He has advised the Governments of Spain, Russia and Poland on the application of EU law.

He has defended clients against whom cases have been brought for infringement of the EU competition rules as well as assisting clients bring complaints and national court proceedings. He has handled a number of major EU merger control cases in both Phases I and II. He advised the Polish government on the convergence of Polish competition law (including state aids) with the EU rules. He has advised the Russian Anti-Monopoly Service on its competition rules under the commission’s TACIS program and also advised the Romanian competition agency under the PHARE program.

Mr. Reynolds is a former Chairman of the IBA’s Antitrust and Trade Law Committee and is EU coordinator for the IBA, handling relations with the EU Commission. He is a Director and founding member of the IBA’s Global Forum on Competition, a former Chair of the Legal Practice Division of the IBA, and former Secretary General of the International Bar Association (IBA) and is now Vice President for 2011–2012.

Mr. Reynolds is a visiting professor in European law at the University of Durham. He is a former Board member of British Invisibles.

Dr. Marc Reysen is a partner in O’Melveny & Myers’ Brussels office and a member of its EU Antitrust and Competition Practice. Mr. Reysen advises clients on all aspects of EU and German competition law, with a focus on mergers and cartel matters in which he has represented clients before the European Commission and the German Bundeskartellamt as well as providing strategic advice in relation to merger control procedures in other countries. Mr. Reysen holds law degrees from the Universities of Bonn and Edinburgh. He currently serves as an officer of the IBA’s Antitrust Committee.

Philippe Rincazaux is a partner in Orrick’s Paris office. Mr. Rincazaux focuses his practice on European and French antitrust and competition law. He regularly advises French and international clients in antitrust, competition and regulatory matters and represents them before European and French courts and competition and regulatory authorities. His practice focuses on mergers, joint ventures and cooperation agreements, cartels, dominant firm conduct and investigations.

Mr. Rincazaux also focuses on European human rights law and constitutional issues in France, and specializes in the new priority constitutional question, which has been open to all litigators in France since March 2010. Mr. Rincazaux has significant experience in audit, chemical industries, computers, electronics and information technology products, distribution, energy, health care products, the hotel industry, luxury goods, mass consumer products, media and telecommunications.

Arthur Rokhlin is a partner at the law firm YUST in Moscow. He is a member of the Moscow Bar Association.
Mr. Rokhlin is an expert in corporate law, contractual law, legislation on insolvency (bankruptcy), legislation on the securities market, exchange law, anti-monopoly legislation and legislation against unfair competition, real estate legislation, civil and arbitration procedure.

He has extensive experience in advising clients regarding business restructuring, M&A transactions and legal expertise of investment projects.

For over 15 years, Mr. Rokhlin has successfully represented the interests of Russian and foreign companies in Russian courts of arbitration and common law courts, in high-profile disputes concerning the application of corporate, civil, land, investment, and anti-monopoly laws.

He is a member of the Board of the Non-Commercial partnership competition support association and a member of the Council of the Non-Profit Partnership “Advancement of Corporate Legislation”.

He is an author of a number of articles and publications on various problems of civil, investment, corporate and anti-monopoly legislation.

As an expert, he has taken part in drafting laws in the spheres of competition and corporate law.

Cyril Shroff is the Managing Partner and head of the corporate group of the Mumbai offices of Amarchand & Mangaldas & Suresh A. Shroff & Co. India’s largest and foremost law firm with approximately 550 lawyers. Mr. Shroff is one of the deans of the Indian corporate bar and a leading authority on Indian M&A, with extensive experience handling many of the largest and most complex domestic and cross-border M&A. With over 30 years of experience in a range of areas, including corporate laws, securities markets, banking, infrastructure and others, Mr. Shroff is regarded and has been consistently rated as India’s top corporate, banking and project finance lawyer by several international surveys, including those conducted by International Financial Law Review (IFLR), Euromoney, Chambers Global, Asia Legal 500, Asia Law and others. Mr. Shroff has authored several publications on legal topics.

Pieter Steyn has been a director of Werksmans since 1996 and has Bsc Lab Med, LL.B. and LL.M. degrees. He is a Vice Chair of the IBA’s Antitrust Committee the chairman of Lex Africa, a network of African law firms, a trustee of the Ten Toes Ten Fingers Trust for persons with disabilities and a member of the competition law committee of the local law society. Mr. Steyn is an expert on South African merger control and cartel law and has written several articles (including the South African chapter of the American Bar Association’s treatise on foreign competition laws) and spoken at several conferences in and outside South Africa.

Jessica Su is a postdoctoral fellow at the Institute of Law, Chinese Academy of Social Sciences and a research consultant to Professor Allan Fels AO, Dean of the Australia and New Zealand School of Government. Mr. Su’s research focuses on comparative competition policy and governance. Prior to her current positions, Mr. Su’s was a consultant at Freshfields Bruckhaus Deringer LLP and at the Competition Division of the Organisation for Economic Co-operation and Development. She holds an LL.B. from Zhengzhou University, an LL.M. with distinction from University College Dublin, and a Ph.D. in law from Queen Mary, University of London. She was admitted to practice law in the People’s Republic of China in 1999.

Nisha Kaur Uberoi heads the Competition Law practice at the Mumbai office of Amarchand Mangaldas and has been recognized by the International Who’s Who of Competition Lawyers (2012). She advises on competition law, with a particular
emphasis on merger control and has advised clients, including Aica Kogyo/BBTCL, NHK Automotives/BBTCL, Isuzu Motors/SML Isuzu/Sumitomo, IVRCL Limited/IVRCL Assets and Holdings Limited and Reliance Capital/Viscount Management in their successful merger notifications before the Competition Commission of India. She has advised both Indian and multinational clients on competition compliance programs. She also acts for clients on enforcement issues relating to abuse of dominance and anticompetitive agreements, including cartels.

David Unterhalter is a South African lawyer. He holds degrees from Trinity College, Cambridge, the University of the Witwatersrand, and University College, Oxford. He lectured at University College, Oxford, returned to South Africa, and commenced practice at the Johannesburg Bar in July 1990. Silk was conferred upon him in 2002. At the Bar, he has specialized in regulatory law (and in particular Competition law and the law of trade law) and constitutional law. He has appeared in many leading cases in these fields.

In addition to his practice at the Bar, David Unterhalter is a Professor of law at the University of the Witwatersrand. He teaches competition law and the law of international trade. He served on a number of World Trade Organization (WTO) panels, and in 2006 was appointed as a member of the WTO Appellate Body. He served for two years as the Chairman of the Appellate Body.

In 2009, he was called to the Bar in London and is a tenant at Monckton Chambers. He has served as an acting judge on the South African bench.

David Unterhalter has published widely in the fields of public law, evidence and competition law. He is a co-author of Competition Law (an account of South African competition law).

Born in 1953, Mr. Ning Wanglu, has a bachelor degree in economics. Mr. Ning has been working in the State Administration for Industry and Commerce (SAIC) since 1982. He consecutively worked as Deputy Director of Division, Director of Division, Deputy Director General of the Market Regulation Department; Deputy Commissioner and Deputy Secretary General of the China Consumer Association; Standing Deputy Director General and Director General of the Fair Trade Bureau; and Director General of the Anti-Monopoly and Anti-Unfair Competition Enforcement Bureau.

Fruitful efforts have been made by Mr. Ning on the drafting and developing China’s competition law system. He has participated in the drafting of the Anti-Unfair Competition Law and the Anti-Monopoly Law, and several important regulations including six supportive regulations to the Anti-Unfair Competition Law and four supportive regulations to the Anti-Monopoly Law. He has mastery skills in the theory and rich experience in the enforcement of competition law. He organized several investigations of significant and typical cases in the fields of anti-unfair competition and anti-monopoly.

Wang Xiaoye is a Professor of law at the Hunan University (China). From 1984 to 2011, she worked at the Chinese Academy of Social Sciences. She holds an LL.M. from Remin University, Doctor juris from the University Hamburg. She has published 18 books and over 200 papers in Chinese, German and English. As the leading expert in the field of antitrust law in China, she is a member of the Expert Advisory Committee of the Anti-Monopoly Commission under the State Council, and Vice President of the National Association for Economic Law of China, she has given two lectures before the Standing Committee of China’s National People’s Congress.
Xixi Yang is an associate in Linklaters’ Beijing office. Mrs. Yang graduated from Harvard Law School and Peking University Law School and studied European competition law in London. She is qualified to practice law in China and is also an Attorney-at-Law of New York state. Prior to returning to China, Mrs. Yang worked at Linklaters’ London, Brussels, and Hong Kong competition teams. Mrs. Yang has considerable experience of commercial matters involving antitrust and merger control in China. This gives her a broad view of the competition regimes of Europe, UK as well as China. Mrs. Yang has spoken at conferences and seminars about the Chinese Anti-Monopoly Law and European competition law.

German Zakharov is a senior attorney of ALRUD in antitrust practice. Mr. Zakharov received his law degree from law faculty of Moscow State University, where he graduated with honors. He has broad experience in all aspects of competition law, including merger control, representation clients before the Russian Federal Anti-monopoly Service, consulting and compliance of competition law. Before joining ALRUD, Mr. Zakharov worked in the position of leading specialist (expert) of the FAS Anti-cartel department. He is an executive director of the Noncommercial partnership “Competition Support Association in the CIS,” a member of the Noncommercial partnership “Competition Support Association” and a member of the IBA and the American Bar Association. In 2011 he was awarded by the FAS Certificate of honor for development of competition legislation and promotion of competition policy.

Yizhe Zhang is a senior associate in Jones Day’s Beijing office where her practice focuses on antitrust and competition law. She frequently assists clients on Chinese and US antitrust matters, including merger control, abuses of dominance and cartels. Mr. Zhang formerly worked for China’s Anti-Monopoly Bureau at the Ministry of Commerce and was heavily involved in the drafting of the Anti-Monopoly Law and other regulations for foreign mergers and acquisitions. She is coauthor of the book Anti-Monopoly Law and Practice, and of multiple other articles on the same subject.
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§2.01 INTRODUCTION

For the past five years enforcement of competition law rules on unilateral conduct\(^1\) has been one of the priorities of the Federal Anti-Monopoly Service (FAS).\(^2\) In Russia, which still has a transitional economy, most of the undertakings acquired their dominant positions through privatization and not via competition on the merits. This historical background is precisely the reason why the enforcement of unilateral conduct rules is especially important to ensure the effective competitive process.

Currently the FAS tends to focus more than half of its investigations on the dominance abuse cases, and the amount of fines imposed for this type of infringements has increased drastically. Among the markets that fall under close scrutiny of the FAS in this respect are the markets for petrochemicals, pharmaceuticals, financial services, natural resources, network industries such as telecommunications, energy sector, railway services, as well as other markets affected by the natural monopolies.

Until recently the FAS limited its control of restrictive unilateral conduct to undertaking which possess a dominant position within a relevant market. This approach was supported by the idea that it is highly unlikely that the conduct of undertakings without a dominant position may harmfully affect competition. However, this position has recently changed in the area of regulation of trade in the food industry, where the competition authority has the power to control unilateral anticompetitive conduct of a non-dominant undertaking. The main purpose of this regulation is to remedy the market failure in this sector of the economy.

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1. Technically, Russian competition law does not use the term “anticompetitive unilateral conduct” but it usually employs the term “abuse of dominant position” instead.
2. Note that the FAS actively cooperates with other competition authorities and participates in the working groups of various international organizations such as ICN and OECD.
§2.02 RELEVANT LEGISLATION

[A] Legislation

The principal rules defining dominance and behavior that can be qualified as abusive are set out in the Competition Law. The Competition Law in Russia is still evolving and rules on unilateral conduct are no exception in this respect. Since adoption of the law in 2006, the rules on unilateral conduct were amended three times and it is safe to say that this trend will be continued. The latest amendments came into force on January 2012 with so-called the third package of amendments and mainly aimed to clarify the existing rules.

Additionally, some provisions related to unilateral conduct are also contained in sector specific legislation. Thus, the Law on Natural Monopolies focuses on the regulation of the respective markets. Its application is complementary to the Competition Law. Moreover, there are several regulations of the Government of the Russian Federation on a non-discriminatory access to products produced by undertakings enjoying the state of natural monopoly.

The Trade Law regulates the relationship between retail chains and food product suppliers. The main purpose of the Trade Law is to curtail the power of retail chains and to prevent them from imposing the onerous contractual terms on the suppliers. As it was stated above, retail trade is the only sector where the competition authority can intervene without the need for the dominant position of the undertaking (retail chain) to preexist.

Besides the above-mentioned legislation, there are several regulations of the Government of the Russian Federation on the assessment of dominance of different financial organizations as well as guidelines and regulations of the FAS on various matters.

[B] Extraterritoriality

Same as European competition law, its Russian counterpart generally follows the “effects doctrine.” The provisions of the Competition Law concerning unilateral conduct are equally applicable to national and foreign undertakings. With regard to foreign undertakings in a dominant position, the Competition Law is applicable whenever their anticompetitive unilateral conduct affects competition on the Russian market.

§2.03 ASSESSMENT OF DOMINANCE

[A] Who Can Be Found Dominant?

The provisions of the Competition Law on dominance apply to undertakings. The concept of an undertaking covers entrepreneurs, commercial organizations, nonprofit organizations engaged in economic activity and some individuals who carry out a professional activity that generates revenue. The latter criterion was introduced recently and is aimed to include within the scope of application of the Competition Law some other professions that are not considered as entrepreneurial under Russian law.

Compared to the European competition law, the concept of an undertaking under Russian competition law is less broad and does not include public bodies or organizations without legal entity status.

When determining whether an undertaking holds a dominant position, the Russian competition authorities take into account not merely the undertaking as such but the whole group of the respective undertaking (so-called group of persons). The group includes all individuals and legal entities under the same controlling share ownership, contractual or other de facto management control. The criteria are listed in Article 9 of the Competition Law.

[B] How Is the Dominance Defined?

Russian competition law adheres to a behavioral definition of dominance and describes dominance as an appreciable freedom from competitive constraints or the ability to act in a way that a competitively constrained undertaking could not. Particularly, Article 5 of the Competition Law defines dominance as:

a market position of an undertaking that enables it to have substantial influence on the general conditions of circulation of products on the relevant market and to remove other undertakings from the relevant market and/or to impede the entry to the relevant market of other undertakings.

However the definition of dominance includes structural aspects as well. The Competition Law employs dominance presumptions based on market share thresholds.

[C] Market Share Thresholds

The practical effect of these dominance presumptions is to relax somewhat the burden of proof required from the competition authority as well as the plaintiff.

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6. In accordance with the Russian Competition Law, this definition also applies to several undertakings that possess market power jointly (so-called collective dominance). However, the present article addresses only single firm dominance and does not consider collective dominance.
For an undertaking with a market share of 50% or higher there is a rebuttable presumption of dominance. An undertaking may challenge this presumption if the analysis of the relevant market concerned demonstrates that the undertaking cannot be considered to be dominant although it has a sufficiently high market share.

An undertaking with a market share of 35%–50% is deemed to be dominant provided that the analysis of the relevant market shows that the undertaking concerned is dominant on the basis of the stability of its market share, possibilities of market entry and other characteristics of the relevant market. Moreover, an undertaking which enjoys a state of natural monopoly is also considered as dominant.

In this context, it is interesting to note that the Russian competition authority keeps a register of the undertakings with a market share over 35% on any particular product market. The data regarding markets shares provided in the register is used by competition authorities in its investigations. The FAS is exonerated from establishing market share of an undertaking if the data regarding its market share is included in the register.

[D] Safe Harbor

Article 5(2) of the Competition Law establishes a conclusive presumption of non-dominance for an undertaking which has a market share under 35% (so-called safe harbor).

There are few exceptions from the safe harbor rule. For these undertakings dominance can be established with the market share below 35%. The first exception concerns financial organizations and the second exception concerns cases expressly provided in other federal laws.

The latter exception applies when the following conditions are met:

- The market share of the undertaking exceeds the market share of other undertakings on the relevant market.
- The undertaking can unilaterally determine the prices of the product and exercise substantial influence upon the conditions of circulation of the product on the relevant market.
- Entry of new competitors to the relevant market is difficult due to economic, technological, administrative or other restrictions.
- The product sold or bought by the undertaking does not have any substitute.
- Change in prices on the product does not lead to an appropriate decrease in demand.

7. The conditions under which a credit institution can be recognized as having a dominant position are established by the Government of the Russian Federation together with the Central Bank of the Russian Federation. The conditions for recognizing as dominant the position of the financial institution (save credit institution) are established by the Government of the Russian Federation. The Competition Law also establishes a conclusive presumption of non-dominance for financial institutions with a market share below 10% on a single market in the Russian Federation or below 20% on the market if the product is also circulating on other markets in the Russian Federation.
[E] Competitive Constraints

Although market shares are used as an indicator for market power, they alone do not determine whether a company is dominant, and other factors may, thus, be relevant for this assessment. While assessing whether a single undertaking has substantial market power, the FAS looks at different factors that may constrain the exercise of such market power. As a result, the following criteria are also taken into account during the market dominance analysis:

- barriers to entry and expansion;
- market share of undertakings active on a relevant market;
- correlation of market shares of suppliers and buyers active on a relevant market;
- durability of market power.

[F] Assessment of Dominance Procedure

The assessment of dominance is carried out in accordance with the relevant market regulation and respective administrative regulations of the FAS. The assessment of dominance generally starts with defining the relevant product and geographical market, suppliers and buyers active on the relevant market, their market shares, concentration of the market, barriers to entry and competition on the market. Subsequently, based on the gathered information the FAS is to establish the dominant position of the undertaking (its group).

The test of the hypothetical monopolist (SSNIP) is the most common method employed by the FAS while assessing the relevant market (both product and geographical dimension).

The concept of dominance is to be applied by the Russian competition authorities from different perspectives. In the context of Article 10 of the Competition Law (abuses of dominant position), a retrospective analysis is required to assess whether the undertaking had a dominant position and whether this undertaking has abused its position. In contrast, the prospective analysis is usually necessary for the purposes of merger control, to appraise whether the proposed concentration will lead to the creation or strengthening of a dominant position.

According to the latest amendments, the minimum interval for market analysis for the purposes of establishing dominance constitutes one year or a term of existence of a market if the market is existed less than a year.

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8. Regulation on the analysis of competition on the relevant market approved by the Order 220 of the FAS of April 28, 2010; Administrative Regulation on establishing the dominant position of an undertaking approved by the Order of the FAS 5 of January 17, 2007.
9. Clause 2.2 of Regulation 220.
§2.04 ABUSE OF A DOMINANT POSITION

[A] What Type of Conduct Constitutes an Abuse of a Dominant Position?

The Russian Competition Law does not prohibit a dominant position or substantial market power as such but only an abuse of that dominant position. A specific anticompetitive conduct of a dominant enterprise that leads or may lead to the restriction, distortion or elimination of competition or infringements of the legitimate interests of other persons falls within the scope of the prohibition.

The Russian competition law does not explicitly recognize the concept of “special responsibility of a dominant undertaking towards the competitive process” employed in the European competition law. However, some behavior which may, from the perspective of competition, be pro-competitive or at least neutral when engaged in by a non-dominant undertaking is subject to prohibition for a dominant undertaking under the Competition Law.

In principal, the Russian Competition Law does not regulate the process of how an undertaking could, through its conduct, become dominant. However, during merger control proceedings, the national competition authority considers the issue of possible dominance resulting from the concentration being notified.

Subparagraphs (1)–(11) of Article 10 of the Competition Law set out examples of abuses as an illustrative but not an exhaustive list. This list includes two types of abuse: per se abuses and those which can be justified by effects-based defense (“rule of reason doctrine”).

[B] Per Se Abuses

Similar to the U.S. competition law, its Russian counterpart uses the method of per se prohibitions in respect of certain types of abuses. Regarding the following practices there is an established, irrebuttable presumption that they restrict competition and therefore are prohibited per se:

- charging excessively high or low prices (monopolistically high or low prices);
- the withdrawal of a product from circulation, if the withdrawal would result in the increase of the price;
- the imposing of onerous contract terms or terms not related to the subject matter of the contract (economically or technologically unjustified and/or not provided for directly by law or judicial acts);
- economically or technologically unjustified refusal or evasion to conclude a contract in the case when there are possibilities for production or delivery of the relevant product, or such refusal or evasion is not provided for directly by legal or judicial acts;

- economically, technologically or in any other way unjustified charging of different prices (tariffs) for the same product if this is not established by the law;
- imposition by a financial organization of unjustifiably high or unjustifiably low prices for financial services;
- violation of the procedure for pricing established by law.

It is also worth noting that the Russian Competition Law provides special tariff regulations for natural monopolies.

[C] Abuses that Can Be Justified

Article 10 of the Competition Law also prohibits such practices as:

- economically or technologically unjustified reduction or cutting off the production of a product if there is demand for the product or the orders for its delivery are placed and there is a possibility of its profitable production, as well as if such reduction or cutting off the production of the commodity product is not provided for by a legal act of state authorities or judicial acts;
- creation of discriminatory conditions;
- creation of barriers to entry into or exit from the relevant market (for other undertakings);
- manipulation of prices on the wholesale and retail electric energy market.

However these latter types of unilateral conduct can be justified by means of an effects-based defense. Contrary to Article 102 Treaty on the Functioning of the European Union (TFEU), the Russian Competition Law extends the effect-based defense to several types of restrictive unilateral conduct. The exemption is granted if the conduct concerned creates sufficient pro-competitive benefits to outweigh its anticompetitive effects (so-called rule of reason). The criteria for justification are mostly borrowed from Article 101(3) TFEU. Particularly, restrictive unilateral conduct can be exempted if the following conditions are satisfied:

- it contributes to improving the production or distribution of goods or to promoting technical or economic progress or the raising of competitiveness of Russian goods on the global market;
- it allows consumers to receive a fair share of the resulting benefits;
- it does not afford an undertaking the possibility to eliminate competition on a relevant commodity market;
- it does not impose restrictions which are not indispensable for the attainment of these objectives.

The burden of proof to show these effects lies on the defendant.

Although economic justification in the dominance abuse cases is legally possible, it is still totally underdeveloped in Russia.
[D] Exploitative and Exclusionary Abuses

The concept of abuse covers both exploitative (i.e., abuses where a dominant undertaking “exploits” its position in a way that would impossible for an undertaking operating on a competitive market) and exclusionary practices (i.e., abuses against the structure of the market). Examples of both kinds of practices are provided in Article 10 of the Competition Law.

The vast majority of dominant cases concern exploitative abuses such as imposition of onerous contract terms, excessive prices, application of discriminatory conditions and refusal to deal. As regards exclusionary abuses, the FAS investigates them less vigorously.

[E] Excessive Pricing and Monopolistically Low Pricing

Cases related to excessive pricing fall within the category of exploitative abuses which are very often investigated by the FAS.

As follows from the Article 6 of the Competition Law, an excessive or monopolistically high price is a price charged by a dominant undertaking above the competitive level. For the purposes of establishing the competitive price, the Russian competition authority compares the price imposed by a dominant undertaking with:

- a price of the same product on a comparable (but competitive) market;
- the costs actually incurred by the undertaking for production (including appropriate profit margin).

The price imposed by a dominant undertaking is deemed to be excessive or monopolistically high if it is in a great disproportion both with a price of the product on a comparable market and the costs incurred for production (including profit margin).

These criteria for establishing monopolistically high prices are not applicable for products produced by undertakings enjoying a state of natural monopolies (tariffs for this category of products are established by the separate state authority), products traded at the commodity exchange market and in some circumstances for innovative products.

In practice, monopolistically high pricing is the one of the most controversial doctrines in Russian competition law. In most cases, when establishing monopolistically high prices, the FAS faces the practical difficulties in the determination of comparable but competitive markets, as well as costs of a dominant undertaking which should be taken into account and acceptable profit margin. Currently the FAS is highly criticized for assuming the role of price regulator, which it is ill-equipped to do.

The concept of monopolistically low prices is aimed to combat predatory pricing of a dominant undertaking. Article 6 of the Competition Law defines monopolistically low prices by setting out the criteria which are similar to excessive prices described above. However there are not so many cases on monopolistically low prices in Russia.
Intellectual Property Rights

Article 10 of the Competition Law exempts anticompetitive unilateral conduct based on exploitation of intellectual property rights (IPRs) from the scope of its application. This approach is based on two major considerations: (i) IPRs protect new product technology, i.e. the benefits from using IPRs are shared between producer and consumer; and (ii) the term of validity of most IPRs is limited by national legislation and/or international agreements, upon the expiration of which the relevant market becomes subject to Article 10 of the Competition Law.¹¹

§2.05 INVESTIGATION (AUTHORITIES, POWERS, BURDEN OF PROOF, APPEAL)

The Russian Competition Law is enforced by the FAS. The FAS may investigate undertakings which it believes have committed a breach of Article 10 of the Competition Law.

An investigation can be initiated upon the complaint of any person (legal or natural), referral of another state authority, information in mass media regarding the alleged violation of the Competition Law or upon findings by the FAS of evidence of violation of Article 10 of the Competition Law.

During the investigation the FAS has a wide range of powers ranging from requesting information necessary for its investigation to inspection of premises of the undertakings.

Where the FAS finds that an infringement has been committed, it may issue a decision ordering the undertaking to cease the infringement (positive or negative conduct), and may impose behavioral remedies.

The burden of proof in dominance abuse cases lies upon the competition authority.

A decision of the FAS as well as remedies imposed by the FAS are subject to judicial review by the arbitrazh courts (branch of the state commercial courts in Russia).

§2.06 SANCTIONS AND REMEDIES (ADMINISTRATIVE, CRIMINAL AND PRIVATE ACTIONS)

The third package of amendments introduced an institute of legal warning in respect of certain dominance abuse cases. In accordance with the new rules, before initiating an anti-monopoly investigation in respect of cases concerning an imposition of onerous contract terms and refusal to deal, the competition authority has to send to the dominant undertaking a legal warning with a request to stop the alleged violation. In


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the event of compliance with the legal warning the competition authority does not initiate an investigation and cannot impose administrative fines.

[A] Administrative Sanctions

Within the framework of the administrative proceedings, the FAS can impose fines on the undertaking of up to 1\%–15\% of the turnover achieved on the market where the violation occurred. Besides, the FAS can impose fines upon officials\(^{12}\) amounting to RUB 20,000–50,000 (approximately USD 700–1,700), or disqualification for a period of up to three years (Article 14.31 of the Code of Administrative offences).

However there are few exceptions from turnover fines. First, the FAS imposes fixed fines for actions of a dominant undertaking involving infringements of legitimate rights of third parties if such actions do not lead to the restriction of competition (such as a refusal to deal an imposition of onerous contract terms). Second, the FAS imposes fixed fines in dominance abuse cases if the market share of the dominant undertaking does not exceed 35\%. In both cases the amount of the fine varies from RUB 300,000 (approximately USD 10,000) to RUB 1 million (approximately USD 35,000).

In addition to the administrative fine, the FAS may issue and order to recover into the federal budget the profit gained by the breach in accordance with Article 23 of the Competition Law. In accordance with the clarification of the Constitutional Court of the Russian Federation, the FAS can apply jointly the sanctions set out in Articles 14.31 of the Code of Administrative Offences and 23 of the Competition Law.

[B] Criminal Sanctions

Article 178 of the Criminal Code provides that a restriction, distortion or elimination of competition by means of repeated abuse of a dominant position in the form of maintaining monopolistically high or low prices, refusal to deal, foreclosure of the market, when such conduct caused gross damages or resulted in obtaining of gross income, may result in imprisonment of up to seven years. Under Russian law, only individuals (company’s officials) can be held liable for the violation of the Criminal Code.

For the purposes of the Criminal Code, an abuse of a dominant position is considered as repeated if an individual was held administratively liable for abuse of a dominant position twice during the period of three years.

Application of the criminal sanctions excludes the possibility of application of administrative sanctions to an individual.

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\(^{12}\) Officials mean any manager or other employee of the company having administrative or executive competence, for example, a general director of the company.
Any person (both individuals and legal entities) injured by abusive conduct of an undertaking holding a dominant position may bring proceedings before a national court seeking damages resulting from that breach. Although private enforcement of the Competition Law is expressly provided by Article 37(3) of the Competition Law, it is still not a common practice in Russia.

§2.07 PRECEDENT CASES

The vast majority of unilateral conduct cases that are lodged before the national courts relate to the following types of exploitative abuses:

- The imposition by a dominant undertaking of onerous contractual terms or conditions not related to the subject matter of the agreement (this type of violation is perfectly illustrated by recent decision of the Supreme Arbitrazh Court of the Russian Federation\(^\text{13}\) in respect of Rexam Beverage Group. In this decision the court recognized that the companies of Rexam Beverage Group imposed upon their customers transportation services which were qualified by the court as totally unrelated to the subject matter of the purchase agreement of tin cans).

- The refusal to deal (e.g., decision of the Federal Arbitrazh Court of the Moscow Region in respect of MOESK JSC active in the energy supply market\(^\text{14}\)).

- The imposition of excessive prices (e.g., the Federal Arbitrazh Court of the Moscow Region recognized that Vnukovo Invest LLC had reaped monopolistically high profit by charging consumers above the competitive level for the parking space on the territory of the international airport Vnukovo (Moscow). In this case the FAS attempted to employ the costs methods to determine the competitive price and had to make a decision which costs incurred by the company can be taking into the account\(^\text{15}\)).