

# Competition Law in the BRICS Countries

Edited by  
Adrian Emch  
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the global voice of  
the legal profession

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# About the International Bar Association

## The Global Voice of the Legal Profession

In its role as a dual membership organization, comprising over 45,000 individual lawyers and over 200 Bar Associations and Law Societies, the International Bar Association (IBA) influences the development of international law reform and shapes the future of the legal profession. Its Member Organizations cover all continents of the World.

Grouped into two Divisions—the Legal Practice Division and the Public and Professional Interest Division—the IBA covers all practice areas and professional interests. It provides members with access to leading experts and up-to-date information as well as top-level professional development and network-building opportunities through high quality publications and world-class conferences. The IBA’s Bar Issues Commission provides its Member Organizations with substantive and social programs at and between meetings and the IBA Human Rights Institute (IBAHRI) works across the Association, helping to promote, protect and enforce human rights under a just rule of law, and to preserve the independence of the judiciary and the legal profession worldwide.

The Antitrust Committee provides an international forum for the exchange of the most current thinking in the field of antitrust law. In addition, there is a strong commitment to bring together international practitioners to facilitate closer working relationships. The committee is increasingly relied upon by government officials and members of the private sector for its expertise and practical input into antitrust developments.

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.



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## PART III.

# Unilateral Conduct

Artur Rokhlin & Radmila Nikitina

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### §2.01 INTRODUCTION

For the past five years enforcement of competition law rules on unilateral conduct<sup>1</sup> has been one of the priorities of the Federal Anti-Monopoly Service (FAS).<sup>2</sup> 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<sup>3</sup> 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<sup>4</sup> 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<sup>5</sup> 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.

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3. Federal Law of the RF 401-FZ dated December 6, 2011 came into force on January 6, 2012.

4. Federal Law of the RF 147-FZ dated August 17, 1995 on Natural Monopolies (as amended).

5. Federal Law of the RF 381-FZ on the Fundamentals of Governmental Regulation of Trade in the Russian Federation (as amended).

**§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<sup>6</sup> 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<sup>7</sup> 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.

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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.<sup>8</sup>

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.<sup>9</sup>

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”<sup>10</sup> 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;

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10. Case 322/81, *Michelin*, [1983] ECR 3461, § 1.

- 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 be 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 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.

**[F] 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.<sup>11</sup>

**§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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11. Unilateral Conduct Working Group Questionnaire. Answers prepared by the Federal Anti-monopoly Service of Russia. Available at <<http://www.internationalcompetitionnetwork.org>>.

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<sup>12</sup> 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 or 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 an 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.

**[C] Private Actions**

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<sup>13</sup> 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<sup>14</sup>).
- 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<sup>15</sup>).

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13. Decision of the presidium of the Supreme Arbitrazh Court of the Russian Federation dated November 8, 2011 4267/11, case A40-42759/10-153-190.

14. Decision of the Federal Arbitrazh Court of Moscow Region dated 06.02.2012 case A40-32873/11-93-237.

15. Decision of the Federal Arbitrazh Court of Moscow Region dated March 3, 2009 KA-A40/858-09, case A40-30354/08-145-352.

