

Competition policy and abuse of dominance in Russia: Comparative analysis with reference to the United States and the European Union

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Abstract

This paper addresses to the main issues in antitrust legislation and their influence on competition policy development in Russia. Focusing on monopoly power abuse, it analyzes different approaches of economic doctrines on antitrust. It evaluates the effectiveness of antitrust laws in Russia and reveals major problems by making a comparison with legislations in the European Union and the United States and analyzing court decisions in these jurisdictions. The thesis asserts that failure to develop and implement proper monopoly regulations has a negative effect on competition in Russian market and slows down the economy in general.

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Introduction

Competition policy is integral part of a market economy, which creates and facilitates the development of competitive environment and promotes fair competition in the markets in order to achieve high economic growth and improve consumer welfare.

The creation of effective competition policy and enhancement of Russian competition legislation have been a big debate over the years. The current legislation is characterized by a high degree of markets monopolization, poor economic diversification and high regional centralization.¹ Moreover, existing legal norms had shifted the law enforcement from the factors essential for competition protection and development to the minor ones. Also business enterprises had been suffering from high administrative barriers.² All these factors greatly reduce the competitiveness of Russian enterprises and hamper the development of competition itself.³

Analysis of state programs for economic development shows that Russian government recognizes the necessity to promote competition in the markets. However, it lacks the understanding of the content, structure and tools needed to design an effective competition policy. Therefore, the main emphasis of the development of such policy still lays on enhancement of antimonopoly legislation⁴. Given the fact that Russian antimonopoly legislation exists for more than twenty years, it is important to provide a critical assessment of current legal framework. My assumption is that failure of developing and implementing

¹ V. Gorbachev "Pravovoe regulirovanie konkurentnykh otnoshenii na tovarnykh rynkakh stran Evropeiskogo sousa I Rosssiiskoy federacii (sravnitelno- pravovoi analiz)", MID RF, Moscow 2010, 3 ("Legal regulation of competition in commodity markets of EU and Russian Federation", transl. mine)

² S. Avdasheva "Obnovlenie Rossiiskogo zakonodatelstva o konkurencii: ekonomicheskii analiz", Higher School of Economics, 2010, 2 (Renewal of Russian competition legislation: economic analysis", transl. mine)

³ Gorbachev, supra note 1, at 3

⁴ V. Yakunin, A. Sulakshina, I. Akhmetsyanova "Gosudarstvennaya konkurentnaya politika Rossii: sostoyanie I problemy", Nauchnyy Expert, Moscow, 2006, 7 ("Governmental competition policy: current situation and problems", transl. mine)

necessary regulations on antitrust bears numerous issues which influence negatively on the development of competition in Russian market. Consequently, the objective of this thesis is to analyze Russian antimonopoly legislation (antitrust) in order to define the main issues that hamper competition development in a country and provide with recommendations for the improvement of the latter.

The thesis examines the major loopholes in Russian antitrust by making a comparison with similar legislations in United States and European Union; it defines the best antitrust practices in chosen jurisdictions and suggests policy changes for Russia. The research includes a comparative study of legislative statutes from selected jurisdictions, along with publications from legal and economic scholars, academic literature, and journal articles of independent international organizations.

This thesis evaluates the effectiveness of antitrust laws in Russia, focusing specifically on regulation of unilateral monopolistic behavior and its influence on competition in a country. The thesis is divided as follows: It begins with analysis of various economic doctrines on antitrust, their approaches and development. It proceeds with comparative study on the major provisions of antitrust legislation with regard to dominance abuse in United States and European Union. Also it analyzes a liability for antitrust under various jurisdictions based on courts decisions.

The next part refers to analysis of Russian antimonopoly legislation. It examines competition policy development in Russia, it provides with major legislative framework on abuse of dominance and, at last, it gives an overview on antitrust enforcement in Russia. The last part is devoted to comparative analysis of dominance abuse in Russia, United States and European Union based on the economic doctrines and legal framework of every country.

Chapter 1. Economic Doctrines on Antitrust

In the following chapter I will provide an overview of the main economic doctrines on antitrust and the legal schools associated with them. I will introduce the novel “innovation school” and briefly compare it with Chicago, Post- Chicago and the Populist doctrines.

1.1. Overview of Economic Doctrines on Antitrust

Different economic doctrines shape an approach towards antitrust. Hence, based on a particular economic theory, four major schools on Antitrust can be defined: Conservative neoclassical economics, which was influenced by the Chicago school, liberal neoclassical economics associated with post-Chicago school; liberal neo-Keynesian economics and the populist school; and innovation economics and the “innovation school”⁵. All of these schools aim to determine an optimal antitrust policy by defining the roles of the state and players in the market.

1.1.1. Neoclassical Economics and Chicago and Post-Chicago schools

Modern antitrust law is believed to be founded by neoclassical economy.⁶ It defines the market as facilitator of free exchanges between economic agents “in the pursuit of their best interests”.⁷ Neoclassicists believe that such market does not need to be regulated by the government, since it has enough power to extinguish monopoly by itself.⁸ This doctrine aims to maximize an allocative efficiency based on the optimal distribution of goods and services with reference to consumer preferences. Market under allocative efficiency is characterized by perfect competition where prices for goods and services charged by producers are equal to

⁵ Robert D. Atkinson and David B. Audretsch “Economic Doctrines and Approaches to Antitrust”, The Information Technology & Innovation Foundation, January 2011, 1

⁶ Herbert Hovenkamp “Post-Chicago Antitrust Analysis: A Review and Critique”, Michigan Law Review (1985): 68

⁷ Atkinson, Supra note 5, at 3

⁸ Ibid.

their marginal costs, and the willingness of consumers to pay for such goods and services reflects the level of consumption⁹.

This economic theory assumes that market players- individuals and undertakings- are rational maximizers. They tend to make rational choices in order to enhance their welfare. However, even when the players do not act rationally, the market due to its self-correcting ability will neutralize the effect of their unwise conduct.¹⁰

Neoclassicists believe that social welfare will be maximized if the players are the ones who are setting up the prices in the market. So in case of governmental intervention, the deadweight loss is inevitable. And as economy tends towards equilibrium, where amount of goods demanded by customers is equal to amount of goods supplied by producers, governmental role is just to reduce all artificial barriers to such equilibrium, simply by aligning prices to their costs.¹¹

All in all, neoclassical doctrine is a static model projecting influence of market power on prices and efficient allocation of resources in the market.¹²

Two legal schools were influenced by neoclassical economics: The Chicago and The Post-Chicago one. The Chicago school emerged from the works of legal scholars such as Director, Posner, Bowman, Bork, Stigler, where at the core is the market ability to self-adjust.¹³ Hence, scholars are against governmental intervention, which, in their opinion, inevitably leads to

⁹ Atkinson, supra note 5, at 4

¹⁰ Amanda P. Reeves "Behavioral Antitrust: Unanswered Questions on the Horizon", June 2010, 1, www.antitrust.com

¹¹ Atkinson, supra note 5, at 5

¹² Ibid. at 4

¹³ Ibid.

consumer harm. They promote consumer welfare as a primary goal of competition law and see allocative efficiency as the instrument to achieve such a goal.¹⁴

The Post- Chicago School is also based on efficiency model; however, it challenges the assumptions of Chicago scholars.¹⁵ For instance, Chicagoans consider market power as the result of firm efficient business performance. Hence, they argue that dominant firm should not be punished for gaining high market share, because it will diminish incentives for other companies in the market to develop and innovate.¹⁶ On the contrary, Post-Chicagoans assert that dominance can entail anti-competitive effects.¹⁷

As to entry barriers Chicagoans assumes that they are generally low despite the ones regulated by the state. They believe that markets with dominant firms are able to self- correct. So, supranormal profits in particular industry will inevitably attract new entrants, consequently, market will adjust the dominant power accordingly. Post- Chicagoans, in turn, consider entry barriers to be high, which, therefore, restrict the market ability to “correct” the dominance.¹⁸

The role of the government differs in both schools. Chicagoans limit the role of the state and prefer weak antitrust enforcement due to market ability to correct any competitive imbalances.¹⁹ They consider governmental involvement in antitrust issues only in the cases when consumer welfare is threatened²⁰. Post –Chicago scholars are more tolerant towards governmental intervention, since they believe in the ability of the latter to distinguish between competitive and anti-competitive conduct.²¹

¹⁴ Atkinson, *supra* note 5, at 12

¹⁵ Amanda P. Reeves & Maurice E. Stucke “Behavioral antitrust”, *Indiana Law Journal*, n.86 (2010): 1528

¹⁶ Alan Greenspan, “Antitrust,” in “Capitalism: The Unknown Ideal”, by Ayn Rand, New York: Signet (1967), chapter 4

¹⁷ Atkinson, *supra* note 5, at p. 12

¹⁸ *Ibid.* at 13

¹⁹ Eleanor Fox “The Battle for the Soul of Antitrust”, *California Law Review*, no. 73 (1987): 917

²⁰ Hovenkamp, *supra* note 6, at 180

²¹ *Ibid.*

1.1.2. Neo-Keynesian Economics and Populist school

Economic scholars John Hicks, Franco Modigliani, and Paul Samuelson made an effort to provide a microeconomic foundation to Keynesian theory through combination with neo-classical model of economics.²² The doctrine focuses on aggregate demand as the main factor of the economic growth. Such demand is sponsored mainly by business investments, governmental and consumer expenditure, and it aims to ensure “full employment, high level of competition and stimulation of consumer demand”.²³

Neo-Keynesians analyze the market with imperfect competition, where prices are not able to rapidly adjust to changing economic conditions.²⁴ Although market participants are rational, their behavior not always leads to efficient allocation of resources resulting in market failure.²⁵ Hence, Neo-Keynesians give a priority to “equitable distribution of income and wealth”, which, from their point of view, will lead to higher level of consumption by consumers and, consequently, entail economic growth.²⁶ In addition, economic scholars accept the governmental intervention to some extent and, moreover, believe that such limited involvement can also result in economic growth.²⁷

The populist school was influenced by Neo-Keynesian Economics. The legal scholars such as Sullivan, Pitofsky, Lande state that the goals of antitrust should be shifted towards “ensuring fairness, protecting the competitive process, controlling wealth transfers, limiting the

²² Michael Woodford “Convergence in Macroeconomics: Elements of the New Synthesis”, *American Economic Journal: Macroeconomics*, no. 1 (2009): 268

²³ Atkinson, *Supra* note 5, at. 5

²⁴ Mankiw, N. Gregory “Small Menu Costs and Large Business Cycles: A Macroeconomic Model of Monopoly”. *Quarterly Journal of Economics* no. 100 (1985): 529–539

²⁵ Huw Dixon “The role of imperfect competition in new Keynesian economics”, Basingstoke: Palgrave, (2001): 74-106

²⁶ Atkinson, *Supra* note 5, at 5

²⁷ *Ibid.*

accumulation of private economic power, and preserving the freedom of individuals and enterprises to engage in economic activity”.²⁸

The primary focus of antitrust populists was considered to be the protection of small competitors from large undertakings. However, after the Second World War when the market became more concentrated, the focus was shifted towards the oligopolies control. Hence, the general approach “big is bad, small is good” was widely applied by competition authorities, sometimes even preventing big companies to achieve efficiency in their business.²⁹

The populists approach was associated with Harvard structure-conduct- performance test, which emphasizes the importance of market structure rather than monopoly conduct. Hence, the undertakings with market share higher than particular percent is automatically suspected of abusive conduct. Because the scholars consider dominant firms the reason of economic inefficiency, they deem the market power to be illegal per se.³⁰

However, the populist doctrine further developed from market structure approach towards the exclusionary conduct analysis. It pays special attention on distribution of resources with the reference to consumers’ welfare rather than on allocative efficiency.³¹ The wealth transfers coming from dominant firms the populists still consider being suspicious even if it leads to economic growth and innovation.³²

1.1.3. Innovation Economics and the Innovation school

This doctrine emerged from the works of different economic scholars who believed that “knowledge, technology, entrepreneurship, and innovation” are the forces driving economic

²⁸ Ibid., at 10

²⁹ Atkinson, Supra note 5, at 9

³⁰ Ibid.

³¹ Ibid.

³² Russell W. Pittman, “Consumer Surplus as the Appropriate Standard for Antitrust Enforcement,” Economic Analysis Group Discussion Paper 07-9, Economic Analysis Group, U.S. Department of Justice, Washington, DC, 2007 <http://www.justice.gov/atr/public/eag/225696.htm>

growth.³³ They state that innovation is the product of activities of all participants of economic exchange including government. So “Innovationists” focus on long- term economic growth considering productive efficiency and adaptive efficiency as the major factors of the latter. Productive efficiency refers the firm’s ability to find the optimal combination of resources in order to produce maximum goods at minimum cost. And adaptive efficiency shows the ability of the market players to adjust and react to changing economic environment.³⁴ So when neoclassical economics is “the study of how societies use scarce resources to produce valuable commodities and distribute them among different people,” the innovation economics, in contrast, is “the study of how societies create new forms of production, products, and business models to expand wealth and quality of life”.³⁵

Innovation economics induce market players to be more productive and innovative³⁶. So even if the governmental policies “distort” price signals in the market leading to “minor deadweight loss”, “Innovationists” believe that benefits from enlarged productive and adaptive efficiency will be greater than losses to allocative efficiency. Moreover, scholars believe that equilibrium in the market is momentary, and disequilibrium doesn’t lead to economic inefficiency, but rather shows progress and development.³⁷

Since innovation economics is characterized by higher level of uncertainty, price signals do not lead to rational decision making by market players. Hence, in contrast to previous doctrines, participants are frequently irrational due to imperfect information in the market.³⁸ Generally, in contrast to previous economic doctrines, innovation economics is rather more flexible, practical and evolving.

³³ Dan Robles “A Definition for Innovation Economics”, November 26, 2009 <http://www.ingenesisist.com/>

³⁴ Atkinson, Supra note 5, at 6

³⁵ Ibid.

³⁶ Robles, Supra note 33

³⁷ Atkinson, Supra note 5, at 6

³⁸ Atkinson, Supra note 5, at 7

The innovation school, having innovation economics in its core, is the latest alternative to both neo- Keynesian and neoclassical economics and the schools associated with them.³⁹ Several factors differentiate “the innovation school” from its predecessors.⁴⁰

First, the “innovationists” argue that antitrust should rather induce greater productivity and innovation in the market than focus on allocative efficiency and resources distribution. They also consider that “inter-firm cooperation” to some extent can enhance productivity and lead to positive outcome. Moreover, innovation scholars emphasize the significance of “dynamic markets” in contrast to neoclassical static model of economy. Hence, they assert that an appropriate antitrust approach should be designed in accordance to dynamics of particular market.

Innovation scholars set a productivity growth as a primary goal of antitrust.⁴¹ Hence, they see an application of innovation doctrine and investigation of particular practices with accordance to their influence on the “total welfare and wealth”⁴². “Innovationists” are rather interested in observation of market processes as the forces of creation “competitive, innovative and productive” undertakings than regulation of competitive markets. And they are not so concerned with the market power such undertakings gain, since they consider that only dominant firms have an incentives to invest in R &D process. And such process, consequently, leads to greater innovation in the market.⁴³

The previous economic models were designed to apply to any market without an exception. Innovation school states that industries differ from each other; therefore, the approach

³⁹ Robert D. Atkinson, Stephen J. Ezell “Innovation Economics: The Race for Global Advantage”, Yale University Press, New Haven and London (2012): 128

⁴⁰ Atkinson, *supra* note 5, at 13

⁴¹ Michael E. Porter, “Competition and Antitrust: Toward a Productivity-based Approach to Evaluating Mergers and Joint Ventures,” *Antitrust Bulletin* 46 (2001): 922

⁴² *Ibid.*

⁴³ Atkinson, *supra* note 5, at 16

towards them should be customized⁴⁴. For instance, High- tech market is distinguished by scholars to have very distinctive features, such as “very high rates of innovation, quick and frequent entry and exit, and economies of scale and consumption”⁴⁵. Hence, it should be treated accordingly.

To sum up, the innovation school is revolutionary approach towards antitrust with a focus on the innovation and productivity. It provides with more practical application of antitrust. All the issues under this doctrine are being examined separately and resolved on the case by case basis.

1.2. Conclusion

The design of optimal antitrust policy is highly debated issue among the legal and economic scholars. The views on economy and its goals differ among the scholars, which leads to sometimes even contradictory approaches towards market regulation. For instance, when traditional economic theories set a focus on allocative efficiency as the mechanism of achieving economic development, the innovation theory puts the latter aside and claims productivity growth to be a leading power in the market.

The innovation school rejects the static models and argues that market is dynamic and, hence, the antitrust should also be evolving and adjusting towards the market changes. Moreover, it claims that antitrust policy should be customized with regard to particular industry. Therefore some types of firms’ conducts, which were forbidden under traditional legal schools, can potentially lead to innovation and productivity⁴⁶. Hence, behavior, previously deemed illegal, can be considered efficient and pro-competitive under “innovation approach”.

⁴⁴ Atkinson, *supra* note 5, at 17

⁴⁵ Richard A. Posner, “Antitrust in the New Economy,” U Chicago Law & Economics, Olin Working Paper No. 106, November 2000, 2

⁴⁶ Atkinson, *supra* note 5, at 28

The Innovation doctrine is believed to be the most flexible and advanced approach towards antitrust issues.⁴⁷

The further application of the following doctrines in United States, European Union and Russia will be analyzed in the fourth chapter of this thesis.

⁴⁷ Atkinson, *supra* note 5, at 28

Chapter 2. Comparative analysis of EU competition policy and US antitrust

In the following chapter I will provide a comparative overview on control of dominance in two major legislations. I will focus mainly on examination of EU competition law through contrast with US system. At first, I will analyze the major legal Acts regulating dominance issues in both models. Then I will consider the factors which constitute offense under each of the systems, after that I will give a definition of dominant position and criteria for defining such position. And in the end I will analyze the types of abusive conduct in both models and draw a comparison between them.

2.1. Comparative analysis of dominance regulation in US and EU

On the surface, the American antitrust and EU competition law are very similar, however, upon closer examination, significant variations on the legal provisions and their application can be discovered.⁴⁸

To start with, the major models were created with common objectives: to protect consumer interests and free flow of goods in competitive markets.⁴⁹ From economic point of view, they should be based on aggregate welfare, since maximization of consumer welfare will inevitably lead to enhancement of the latter.⁵⁰ So US antitrust make a strong focus on achievement of consumer welfare as primary objective. Similarly, the European Commission applies the “economics-based approach” defining growth of consumer welfare and promotion of efficiency as goals of competition law.⁵¹ However, case law and Commission’s approach

⁴⁸ Eleanor Fox “Global Competition policy”, chapter 10 “US and EU competition law: a comparison” Institute for International Economics, 339 <http://www.piie.com/>

⁴⁹ Ibid.

⁵⁰ Farrell and Katz , Discussion paper on “Consumer Surplus as the Appropriate Standard for Antitrust enforcement”, 2006 <http://www.justice.gov/atr/public/eag/225696.htm>

⁵¹ Gerber, David J. “Two Forms of Modernization in European Competition Law”, 31 Fordham International Law Journal 1235 (2007): 1262

towards application of competition legislation differ significantly. Commission strives to apply more economic analysis for case investigations, CJEU, in turn, applies the same practices being used in 1980s-1990s. Hence, case law practice of EU highlights the importance of competitive process' protection, regardless of consumer welfare. Consequently, the evidence of damage as such of competitive process is sufficient enough to initiate the violation under EU competition law, even without the proof of direct consumer harm.⁵² Thus, the different focus of two models reflects the practical application of legal provisions.

Because of the difference in Commission and court's view of EU competition law application, I will focus mainly on comparative analysis of the court practices in two major models, commenting briefly on Commission's opinion for some of the court decisions.

2.1.1. Major provisions on Antitrust

The two major legal acts are addressed to the issues regarding regulation of competition. In the United States the Sherman Act was passed by Congress in 1890 as the first statute on antitrust in history. It was designed to prevent anticompetitive effects focusing primarily on prohibition of illegal behavior of trusts. In European Union Treaty of Rome was enacted in 1957 establishing the common market and specifying the particular rules applied to competition.

Sections 2 of the Sherman Act and Article 102 of Treaty on the functioning of the European Union stipulate the rules applicable to monopoly power and its misuse.

Section 2 states that "every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a

⁵² Pierre Larouche , Maarten Pieter Schinkel "Continental drift in the treatment of dominant firms: Article 102 TFEU in contrast to & 2 Sherman Act", TILEC Discussion Paper No. 2013-020, (2013): 7

felony...”. Article 102 (formerly 82) TFEU specifies that “any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States..”.

So Section 2 emphasizes the ways how the monopoly position is obtained and managed, Article 102, in turn, do not take into consideration these factors, but rather focus on the particular types of prohibited monopolistic behavior.⁵³ Section 2 in contrast to Article 102 also prohibits the particular effort of dominant undertaking to monopolize.

Since Section 2 was passed as a part of Criminal law, the monopolization offence constitutes a felony under Sherman Act. Article 102, in turn, was based on European administrative laws, thus violation of it is classified as administrative offence under TFEU.⁵⁴ As a result, the punishment degree in two models varies significantly.

2.1.2. Infringement under Section 2 of the Sherman Act and Article 102 TFEU

In order to constitute an infringement under Section 2 of the Sherman Act two elements must be established: “1) the possession of monopoly power in the relevant market and 2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of superior product, business acumen, or historic accident”.⁵⁵

The violation under Art. 102 TFEU is similar and also includes two steps. The first one establishes “the degree of market power that the firm under investigation holds in order to assess whether it enjoys a dominant position”⁵⁶. Such dominant position must be determined

⁵³ E. Elhauge , D. Geradin “Global Competition Law and Economics”, Oxford and Portland, Oregon: Hart publishing (2011) as cited by P. Larouche

⁵⁴ Larouche, supra note 52, at 2.

⁵⁵ United States v. Grinnell Corp., 384 U.S. 563 [1966]

⁵⁶ Guidance on the Commission’s Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings (2008)

in relation to the relevant market. The second step examines whether the conduct of such firm constitutes an abuse.⁵⁷ It is important to emphasize that Art. 102 do not prohibit companies from holding a dominant position itself, rather than abusing such position.⁵⁸

In addition, a dominant firm has a special responsibility under EU Competition law “not to allow its conduct to impair undistorted competition on the common market”.⁵⁹ Hence, the company is allowed to participate into “competition on the merits”, however, it must refrain from any conduct which can be determined as “unmeritorious”.⁶⁰

So when US authorities refrain from differentiation between anti- and pro-competitive behavior and prefer system of active enforcement upon fulfillment of violation criteria by the company, the EU legislators, in turn, believe that dominant firm is able to distinct these two types of conduct and make a decision which one to pursue.⁶¹

2.1.3. Dominance

The Sherman Act does not specifically define monopoly. However, it was established in *Broadcom v. Qualcomm* that monopoly power of a firm can be assessed by direct evidence of using its power to control prices and restrict output.⁶²

In EC Competition law definition of dominant position was determined by CJEU in *United Brands v. Commission*. The Court specified that “dominant position... relates to position of economic strength enjoyed by undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable

⁵⁷ Simon Bishop, Michael Walker “The Economics of EC Competition Law: Concepts, Application and Measurement”, (Thomson Reuters (Legal) Limited. 3d ed., 2010): 224

⁵⁸ Ibid.

⁵⁹ Michellin v. Commission., 322/81 [1983]

⁶⁰ Larouche, supra note 52, at 6

⁶¹ Ibid.

⁶² *Broadcom Corp. v. Qualcomm, Inc.*, 501 F3d 297 [2007]

extent independently of its competitors, customers and ultimately of its consumers”.⁶³ Hence, the dominance of a firm is defined by its “ability to prevent effective competition by acting independently from competitors, customers, and consumers.”⁶⁴

The criteria for establishing dominance are similar in both jurisdictions. Thus, the dominant market share on the relevant market and significant barriers for new firms to enter such market must be established.⁶⁵ For United States and Europe market share in excess to 50 % is presumed to be dominant according to case law⁶⁶. However, for EU European Commission lowered this index to 40-45 %.⁶⁷

The relevant market consists of 2 elements: relevant product market and relevant geographic market.⁶⁸ The relevant product market consists of all goods produced by different firms but with similar attributes”.⁶⁹ Besides it comprises of products which “reasonably interchangeable” for the purpose they produced.⁷⁰ Interchangeability requirement is measured by consumer perception to treat such products as they are substitutes.⁷¹

The relevant geographic market is defined by “the geographic area in which the firm and its competitors sell the product or services”.⁷² For some of the products which are being sold nationwide the geographic area can be extended to national scales, for other goods which are

⁶³ United Brands Co and United Brands Continental BV v Commission (27/76) [1978]

⁶⁴ Bishop, supra note 57, at 227

⁶⁵ K.W. Clarkson, R. Miller, G. Jentz, F. Gross “Business law: text and cases: Legal, ethical, global, and e-commerce environments”, South-western, Cengage learning. Mason, USA. (2012): 944

⁶⁶ Engineering and Chemical Supplies (Epsom and Gloucester) Ltd v Arzo Chemie UK Ltd (IV/30.698) [1982]; [1981] OJ L374/1

⁶⁷ Guidance on the Commission’s, supra note 51, para 14

⁶⁸ Clarkson, supra note 65, at 944

⁶⁹ Ibid.

⁷⁰ Ibid.

⁷¹ HDC Medical, Inc., v. Minntech Corp., 474 F3d 543 [2007]

⁷² Clarkson, supra note 65, at 945

being traded on some particular territory the geographic market is restrained by this territory.⁷³

Hence, when dominance of particular undertaking is established, the next conduct of such undertaking must be assessed.

2.1.4. Abusive conduct

Under EU Competition law abusive conduct was defined by legal test in *Hoffmann-La Roche v. Commission*⁷⁴. In this case the conduct of the firm is determined to be abusive if it affects the market structure and weakens the competition.⁷⁵ From economic point of view, abuse is determined as “particular mode of behavior that significantly reduces consumer welfare”.⁷⁶

Abusive conduct is divided on exploitative and exclusionary abuses. Exploitative abuses refer to a conduct where dominant firm charges excessive prices for its products and services, which, consequently, directly harm consumers. Exclusionary abuses, in turn, refer to different practices for foreclosing competitors by a dominant firm, which indirectly injure consumers, by allowing this firm to influence the prices on the market.⁷⁷

Exploitative practices were established by *United Brand* case. It was determined that “price is excessive and unfair when it is significantly above the effective competitive level or above the economic value of the product”.⁷⁸ Additionally it stated that “It is advisable therefore to ascertain whether the dominant undertaking has made use of the opportunities arising out of

⁷³ Ibid.

⁷⁴ Hoffmann-La Roche & Co. AG v Commission (85/76) [1979]

⁷⁵ Ibid.

⁷⁶ Bishop, supra note 57, at 230

⁷⁷ Ibid.

⁷⁸ Motta M. and de Streel A. “Excessive Pricing in Competition Law: Never say Never?”, Stockholm: Konkurrensverket - Swedish Competition Authority, (2007): 16

its dominant position in such a way to reap trading benefits which it would not have reaped if there had been normal and sufficiently effective competition”.⁷⁹

Case law of the United States, on the contrary, does not consider excessive pricing to be violation under Sherman Act.⁸⁰ In *National Reporting* case District Court stated that “antitrust laws are not a price-control statute or a public utility or common-carrier rate-regulation statute.”⁸¹

From point of view of American legislator, the reasonableness of the market prices is very hard to determine, thus, the excessive price is difficult to establish. Moreover, they believe that taking the freedom of setting up prices from companies will diminish incentives for the latter to compete and innovate.⁸²

Exclusionary practices in both legislations are similar and can be divided into horizontal and vertical. In horizontal practices dominant undertaking forecloses competitors on the same market, while in vertical ones it excludes competitors on the downstream market. To horizontal practices three types of conduct refer: predation, exclusive dealing and tying & bundling. To the vertical practices refusal to supply apply.

⁷⁹ United Brands Co and United Brands Continental BV v Commission (27/76) [1978]

⁸⁰ Blue Cross and Blue Shield United of Wisconsin v. Marshfield Clinic, 65 F.3d 1406, 1413 [1995], U.S. v. Aluminum Co. of America, 148 F.2d 416, 430 [1945]; Ball Memorial Hospital, Inc. v. Mutual Hospital Ins., Inc., 784 F.2d at 1325, 1339 [1986]; Berkey Photo, 603 F.2d at 296-98

⁸¹ National Reporting Co. v. Alderson Reporting Co., 763 F.2d 1020, 1023-24 [1985]

⁸² Organization for Economic Co-operation and Development; Directorate for financial and enterprise affairs, Competition committee “Working Party No. 2 on Competition and Regulation. Excessive prices”. DAF/COMP/WP2/WD (2011) 65. October 17, 2011

2.1.5. Horizontal practices

i. Exclusive dealing

The first category of abusive conduct in horizontal practices, exclusive dealing, in EU is defined as “use of exclusive purchasing obligations or rebates to potentially hinder the ability of competitors to sell to customers”.⁸³

The term “loyalty rebate” is commonly used in EU Competition law with reference to exclusive dealing schemes. Such schemes represent a form of price discrimination which defined by posing different prices to different buyers depending on the volume of their purchase unrelated to their actual total needs.⁸⁴ Article 102 (c), consequently, prohibits dissimilar conditions and refers to price discrimination as pro-competitive conduct.⁸⁵

From economic point of view, price discrimination established in situations when a particular product “sold to different consumers at different prices that do not reflect differences in the cost of supply”.⁸⁶

Economists define three types of price discrimination: first, second, and third degree. First degree price discrimination is characterized by ability of undertaking to discriminate perfectly among its customers. However, it also suggests that such undertaking has a full knowledge of its customers willingness to pay, which is unrealistic assumption regarding market economy.⁸⁷ That is why competition law does not take into account this type of discrimination. Second degree price discrimination is defined by volume discounts as the most common form, which allows consumers to self-select their own willingness to pay.⁸⁸ Third degree price discrimination is assessed when an undertaking has a superior knowledge about its consumers

⁸³ Article 82 Guidance, supra note 51, paras 31 to 45

⁸⁴ Bishop, supra note 57, at 250

⁸⁵ Art. 120 (c) TFEU

⁸⁶ Bishop, supra note 57, at 251

⁸⁷ Ibid.

⁸⁸ Ibid.

and it uses this knowledge to price discriminate.⁸⁹ Thus two last types of discrimination are common concern of competition policy in relation to exclusive dealing cases.

In practice loyalty rebates can be divided into several categories.⁹⁰ An exclusivity discount obliges the buyer to make further purchases only from this particular supplier. An individual quantity discount empowers a buyer to get rebate depending on quantity purchased within the stated period. A growth discount is given to a buyer in case when his current purchases exceed those for relevant past period for specified quantity. A bundled discount obliges the buyer to purchase some amount of other product produced by supplier indifferently to the buyer's actual needs of such product.⁹¹ Thus all these discount schemes are providing incentives for the customers to buy more from one supplier.

The case law in EU is completely hostile with regard to application of loyalty rebates by a dominant undertaking.⁹² However, in *Michelin*⁹³ Commission held that "with the exception of short term measures, no discount should be granted unless linked to a genuine cost reduction in the manufacturer's costs". The Michelin was found guilty of abuse of dominance by providing of off- invoice discounts and based on the performance end-of-year rebates for rendering its services in tires replacement. The Commission also stated that "the compensation paid to Michelin dealers must be commensurate with the tasks they perform and the services they actually provide, which reduce the manufacturer's burden".⁹⁴

In *Hoffmann-La Roche*⁹⁵ CJEU found the company guilty in abuse of dominance by offering the royalty rebates and entering into exclusive purchasing agreements with its customers. The CJEU investigated that such discount schemes were based only on the volume of purchases,

⁸⁹ Ibid.

⁹⁰ Bishop, supra note 57, at 257

⁹¹ Ibid.

⁹² Ibid. at 260

⁹³ *Michellin v. Commission.*, 322/81 [1983]

⁹⁴ Ibid.

⁹⁵ *Hoffmann-La Roche & Co. AG v Commission* (85/76) [1979]

which, in turn, were not fixed according to customer's needs and were extended to whole line of company's products. Consequently, CJEU concluded that application of such rebates was an attempt for increasing the company's share of a customer's purchasers, which, in Court opinion, would lead to foreclosure of company's competitors.

To conclude, in EU case law the application of rebates is strictly regulated, so when a dominant undertaking employs any discount scheme, it is likely to be accused of exclusionary behavior. However, Commission states that not in every case loyalty rebates are exclusionary.⁹⁶ So when such discounts entail costs saving by a consumer related to additional sales, they, consequently, increase consumer welfare and, hence, can be deemed pro-competitive.

In United States the Clayton Act regulates the exclusive dealing practices. Section 2 of Clayton Act forbids price discrimination, which is defined as situation when a "seller charges different prices to competing buyers for identical goods and services".⁹⁷ Robinson-Patman Act specified further the application of the latter in which "direct and indirect price discrimination that cannot be justified by differences in production costs, transportation costs, or cost differences due to other reasons"⁹⁸ is deemed forbidden.

In order to initiate violation under section 2 certain elements are required: the seller must be engaged in interstate commerce and actual proof of injuring the competition should be provided.⁹⁹ Exclusive dealing contracts are regulated by section 3 of the Clayton Act. Such contracts are deemed forbidden if they "substantially lessen the competition and tend to create a monopoly".¹⁰⁰

⁹⁶ Bishop, *supra* note 57, at 261

⁹⁷ Clarkson, *supra* note 65, at 946

⁹⁸ *Ibid.*

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid* at 947

For instance, in *Standard Oil*¹⁰¹ the largest gasoline seller was found guilty of abuse of dominance by entering into exclusive dealing contracts with independent stations in seven states. Under such contracts the dealers agreed to purchase the products exclusively from the company. These agreements affected a gross income of \$58,000,000, comprising 6.7% of the total in a seven-state area where Standard Oil sold its products. Thus the Supreme Court held that Standard Oil violated section 3 of Clayton Act by foreclosing the competition in a substantial share of the relevant market.

To conclude, both jurisdictions regulate exclusive dealing practices in cases when they substantially lessen competition and harm consumers. However, when in EU such practices are not tolerated and strictly regulated by court, in US some statutory defenses can be applied in these situations.¹⁰² In addition, exclusive dealing practices in US are characterized with higher burden of proof than in EU. So in order to violate antitrust law, the plaintiff must provide the actual affirmative evidence that particular practice forecloses the competition and injures consumers.¹⁰³

ii. Tying and bundling

The next category of abusive conduct is tying and bundling, which refer to a sales strategies where undertakings offer a combination of diverse products.¹⁰⁴

Three types of strategies are defined: pure bundling, mixed bundling and tying.¹⁰⁵ Pure bundling occurs when two products X and Y are available for purchase only together. Mixed bundling happens when these products are available for purchase separately as well as offered

¹⁰¹ *Standard Oil Co. of California v. United States*. 337 U.S. 293, 69 S. Ct. 1051, 93 L. Ed. 1371 [1949]

¹⁰² For example, cost justification, meeting the price of competition, changing market conditions.

¹⁰³ Clarkson, *supra* note 65, at 947

¹⁰⁴ Bishop, *supra* note 57, at 276

¹⁰⁵ *Ibid.*

at discount when purchased together. Tying refers to a situation when customer by purchasing tied product X is obliged to buy a tying product Y (*see table 1*).

In economics, although leveraging theory of harm refers to all horizontal practices, in tying and bundling cases it is represented the best. According to such theory a firm can gain higher profits by bundling or tying two products together rather than selling them separately. It is leveraging the dominance in its primary market to another market, which is although separate, but still related. By such actions it protects its positions on the both of them and also lessens the competition on the related one.¹⁰⁶

Table 1. Options available to buyers under tying and bundling

	Options available to buyers
Tying	X+Y Y
Pure bundling	X+Y
Mixed bundling	X+Y X Y

Source: Bishop S., Walker M., "The Economics of EC Competition Law: Concepts, Application and Measurement" (2010).

The Article 82 (102) Guidance also affirms: "An undertaking which is dominant in one product market (or more) of a tie or bundle (referred to as the tying market) can harm consumers through tying or bundling by foreclosing the market for the other products that are part of the tie or bundle (referred to as the tied market) and, indirectly, the tying market".¹⁰⁷

Despite being anticompetitive in some cases, tying and bundling does not constitute a per se an abusive conduct in EU Competition law.¹⁰⁸ The bundling in automotive industry is a good example of pro-competitive conduct. Since it's always more beneficial for consumer to buy manufactured car rather than purchasing different parts for such car and assembling them together.

¹⁰⁶ Ibid at 277

¹⁰⁷ Article 82 Guidance, supra note 51, para. 48

¹⁰⁸ Bishop , supra note 57, at 277

So which conduct is considered to be anticompetitive and, hence, abusive then? The criteria for establishing an abusive conduct was brought in *Microsoft*¹⁰⁹ case. The CJEU determined five conditions upon fulfillment of which the violation of Article 102 is established.¹¹⁰

- Dominance in the supply of the tying products
- The tying and tied good are two different products
- The tying product is not offered for purchase without the tied one
- Such “tying conduct” forecloses the individual competitors
- Such “tying conduct” cannot be “objectively justified”.

At first, the dominant position of undertaking in the supply of tying product must be confirmed. However, the dominance of such firm in the tied market is not required. Secondly, the two goods must be “separate” products. The Article 82 (102) Guidance set up the test for defining goods as distinct ones with the reference to consumer demand.¹¹¹ It states that “Two products are distinct if, in the absence of tying or bundling, a substantial number of customers would purchase or would have purchased the tying product without also buying the tied product from the same supplier, thereby allowing stand-alone production for both the tying and the tied product”.

The next criterion determines whether these goods are offered separately. In *Microsoft* it was required for Media Player to be pre-installed in Windows operating system. Moreover, it was impossible for a customer to uninstall such player from the system.¹¹² Although the Media Player was free of charge, many of other rival players were available gratis, that is why Court held that, in fact, Microsoft did not foreclose the competition on the market directly, and it created inconvenience for the customer to opt out from using Windows player. And such

¹⁰⁹ Microsoft Corp. v. Commission (T-201/04) [2007]

¹¹⁰ Bishop, supra note 57, at 288

¹¹¹ Article 82 Guidance, supra note 51, para. 50

¹¹² Commission Decision, supra note 109, at para. 827- 828

behavior, in the Courts opinion, entailed the restriction of competition in the favor of Microsoft and against the rival companies.¹¹³

The forth and the most important factor refers to foreclosure of competitors by tying conduct. Article 102 Guidance states that tying and bundling practices become a concern of competition authorities only in the cases when consumer's harm can be proved. For example, in *Microsoft* case such combination of Media player and Windows operating system, in Commission's opinion, lead to foreclosure of the market.¹¹⁴ Moreover, tying conduct by Microsoft would make other producers less attractive to the customers and, in the long run, they will likely be forced to leave the market.¹¹⁵

The last criterion for establishing abusive conduct is "Objective justification". Although there is no exact definition of this term, it is widely applied and determined in the case law. Like in *Microsoft* Court held that there was no "objective justification" for tying Media player to operation system.¹¹⁶

To conclude, in EU Competition law tying and bundling can have both pro- and anticompetitive effects, thus each case should be considered on the merits, and all per se violation rules should be eliminated.¹¹⁷

In the United States the tying practices are forbidden under section 3 of the Clayton Act. In *International Business Machines*¹¹⁸ the Supreme Court found International Business Machines and Remington Rand guilty of dominance abuse by employing tying arrangements. These two companies were the only firms in the market who manufactured and offered for purchase fully automated tabulation machines. Thus all consumers who would like to lease such machines

¹¹³ Microsoft Corp. v. Commission (T-201/04) [2007]

¹¹⁴ Ibid.

¹¹⁵ Ibid.

¹¹⁶ Ibid.

¹¹⁷ Bishop, supra note 57, at 291.

¹¹⁸ International Business Machines Corp. v. United States, 298 U.S. 131, 56 S. Ct. 701, 80 L. Ed. 1371 [1949]

(the tying product) were required to purchase the cards (the tied product) from the companies. The Supreme Court held that such behavior would “substantially lessen the competition”, so it must be deemed forbidden.

The tying arrangements can also be considered under section 1 of the Sherman Act on the grounds of “restraining trade”.¹¹⁹ So every case regarding such conduct is being brought under first section, which primarily regulates horizontal and vertical restraints in US antitrust. Although in the beginning during the Activism policy in United States the tying practices were illegal per se, later the Courts realized the necessity to investigate such cases under the rule of reason.

To conclude, in both jurisdictions tying and bundling practices are forbidden due to its detrimental effect on competition and customers. Moreover, such practices are investigated on the merits and not considered illegal per se. However, in United States tying conduct is primarily investigated together with market concentration cases regarding horizontal and vertical restraints.

iii. Predation

The conduct of a firm for establishing prices in such low level, which forces other players to leave the market or precludes new ones from entering, called predatory.¹²⁰ And such behavior can be detrimental to competition and have a further negative influence on consumers.

Article 82 (102) Guidance defines predatory conduct: “A dominant undertaking engages in predatory conduct by deliberately incurring losses or foregoing profits in the short run... so as

¹¹⁹ Clarkson, *supra* note 65, at 947

¹²⁰ Viscusi, Vernon and Harrington “Economics of Regulation and Antitrust”, MIT (2005) as cited by Bishop, *supra* note 57, at 292

to foreclose one or more of its actual or potential competitors with a view to strengthening or maintaining its market power, thereby causing consumer harm”.¹²¹

So from this definition we can establish the three steps to be followed in order to identify predation. First, firm should have substantial market power, so to be dominant in the relevant market. Without such dominance the effect on competition would be insufficient. Second, the firm should sacrifice its short-run profits. And the last, the firm sacrifice should lead to foreclosure of competitors and, consequently, increase of its market power in the market.

So the key element in distinguishing whether conduct is predatory or not, is to establish whether firm is foregoing or sacrificing its short run profits.¹²² Such behavior called “investing”, because firm is so called investing in short run losses, so later it can recoup such “investment” and get a higher pay –offs from maintaining monopoly prices.¹²³

In *AKZO Chemie BV*¹²⁴ Commission found Akzo guilty of dominance abuse by maintaining predatory prices in the market of organic peroxides with the intention to exclude competitor. CJEU established two legal tests to define the price to be predatory.

The first test identified the prices below average variable costs¹²⁵ to be predatory. In Court opinion, the undertaking does not have any interest in selling its goods for such prices, since each unit produced combines total amount of fixed costs and some amount of variable costs. Hence, the each sale of unit would amount in a loss of profits.¹²⁶ So when the firm is pursuing such conduct, it is presumed that it has a predatory intent. The second test defined prices

¹²¹ Article 82 Guidance, supra note 51, para. 62

¹²² Bishop , supra note 57, at 292

¹²³ Ibid.

¹²⁴ OJ L374/1 and case C-62/86 *Akzo v. Commission* (C-62/86) [1991] E.C.R. I-3359; [1993] 5 C.M.L.R. 215.

¹²⁵ Average variable cost is a firm's variable costs (labor, electricity, etc.) divided by the quantity of output produced. Variable costs are those costs which vary with output

¹²⁶ Bishop, supra note 57, at 292, para. 71

below average total costs¹²⁷ and above average variable costs to be predatory in case where is sufficient proof that such pricing was aimed to eliminate a competitor.¹²⁸

So, in cases when the prices are below average variable costs, they are assumed to be predatory. However, when such prices are above average variable cost, but at the same time below the average total cost, they deemed to be abusive if there is an evidence of driving out competitor from the market.

In United States predatory pricing is regulated by section 2 of the Sherman Act. It forbids to monopolize or to attempt to monopolize. In *Brown & Williamson Tobacco Corp.*¹²⁹ the Court established a legal test for defining predatory conduct. It must be proved that “1) the prices are below an appropriate measure of its rival's costs, and 2) the competitor had a reasonable prospect or a "dangerous probability" of recouping its investment in the alleged scheme”.¹³⁰

Moreover, the Court introduced the concept of predatory bidding, where the input side of the conduct must be analyzed. Firm involved in predatory bidding “deliberately bids up the prices of inputs to prevent its competitors from obtaining sufficient supplies to manufacture their products.”¹³¹ Like in predatory pricing, the firm in predatory bidding uses its market power to drive out the competitors. Once it succeeds, it will lower input prices to earn supracompetitive profit and to cover the losses.

¹²⁷ Average total cost (ATC) is the sum of all the production costs divided by the number of units produced

¹²⁸ Bishop, *supra* note 57, at 292, para. 72

¹²⁹ *Brooke Group, Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 113 S. Ct. 2578, 125 L. Ed. 2d. 168 [1993]

¹³⁰ *Ibid.*

¹³¹ Clarkson, *supra* note 65, at 946

In *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*¹³² Supreme Court stated that both models : pricing and bidding are common, and the same legal standards used for cases in predatory pricing should be applied to predatory bidding.

To conclude, the approach in defining predatory conduct in both jurisdictions differs. In EU coherent economic analysis applies in identifying the predatory price. In US “the appropriate measure of rival costs” is not particularly specified. In addition, in US the proof of recoupment of losses is required, which is abandoned in CJEU practice.¹³³ Moreover, United States introduced the concept of predatory bidding, which is similar to the pricing one, but focuses mainly on input’s manipulations by dominant undertakings.

2.1.6. Vertical practices

The firms in the market have inalienable right to make their own business decisions, chose their partners and maintain their property rights accordingly. However, in some cases when a dominant undertaking is involved these rights can be waived by competition authorities. Such cases are known as refusal to deal or refusal to supply. For instance, in the cases when a dominant form is competing in “downstream” market and refuses to supply to other companies or when this firm sets up the prices to “downstream” players at such level, so they are not able to compete profitably.¹³⁴ Such practices refer to vertical ones.

The economic approach to these issues was formed under influence of essential facilities doctrine. It was originated in the United States and refers to dominant undertaking’s behavior to use its market power to apply “bottleneck” to preclude competitors from entering the

¹³² *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., Inc.*, U.S. 127 S.Ct. 1069, 166 L.Ed. 2d. 911 [2007]

¹³³ Commission Decision relating to a proceeding under Article 82 of the EC Treaty (COMP/38.233 - Wanadoo Interactive), July, 16 2003

¹³⁴ Article 82 Guidance, supra note 51, para. 79

market.¹³⁵ According to this doctrine, the owners of “essential” or “bottleneck” facility are obliged to give an access to such facility at the reasonable price.¹³⁶ The Commission identified an essential facility as “a facility or infrastructure without access to which competitors cannot provide services to their customers”.¹³⁷ The essential facility doctrine was mostly associated with the industries of natural monopolies such as gas, electricity, transport, and telecommunications; however, it was not limited by them.¹³⁸

The main concern of the competition authorities is the negative effect of such refusals by dominant firms, which entails lessening competition in the market. Article 82 (102) Guidance states:” A refusal to supply may lead to consumer harm where the price in upstream input market is regulated, the price in the downstream market is not regulated and the dominant undertaking, by excluding competitors on the downstream market through a refusal to supply, is able to extract more profits in the unregulated downstream market than it would otherwise do”.¹³⁹

So in order to prevent the dominant firms to take over through refusals to supply, the Commission defined three factors for identifying an abusive conduct.

- “The refusal relates to a product or service that is objectively necessary to be able to compete effectively on a downstream market;
- The refusal is likely to lead to the elimination of effective competition on the downstream market; and
- The refusal is likely to lead to consumer harm”.¹⁴⁰

¹³⁵ http://en.wikipedia.org/wiki/Essential_facilities_doctrine

¹³⁶ Bishop , supra note 57, at 323

¹³⁷ B & I Line Plc v. Sealink Harbours Ltd and Sealink Stena Ltd (IV/34.174) [1992]

¹³⁸ Bishop , supra note 57, at 323

¹³⁹ Article 82 Guidance, supra note 51, para. 88

¹⁴⁰ Ibid., para. 81

In *Commercial Solvents*¹⁴¹ CJEU found the company guilty of dominance abuse by refusing to supply its product to a downstream competitor. Commercial Solvents held a dominant position in the market of raw materials which were used to manufacture a chemical. The Court held that by refusal to supply a raw material, the company reserves it for their own production needs, and at the same time, eliminates a competitor who needs such raw material for their manufacturing demands.

Generally, the Commission while investigating the case decides whether the refused product is possible to substitute with another good. And then it analyzes whether it is possible to create an alternative source of efficient supply or not.¹⁴²

Another type of conduct which is considered to be abusive under EU Competition law and similar to a refusal to supply is margin squeeze. It occurs when a dominant undertaking offers to competing downstream firms a product at the wholesale price, which, comparing with retail price, does not allow even efficient firms to cover their costs.¹⁴³ It is not enough just to establish a margin squeeze by a dominant firm, it is essential to show that such conduct is detrimental to a consumer.¹⁴⁴

In *Deutsche Telekom*¹⁴⁵ the company was found guilty of a margin squeeze. Deutsche Telekom was operating in the retail fixed line telephony market. It was dealing with retail consumers and other firms offering telephony services. Commission found that either the retail price of the company products was lower or higher than the wholesale price; the other firms on the market still could not cover their costs. Hence, downstream competitors were harmed.

¹⁴¹ *Instituto Chemioterapico Italiano Spa and Commercial Solvents Corp. v. Commission* (6& 7/73) [1974]

¹⁴² <http://internationalcompetitionlaw.wikidot.com/system:refusals-to-deal-supply-in-the-eu-and-us>

¹⁴³ Bishop, supra note 57, at 337

¹⁴⁴ Ibid at 338

¹⁴⁵ *Deutsche Telekom AG* (COMP/C-1/37.451, 37.578 and 37.579) [2003]

In United States Section 2 of the Sherman Act regulates the unilateral refusal to deal. It focuses mainly on anticompetitive consequences of such conduct. Authorities give a full right for undertaking to refuse to deal with their competitors; however, such conduct must have legitimate reasons and it should not entail anticompetitive effects on a particular market.

In *Aspen Skiing*¹⁴⁶ the company was found guilty of dominance abuse by refusing to deal with a smaller competitor. Aspen Skiing held three out of four major ski areas in Aspen, and for several years it cooperated with Aspen Highlands for selling "all-Aspen" tickets. Aspen Skiing refused to deal with the competitor and started selling lift tickets to only his mountains. Moreover, it refused to sell any of these tickets to Aspen Highlands, so the latter couldn't offer the lifts to other mountains. Supreme Court held that Aspen Skiing had a monopoly position and its conduct entailed an anticompetitive effect.

While investigating the "refusal to deal" cases the court considers several factors. Whether the essential facility is controlled by a dominant firm, whether the competitor able to reproduce the essential facility, whether the access to such facility is denied and whether it is feasible to provide such access.¹⁴⁷

To conclude, both models aim to prevent distortion of competition and consumer harm. Since they were primarily based on essential facilities doctrine, the approach to refusal to deal or supply is similar in both jurisdictions. However, if CJEU focus mainly on the product itself and tries to find alternative channels for such good supply, Supreme Court of United States analyzes the essential facility and whether the access to it is achievable or not. Moreover, EU Competition law recognizes a margin squeeze conduct, which refers to dominant firm dealing with downstream competitors and offering to them the prices that do not allow the latter to recoup their costs.

¹⁴⁶ *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 105 S. Ct. 2847, 86 L. Ed. 2d. 467 [1985]

¹⁴⁷ *B & I Line Plc v. Sealink Harbours Ltd and Sealink Stena Ltd* (IV/34.174) [1992] 5 C.M.L.R. 255

2.2. Conclusion

The comparative analysis shows that although both EU and US systems are quite similar, some fundamental differences lay in their substance.

Firstly, both models pursue different policy goals. While US protect consumers, EU also cares about safeguarding a competition process itself. Additionally, when US prevent monopoly and any attempt to monopolize, EU does not consider dominance illegal per se, however, it is designed to prevent an abuse of the latter. That is why exclusionary conduct punished as a crime under American system, while European system limits such punishment to an administrative offence. Moreover, EU applies “economics-based approach” in investigating the cases, in which it asserts that exclusionary conduct can be also a pro-competitive one. Hence, European model introduced a special responsibility for the dominant firm to evaluate their conduct and refrain from “unmeritorious” one. US, in turn, do not make a difference between anti- and pro- competitive behavior and prefers a system of active enforcement. Also US can be characterized by higher burden of proof, since it requires establishing intent in order to constitute an abuse. EU, in contrast, does not specifically recognize an intent requirement.

The approach towards exclusionary practices is mostly common in both systems; however, some distinctions can be drawn. First, US don't recognize an excessive pricing, since it believes that the right to set up prices for their products and services is inalienable for a firm, and, it motivates the latter to develop and innovate. Second, US introduce the concept of predatory bidding characterized by lowering prices on input level, which is not particularly recognized in EU Competition law. Last, in vertical practices EU established a margin squeeze behavior, in which a dominant firm dealing with competitor makes the latter incur losses. And such practice is not introduced in United States.

Chapter 3. Analysis of Russian Antitrust Legislation

In the following chapter I will analyze the formation and development of competition policy in Russia, in order to define the main issues antitrust establishment faced and how such problems were resolved. I will provide an overview of the major provisions covering competition cases and practical application of such provisions in order to see how antitrust enforcement works and what the types of conduct are forbidden in Russia.

3.1. *Development of competition policy in Russia*

The first steps in Russian competition policy commencement were made in the 1980s during the USSR existence. However, only in the early 1990s due to the implementation of new economic reforms, formation of a market system, rejection from ineffective totalitarian methods of management radical transformation of existing legal norms started to happen. Hence, several stages of competition policy development are defined based on the particular time periods when these norms were introduced.¹⁴⁸

3.1.1. 1991- 1993

The Principal stage of competition policy development is characterized by realizing the necessity of antitrust policy formation, by creation of special regulatory body and adoption of essential regulatory laws¹⁴⁹. The Law “On Competition and Restriction of Monopolistic Activity in Commodity Markets”¹⁵⁰ was introduced in 1991. It was mainly based on Western European standards. A wide range of antitrust goals was commenced there, such as:

¹⁴⁸ N. Rosanova, “Evoluciya antimonopol’noy politiki Rossii: Problemy I Perspektivy”, Voprosy Ekonomiki no. 5 2005, 117 (“Evolution of Russian antitrust policy: problems and perspectives”, transl. mine)

¹⁴⁹ Rosanova, supra note 148, at 119

¹⁵⁰ Zakon RSFSR N 948-1 “ O konkurencii I ogranichenii monopolisticheskoy deyatel’nosti na tovarnykh rynkakh” ot 22.03.1991 (The Federal Law N 948-1 “On Competition and Restriction of Monopolistic Activity in Commodity Markets” from 22.03.1991, transl. mine)

- creation of strong market relations based on development and protection of competition and entrepreneurship;
- prevention, control and suppression of unfair competition and abuse of dominant position;
- monitoring and execution of the antitrust laws by the state government¹⁵¹.

Despite the fact that law was drafted according to current state of affairs of that period, its inadequacy and vagueness raised a number of issues in the following years. That is why the law was amended eight times; however, a new version was never adopted.¹⁵²

Two years later the primary source of national legislation the Constitution of Russian Federation was introduced. It guaranteed basic constitutional rights based on “integrity of economic space, a free flow of goods, services and financial resources, support for competition, and the freedom of economic activity”¹⁵³. Also it forbade “economic activity aimed at monopolization and unfair competition”¹⁵⁴. Hence, it declared a commencement of a common market and it defined the regulatory framework of competition law.

This period of radical reforms was characterized by the intersection of economic, competition and industrial policies.¹⁵⁵ There was no clear understanding which functions each of policies should carry on and where to set up a barriers. Thus, different policies were overlapping and inhibiting the progress of each other. For instance, competition policy was understood to be an industrial policy, but with the aim of giving benefit to one economic agent to the detriment of another. In addition, economic policy at these times was associated with “pro-monopolization”. Hence, the primary antitrust regulation was considered to be unreasonably strict, trying to distance itself from the economic policy. However, it was hard to separate the

¹⁵¹ Rosanova, *supra* note 148, at 119

¹⁵² *Ibid* at 117

¹⁵³ Konstitutsiia Rossiiskoi Federatsii (1993) [Konst. RF] (Constitution)

¹⁵⁴ *Ibid*.

¹⁵⁵ Rosanova, *supra* note 148, at 118

two of them, since competition policy was created primarily as a passive instrument of an economic one.¹⁵⁶

As the primary goals of the economic policy were privatization and enterprises' reorganization, the antitrust committee carried out mainly two functions: creating and maintaining a register of monopolies and regulating prices. Such functions were in direct contradiction with the principal objectives of antimonopoly committee defined by law. Firstly, matters regarding price regulation were not mentioned in the Federal Law "On competition..." at all. Secondly, creating such register by default was infringement of antitrust regulation, since inclusion in this database should be a result of particular violation by the company, despite to be based only on vague 35 % market share's indicator. Therefore, given that data about market concentration was limited and boundaries between the markets were not clearly specified, "bona fide" enterprises could become potential infringers in such case.¹⁵⁷ Also considering that all antimonopoly committee actions at those times were based on the "presumption of guilt" principle, registration of all new enterprises was made only after the committee approval. Such behavior entailed the creation of new administrative barriers in the market entry and in competition in general.

Attempts of monopoly price regulation by the committee, in turn, resulted in a big failure. The Governmental resolution from August, 1992¹⁵⁸ introduced new regulatory methods for prices and tariffs of monopoly's products and services. It defined ceiling price, rentability limit and marginal rate of price change. Such regulation entailed growth of production costs, which successively lowered interest of companies in production development and improving product

¹⁵⁶ Ibid at 118

¹⁵⁷ Ibid.

¹⁵⁸ Postanovlenie Pravitelstva RF [PP] N 576 "O gosudarstvennom regulirovanii tsen i tarifov na produkciju i uslugi predpriyatii- monopolistov v 1992- 1993." (Governmental resolution N 576 "On governmental regulation of prices and tariffs for products and services of monopolies in 1992-1993 yy", transl. mine)

competitiveness. The implementation of this resolution was against the goals of economic policy, it ruined tax base and it did not facilitate the development of competition.¹⁵⁹

As a result, on the first stage of reforms regulatory provisions of antitrust regulation were not only defined by the goals of economic policy, but the latter were dominating over in practical application, sometimes even in detriment to competition policy itself. Hence, competition policy was based on governmental antitrust control and register of forbidden actions.¹⁶⁰ And it did not and could not carry out functions necessary for achieving its objectives.

3.1.2. 1994- 1997

The second stage was characterized by the isolation of antitrust regulation as an independent policy with specific objects, actors and tools, different from the methodology of economic policy. It started with the adoption of the Governmental program “On economy’s demonopolisation and competition development”¹⁶¹ in 1994 and the Federal law “On Natural monopolies”¹⁶² in 1995. These legal acts defined the development strategy of antitrust regulation, and gave it essential consistency and organization.

The Governmental program stated the target markets for demonopolisation and determined the particular stages of program’s realization.¹⁶³ The Federal Law, in addition, defined the legal framework of the federal policy regarding natural monopolies. During this period the general principles of competition policy were extended to specific sectors of the economy - the financial markets, insurance sector, banking sector, industries with natural monopolies.

¹⁵⁹ Rosanova, supra note 148, at 119

¹⁶⁰ Ibid.

¹⁶¹ Postanovlenie Pravitelstva RF [PP] N 191 “O gosudarstvennoi programme demonopolizacii ekonomiki I razvitiya konkurencii na rynkakh Rossiiskoi Federacii” (Governmental resolution № 191 “On governmental program on economy’s demonopolisation and competition development on Russian markets”, transl. mine)

¹⁶² Federalnii Zakon N 147- FZ “O estestvennikh monopoliyakh” (Federal Law № 147- FZ “On natural monopolies”)

¹⁶³ Postanovlenie Pravitelstva RF [PP] N 191, Supra note 161

Antitrust policy began to shift from the regulation of the distribution network to the control of production processes.¹⁶⁴

Additionally, in 1995 the Federal Law “On competition...” was amended. Quantitative approach towards anticompetitive actions started to prevail. Enterprises with market share lower than 35 % were excluded automatically from potential infringers, companies with market share of 65 % were considered to be infringers by default; and firms with market share between 35% and 65% were subject to antitrust body’s investigation.¹⁶⁵

Special role in the second stage was devoted to introduction of the law “On advertising”¹⁶⁶. It included specification on different types of firm’s behavior whether allowed or forbidden on the market, description of requirements on advertising activity and instructions in case of appropriateness and inappropriateness of such activity. The Law was aimed to disseminate the definition and idea of civilized competition and, consequently, to satisfy a domestic demand with national products and services. On the whole, it intended to harmonize competition and industrial policies.¹⁶⁷

However, the dissonance between competition, economic and industrial policies continued to exist. While the Law “On measures to protect the economic interests of the Russian Federation in foreign trade”¹⁶⁸ adopted in 1998 meant to defend economic agents and specific industries from detrimental influence of external competition, it did not take into account that

¹⁶⁴ Rosanova, supra note 148, at 119

¹⁶⁵ Postanovlenie Pravitelstva RF [PP] N 154 “O reestre hozyaistvuyuschikh subektov, imeyuschikh na rynke opredelenного товара dolyu bole 35 %” ot 19 Fevralya, 1996 (Governmental resolution N 154 “On register of business entities with a share more than 35% on a certain commodity market” from February, 19 1996, transl. mine)

¹⁶⁶ Federalnii Zakon N 108- FZ “O reklame” (Federal Law № 108 – FZ “On advertising”)

¹⁶⁷ Rosanova, supra note 148, at 122

¹⁶⁸ Federalnii Zakon N 63- FZ “O merakh po zaschite ekonomicheskikh interesov RF pri osuschestvlenii vneshney trgovli tovarami” ot 14 Aprelya 1998 (Federal Law № 63- FZ “On measures to protect economic interests of Russian Federation in foreign trade” from April, 14, 1998, transl. mine)

such measures could lead to legal monopolistic effects which, in turn, would likely to negatively affect domestic competition.¹⁶⁹

To conclude, the lack of understanding outcomes each policy's influence could lead to, specific instruments of such influence as well as identification of areas where the interests of such policies may overlap and conflict lead, in turn, to inconsistency between economic and competition policies.¹⁷⁰

3.1.3. 1998- 2003

The Financial crisis of 1998 forced the changes in methods and goals of economic policy. Clear understanding, that competition policy could not only facilitate but also prevent the effective functioning of economic policy, lead to essential transformations in existing system.¹⁷¹

Firstly, The Governmental committee for antitrust policy changes its status to Ministry for Antimonopoly Policy and Business Support. Secondly, antitrust policy enforced its protection function by amending the Federal Law “On competition...” and widening the list of restricted activities. Additionally, demonopolisation activity was passed from economic to antitrust policy, thereby separating them.

In 1999 Law “On protection of competition on financial markets”¹⁷² defined the major direction in competition policy regarding this area. Since 2000 regulatory measures in case of governmental anticompetitive actions were added to Federal law “On competition...”. Such provision distinguishes Russian legislation from the foreign analogs. In most foreign antitrust

¹⁶⁹ Rosanova, supra note 148, at 124

¹⁷⁰ Report “On competition development on commodity markets of Russian Federation”, 17—21 www.fas.gov.ru

¹⁷¹ Rosanova, supra note 148, at 125

¹⁷² Federalnii Zakon N 117- FZ “O zaschite konkurencii na rynke finansovykh uslug” ot 23 Iyunya 1999 (Federal Law N 117- FZ “On protection of competition on the market of financial services” from June, 23, 1999, transl. mine)

legislations government is understood as protector of domestic competition, however, they don't take into account that state actions, in opposite, can also have an anticompetitive effects. Thus, when the state government sets up a target to implement specific industrial policy in the region or in particular market, this action can be a reason of anticompetitive behavior from the state side. In Western countries, the economic and competition policy are concurrent, so the state happens to be *ex post* on the side of the competition mechanism, and all arising issues are being resolved *ex ante*.¹⁷³

The third stage was completed by introduction of new concept in demonopolisation of economy in 2002. It brought the necessity of differentiated approach taking into account the characteristics of individual industries and specific markets. The efficiency of competition mechanism focused on regulation in case of new economic agent's creation rather than on restriction of measures towards existing ones.¹⁷⁴

3.1.4. 2004- Present

The creation of Federal Antimonopoly service (FAS) as separate body in 2004 highlighted the last stage of competition development. The functions of the new body in addition to antitrust regulation spread towards development of competition policy with regard to competition support. Moreover, FAS started to directly participate in creation of industrial policy.¹⁷⁵

In 2006 the new Federal Law "On the Protection of Competition"¹⁷⁶ was introduced, which is in force even today. Also in 2006 "first antimonopoly package" was adopted, which entailed new amendments in the Code of Administrative Offences and in article 178 of the Criminal Code. It introduced new procedure for calculating penalties in case of antitrust law violation,

¹⁷³ Rosanova, supra note 148, at 126

¹⁷⁴ Report «On Competition policy in Russian Federation» (1999-2001 yy.), 87-88

¹⁷⁵ Rosanova, supra note 148, at 127

¹⁷⁶ Federalnii Zakon N 135-FZ "O zaschite konkurencii" ot 26 Iyulya 2006 (Federal Law № 135- FZ "On protection of competition" from July 26, 2006)

depending on “*corpus delicti*”, the actual damage done and the size of the company's turnover.¹⁷⁷

In 2009 "second antimonopoly package" was introduced. It stated the procedure for state and municipal preferences, defined parameters for non-discriminatory access to goods and services produced by natural monopolies, tightened control over transactions concluded outside the territory of the Russian Federation, if these transactions affect competition within the country. It also revised the definition and criteria of dominant position, monopolistically high and low prices; and introduced new restraints on vertical contracts.¹⁷⁸

Currently, antitrust regulation in Russia is not just a set of one-time measures, but permanent and at the same time flexible system for controlling and correcting the market economy. Harmonization of the Russian legislation in accordance with international standards has provided the necessary preconditions for the further successful development of antitrust policy.¹⁷⁹

3.2. Overview of Current Antitrust Legislation in Russia with focus on Abuse of Dominance.

In this subchapter I will provide the main regulatory framework on abuse of dominance in Russia. I will list the major legislative Acts and important provisions controlling the monopoly's activity in order to highlight the improvement of competition policy and to make a comprehensive analysis of practical application and law enforcement in the following chapter.

¹⁷⁷ <http://www.fas.gov.ru/>

¹⁷⁸ Ibid.

¹⁷⁹ Rosanova, supra note 148, at 128

Legal regulation of competition and monopolistic activity is based on the provisions of the Constitution of the Russian Federation, Civil Code, antitrust Federal laws and other sub-legal acts.

3.2.1. General provisions

Russian Constitution contains provisions defining regulatory framework of competition law.

In particular the following should be noted:

- It guarantees “the integrity of economic space, a free flow of goods, services and financial resources, support for competition, and the freedom of economic activity” in article 8.
- It forbids “The economic activity aimed at monopolization and unfair competition” in article 34.2
- It states that “establishment of legal groups for a single market; financial, currency, credit, and customs regulation, money issue, the principles of pricing policy; federal economic services, including federal banks” are under jurisdiction of Russian Federation, and, consequently, the antitrust laws have a federal level (Article 71 g).
- It forbids the establishment of “custom borders, dues or any other barriers for a free flow of goods, services and financial resources” on the territory of Russian Federation (Article 74)¹⁸⁰.

Another source of antitrust legislation is Civil Code of Russian Federation. Article 10 prohibits “the use of civil rights for the purpose of restricting the competition, as well as the abuse of the dominant position in the market”¹⁸¹.

¹⁸⁰ Konstituciia RF, Supra note 153

¹⁸¹ Grazhdanskii Kodeks RF [GK] [Civil Code] art. 10 (Russ.).

The competition issues in Russia are primarily regulated by the Federal Law No. 135-FZ from July 26, 2006 ” On the Protection of Competition”. It aims “to ensure common economic area, free movement of goods, protection of competition, and freedom of economic activity in the Russian Federation and to create conditions for effective functioning of the goods markets”¹⁸². Also it focuses on prevention and prohibition of monopolistic activity and unfair competition. Special attention the law pays to restriction of competition by “federal executive authorities, public authorities ..., bodies of local self-government, other bodies ..., as well as public extra-budgetary funds, the Central Bank of the Russian Federation”¹⁸³.

3.2.2. Provisions defining dominance

Article 5 of Federal law” On competition” defines the dominant position or the market power. Thus in cases when “position of an economic entity (a group of persons) or several economic entities (groups of persons) in the market of certain commodity” have an opportunity to make a decisive impact on the general conditions of commodity circulation in the relevant ... market and (or) to remove other economic entities from this ... market and (or) to impede access to this ... market for the other economic entities”¹⁸⁴ defined to be dominant.

The further quantitative methods are used in order to determine dominance. They apply to all economic entities except financial organizations. So entity is recognized as dominant if:

- Its share in the certain goods market exceeds 50 %, unless otherwise proven by FAS.
- Its share in the certain goods market is less than 50 %, but the dominance is proven by FAS.

¹⁸² Federal Law No. 135-FZ, Supra note 176, art. 1(2)

¹⁸³ Ibid art. 1(1)

¹⁸⁴ Ibid art. 5

For the economic entities whose shares are less than 35 % on the particular market, dominance cannot be declared unless it is collective dominance. The cases on such dominance will not be analyzed further in this paper.

3.2.3. Provisions on abuse of dominance

Article 10 of the law “On competition” prohibits the abuse of dominance by economic entity. Actions or lack of them of a particular economic entity with a dominant position, resulted or could have resulted “in prevention, restriction or elimination of competition and (or) infringement of the interests of other persons are prohibited”.

Thus the law defines 11 types of such actions (or lack of them):

- Establishment and maintenance the monopolistically high or monopolistically low price for a commodity;
- Withdrawal of goods from circulation, if the result of such withdrawal is increase of price for commodity;
- Imposing contractual terms upon a counteragent which are unprofitable for the latter or they are not connected with the subject of agreement (economically or technologically unjustified);
- Economically or technologically unjustified reduction or cutting off the production of goods;
- Economically or technologically unjustified refusal or evasion form concluding a contract with individual purchasers (customers);
- Economically, technologically or otherwise unjustified establishment of different prices (tariffs) for the same goods if not established otherwise by the law;
- Establishment of unjustifiably high or unjustifiably low price of a financial service by a financial organization;

- Creation of discriminatory conditions;
- Creation of barriers to entry into the goods market or leaving from the goods market for the other economic entities;
- Violation of the procedure of pricing established by statutory legal acts;
- Price manipulation on the markets of electrical energy.

Article 6 of Law “On competition” gives a definition of monopolistically high price of goods as “a price fixed by an economic entity with dominant position, if this price exceeds the sum of the necessary production and distribution costs of the goods and profit, and exceeds the price formed under competitive conditions in the goods market ...”¹⁸⁵. FAS applies the analysis based on “comparable composition of goods’ buyers or sellers, conditions of goods circulation, market entry conditions, government regulation, including taxation and customs-and-tariffs regulation”¹⁸⁶. However, the price fixed by a natural monopoly within the rates determined in accordance with legislation of the Russian Federation is not considered to be monopolistically high.¹⁸⁷ Paragraph 4 gives exclusion for the price lower than the one’s formed under competitive conditions from the monopolistically high.¹⁸⁸

Article 7 of the following law defines the monopolistically low price as a “price fixed by an economic entity with a dominant position, if such price is below the sum of the necessary production and distribution costs of goods and profits of the entity, and it is below the price formed under competitive conditions in the market...”¹⁸⁹. The similar analysis as for determination of monopolistically high price applies here.

¹⁸⁵ Ibid art. 6

¹⁸⁶ Ibid.

¹⁸⁷ Ibid.

¹⁸⁸ Ibid.

¹⁸⁹ Ibid art. 7

There are certain conditions when price of goods cannot be described as monopolistically low one. In case when the price is “fixed by a natural monopoly within the rates for such goods, and determined in accordance with legislation of Russian Federation”; in case when price “is not below the price formed under competitive conditions in the comparable goods market”; and in situations when the “price fixing by the goods’ seller has not resulted or could not have resulted in restricting competition ...”¹⁹⁰, price is not considered to be monopolistically low.

Certain actions are permissible under Russian legislation. In case when they do not impose restriction on competition in a particular market and they result in “perfection of production, sale of goods or stimulation of technical, economic progress or rising competitive capacity of the Russian goods in the world market”¹⁹¹ and benefits obtained by consumers are proportionate to the benefits obtained by the economic entities in the result of such actions (or lack of actions), agreements etc.; they are not considered to be dominant.

3.2.4. Provisions regarding natural monopolies

Natural monopolies are regulated by Federal Law No. 147-FZ (I) "On Natural Monopolies" from August, 17 1995.¹⁹² The market with natural monopoly defined by law as “the state of the commodity market in which demand is more effectively satisfied ...due to technological peculiarities of production..., and in which commodities manufactured by natural monopoly entities cannot be substituted with other commodities in the market¹⁹³...”. Natural monopoly can exist in certain areas such as transmission of oil and oil products through trunk pipelines; pipeline transportation of gas; services on the transmission of electric power and heat energy; railroad transportation; transportation terminal, port and airport services; public telecommunications and postal services.

¹⁹⁰ Ibid.

¹⁹¹ Ibid art. 13

¹⁹² Federal Law No. 147-FZ , Supra note 162

¹⁹³ Ibid art. 3

3.2.5. Recent changes in competition legislation

The law “On protection of competition” was amended in 2011. Hence, the Federal law No. 401-FZ “On protection of competition” from December, 6¹⁹⁴ and “Third Antimonopoly Package” were introduced. These legal acts aimed to resolve current antitrust issues.

First of all, in case when agreement is concluded between Russian company and foreign organization outside of the Russian territory, but such agreement has an impact within Russian territory, then Russian competition law applies. In such situations foreign organizations are subject to particular fine under Administrative code, foreign officials, additionally, are liable under Criminal Code¹⁹⁵. Secondly, these legal acts stipulate a rule granting the right to claim damages for those whose rights and legal interests were violated by antitrust law infringement¹⁹⁶. In addition, this rule enacts civil liability for damages and respective remedies.¹⁹⁷ Thirdly, latter acts formed new enforcement practice regarding subsequent amendments in Federal law “On competition..”:

- fixing the criteria of the monopolistically high price;
- Specifying the procedure for handling antitrust cases. Introducing new instruments of ‘warning’ and ‘admonition’, which shorten such procedure.¹⁹⁸

A year later Federal Antimonopoly Service enacted The Road Map¹⁹⁹. Besides listing the general activities in the area of competition development, it provides with detailed information on actions in particular business sectors (ex. medical services, air transportation,

¹⁹⁴ Federalnii Zakon N 401- FZ “ O zaschite konkurencii” ot 6 Dekabrya, 2011 (Federal law N 401-FZ “On protection of competition” from December, 6, 2011)

¹⁹⁵ Ibid.

¹⁹⁶ Federal law N 401-FZ, Supra note 194, art. 27 (3)

¹⁹⁷ Yaroslav Kulik, Dmitry Magonya “Russia. Overview”

<http://globalcompetitionreview.com/reviews/53/sections/179/chapters/2113/russia-overview/>

¹⁹⁸ Ibid.

¹⁹⁹ The Road Map ‘Development of the Competition and Improvement of the Antimonopoly Policy’, No. 2579-r, December 28, 2012

communication services, preschool education, and oil products). Moreover, it guarantees participation of business community members into development of governmental competition policy²⁰⁰.

“Governmental Commission on Competition Issues and Development of Small and Medium Enterprises “aims to provide necessary control over Road Map’s implementation. Furthermore, it thrives to limit governmental intervention in small and medium enterprise’ business. Another goal of Governmental Commission is to further improve Russian antitrust legislation by applying the best competitive practices²⁰¹.

The document defining the way of Russian antitrust development was enacted on February, 2013. The ‘Strategy of Development of Antimonopoly Regulation in the Russian Federation for 2013–2024’ (the Strategy) specifies FAS’s controlling and supervisory functions. Also it focuses on improvement of internal communication and cooperation within the antimonopoly service²⁰².

To conclude, the general competition issues and problems on abuse of dominance in particular are widely analyzed in Russian legislation. Competition laws are constantly progressing and enhancing with regard to economic realities. However, some major issues still remain. In order to reveal such issues I will further focus my comparative analysis on criteria defining monopoly position, types of abuse and principles of enforcement applied in each country.

²⁰⁰ Ibid.

²⁰¹ Ibid.

²⁰² The ‘Strategy of Development of Antimonopoly Regulation in the Russian Federation for 2013–2024’ (the Strategy), 2013 http://www.fas.gov.ru/netcat_files/File/Str_razv_konk_i_antimonop_reg_13-14.pdf

3.3. Practical Application of Abuse of Dominance based on the Case Law

Analysis

In this subchapter I will examine the application of Russian competition regulation in order to see in practice the types of exclusionary behavior identified, the ways such behavior is defined and the principles used for law enforcement in my country.

The Russian Federal Antimonopoly Service is the biggest competition authority in the world. In 2012 the number of officers of FAS exceeded 3000 people as stated in Global Competition Review. In comparison, the country following Russia in this rank, United States had approximately only 1000 officers in their authority²⁰³ (see table 2).

Table 2. Number of employees of competition authorities in G8 countries in 2012.

Russia	France	Germany	UK	USA	Canada	Italy	Japan
3097	201	333	489	1043	386	262	799

Source: <http://globalcompetitionreview.com/>

The scale of enforcement in Russia is assessed as very high comparing to international practices. Specifically, in the same year FAS opened 2582 investigations regarding abuse of dominance, which is higher than number of cases in other countries all together (see table 3)²⁰⁴. Moreover, for the period from 2003 till 2012 the quantity of cases on monopolistic abuse increased by three times.²⁰⁵

Table 3. Number of antitrust cases by countries, 2012.

	Russia	France	Germany	UK	USA	Canada	Italy	European commission
Abuse of dominance	2582	23	35	1	16	11	3	44

Source: <http://globalcompetitionreview.com/>

²⁰³ Global competition Review. Rating Enforcement, 2012 <http://globalcompetitionreview.com/>

²⁰⁴ Ibid.

²⁰⁵ <http://www.fas.gov.ru/>

According to FAS statistics, the ratio of convictions in the courts increased from 1:2 in 2008 to 2:3 in 2012. So in 2008 in every second case the economic entity was found guilty, and in 2012 in every two out of three cases company was convicted.²⁰⁶

Due to very broad area of FAS responsibilities and the number of investigations open, the burden laying on Russian Antimonopoly authority is immense. Besides the antitrust provisions, “FAS is responsible for public enforcement of the rules on unfair competition, on restrictions of competition by public authorities, on the control over public procurement, on the Law on Advertising, on sector-specific regulatory provisions in such different industries as electricity and retailing, and on the approval of foreign investments in strategic companies”²⁰⁷.

Below I provide with an overview of practical application of Article 10 of the Federal Law “On Competition” in order to see what issues are investigated under Russian system and what are the grounds of the Court’s decisions. All types of abusive conduct I grouped into four categories: Excessive pricing and predation, Tying, Refusal to deal, Exclusive dealing. All the court cases in the following analysis deal with monopolies with market share higher than 65%.

Abuse of a dominant position in the market constitutes an administrative offense under Article 14.31 of the Administrative Code of The Russian Federation²⁰⁸. Article 14.31 establishes an administrative liability for officials and legal entities for the actions of economic entity which are recognized as abuse of dominance and, consequently, prohibited by the antitrust laws. Abuse of dominance can be a criminal offense too, however, in the

²⁰⁶ S. Avdasheva, P. Kryuchkova “Law and Economics of antitrust enforcement in Russia”, National Research university, Higher School of Economics, 2013, 3

²⁰⁷ Ibid.

²⁰⁸ Kodeks RF ob Administrativnykh pravonarusheniakh N 195- FZ ot 30 Dekabrya 2001 (Code of Administrative Violations)

following analysis I will not take such cases into consideration. In order to prove an abuse of dominance, the intent to perform (or refusal from performance) by infringing party must be established in case of violation of the antimonopoly legislation.

3.3.1. Excessive pricing and predation

The first category of exclusionary practice combines excessive pricing conduct by monopoly and predation. In this group of court decisions abusive behavior of monopoly is expressed with different types of price manipulation.

Paragraph 1.1. of Art.10 of the Federal law “On competition” prohibits the “*establishment and maintenance of monopolistically high or monopolistically low price for a commodity*”²⁰⁹.

In the case *N A37-947/2009*²¹⁰ OAO “Kalymacement” was found guilty in abuse of dominant position by establishing and maintaining monopolistically high prices for cement and clinker processing services, which were exceeding the competitive level and, consequently, were generating high profits for the entity. Antimonopoly authority by analyzing the indicators of the entity’s costs and profits on the basis of data submitted by them, established that in formation of the price of cement and clinker processing services company took into account administrative and production costs in excess to requisite level, which resulted in profits growth by 1.5- 2 times. As established by the previous courts, the share of the entity on the commodity market of Magadan region in 2007-2008 was 100 %.

According to Art. 10.1 of the Federal Law “On competition”, certain actions or lack of actions by an economic entity with a dominant position, which result or can result in prevention,

²⁰⁹ Federal law N 401-FZ, Supra note 194, art. 10.1

²¹⁰ Postanovlenie Federalnogo Arbitrazhnogo Suda Dalnevostochnogo Okruga [PVAS] N F03-3900/2011 ot 1 Sentyabrya 2011 po delu N A37-947/2009 (Federal arbitration court’s decree N F03-3900/2011 from September, 1, 2011 regarding case N A37-947/2009, transl. mine)

restriction or elimination of competition and (or) infringe the interest of other persons are deemed to be forbidden.

Art. 6 of the Federal Law “On competition” defines monopolistically high price is the one “fixed by an economic entity with dominant position, if this price exceeds the sum of the necessary production and distribution costs of the goods and profits, and exceeds the price formed under competitive conditions in the goods market...”.

Monopolistically low price shall not be recognized if it’s not below the price formed under competitive conditions in the comparable goods market. Thus, in order to establish monopolistically high price, it’s enough to prove discrepancy of price for a commodity and sum of expenses needed for production and sales of such commodity and entity’s profits.

According to Art. 14.31 of Code of Administrative offenses for “the actions deemed abuse of dominance and inadmissible under the antimonopoly legislation of the Russian Federation, if such actions lead or can lead to an infringement on the interests of other persons/entities, and in this case the result of such actions is not and cannot be the prevention, restriction or elimination of competition”. Thus, OAO “Kalymacement” was held liable under Art 10. 1 (1) of Federal Law “On competition” and under Art. 14.31 of the Code of Administrative offenses. FAS imposed an administrative fine of 696 630 rubles. Court lowered this fine to 208 989 rubles.

Paragraph 1.7. of Art.10 of the Federal law “On competition” forbids “*establishment of unjustifiably high or unjustifiably low price of a financial service by a financial organization*”. In a case *N A19-507/2012*²¹¹ OAO “Sberbank Rossii” was found guilty in abuse of dominance by setting up unreasonably high prices for rendering services for nontax

²¹¹ Opredelenie Vysshego Arbitrazhnogo Suda RF N 17786/12 ot 9 Aprelya 2013 po delu N A19-507/2012 (Supreme Arbitration Court’s decree N 17786/12 from April, 9, 2013 regarding the case N A19-507/2012, transl. mine)

payment's transfer to the state budget and state non-budgetary funds without a contract concluded.

According to Art. 4.12 of Federal Law "On competition" unjustifiably high or unjustifiably low price of a financial service is the price of a financial service or financial services, established by a financial organization with a dominant position, and which differs considerably from the competitive price of a financial service and (or) impedes access to the goods market for the other financial organizations and (or) has negative impact on competition.

Competitive price of a financial service determined as a price for which a financial service can be provided in the conditions of competition based on Art. 4.13. of the Federal Law "On competition". So during the investigation Court determined that the tariff of 3 % from the transaction sum fixed by Sberbank was unjustifiably high and differed a lot from the market price. Thus Sberbank was held liable under Art. 10. 1 (7) and under Art. 14.31 of the Code of Administrative Offences. FAS imposed an administrative fine- 348530 rubles. The Court supported the FAS decision.

Paragraph 1.10 of Art. 10 of the Federal Law "On competition" forbid the *violation of the pricing procedure established by statutory legal acts*. In a case N A82- 15537/2012²¹² OAO "DSK" was found guilty of abuse of dominance by failure to comply with the procedure for setting up the tariff for its services, as well as by unauthorized fee charging for municipal services.

Due to the system maintenance, OAO "DSK" terminated hot water supply for a period of 14 days. After this period passed it didn't recommenced the service. Hence, Court classified such

²¹² Postanovlenie Vtorogo Arbitrazhnogo Appelyacionnogo Suda ot 30 Oktybrya 2013 po delu N A82-5537/2012 (Second Arbitration Court of Appeal's resolution from October, 30, 2013 regarding the case N A82-15537/2012, transl. mine)

actions under Art. 10. 1. as violation of interests of other persons. Moreover, accruing fees for municipal services without fixed tariff was found by Court as violation of Art. 10. 1 (10) of the Federal Law “On competition”. Hence, OAO “DSK” was held liable under paragraph 10 of Art. 10. 1 of the Federal Law “On competition”.

To sum up, in “Kalymacement” Court applied a test for identifying the monopolistically low and monopolistically high prices by comparison with the competitive price level on the market. In addition, in “Sberbank” Court defined that such prices should not impede access to the market for other undertaking and to have a negative impact on competition. Also it prohibited any price manipulations specifically for financial organizations and on the markets for electrical energy²¹³. In “DSK” Court established that in cases when the pricing procedure for goods and services is violated, the undertaking cannot carry on the business.

3.3.2. Refusal to deal

The next category is devoted to refusal to deal cases. They include any denial by monopoly to perform its obligations, which entail a negative effect on competition. Paragraph 1.2. of Art.10 of the Federal law “On competition” prohibits the *“withdrawal of goods from circulation, if the result of such withdrawal is increase of price of the commodity”*.

In a case *N A82-7782/2010*²¹⁴ OAO “Yaroslavl’vodokanal” was found guilty of abuse of dominance by unilateral refusal to perform the obligations and unilateral rescission of the contract for drinking water supply and services for sewage discharge.

The court classified these actions under Art. 10.1 of the Federal Law “On competition” as actions which resulted or could result “in prevention, restriction or elimination of competition

²¹³ Was introduced by “Third monopoly package” <http://www.fas.gov.ru/>

²¹⁴ Postanovlenie Federalnogo Arbitrazhnogo Suda Volgo- Vytskogo okruga ot 23 Avgusta 2011 po delu N A82-7782/2010 (Federal Arbitration Court’s resolution from August, 23, 2011 regarding the case N A82-7782/2010, transl. mine)

and (or) infringe the interest of other persons”. Specifically, Court concluded that Economic entity was acting in excel of it civil rights, by preventing the consumption of stated services by the third parties. Hence, it was held liable under paragraph 10 of Art. 10.1 of the Federal Law “On competition”.

Paragraph 1.4. of Art.10 of the Federal law “On competition” prohibits “*economically or technologically unjustified reduction or cutting off the production of goods if there is demand for the goods* or orders for their delivery are placed, and there is possibility of its profitable production , as well as if such reduction or cutting off the production of goods are not provided directly by the Federal Laws, statutory legal acts ...”.

In a case *N A24-4243/2011*²¹⁵ , *OAO “Kamchatskenergo”*, subject of natural monopoly in area of electrical and heat energy supply, was found guilty of abuse of its dominant position by unjustified termination of services of a hot water supply in the apartment building due to two month indebtedness for the rent and utilities from one tenant.

According to the “Rules for rendering utility services to the citizens” approved by Governmental Resolution from 23.05.2006 № 307, Art. 3.4 of the Housing Code of the Russian Federation and Governmental Resolution № 1 from 05.01.1998, the existence of two-months debt is not sufficient reason for a service termination. Moreover, the termination of water supply must not violate the rights of “bona fide” consumers.

Most of violations connected to “economically or technologically unjustified reduction or cutting off the production of goods” are allowed by natural monopoly. Hence, even if *OAO “Kamchatskenergo”* was found guilty of abuse of dominance under Art.10.4 of the Federal Law “On competition”, the court issued just a warning.

²¹⁵ Postanovlenie Federalnogo Arbitrazhnogo Ssuda Dalnevostochnog okruga N Ф03-2620/2012 ot 4 Iyulya 2012 po delu N A24-4243/2011 (Federal Arbitration Court’s resolution N F03-2620/2012 from July, 4, 2012 regarding the case N A24-4243/2011, transl. mine)

Paragraph 1.5. of Art.10 of the Federal law “On competition” prohibits “*economically or technologically unjustified refusal or evasion from concluding a contract with individual purchasers (customers)* in the case when there are possibilities for production or delivery of the relevant goods, as well as if such refusal or evasion is not provided directly by the Federal Laws, statutory legal acts ...”. In addition, Paragraph 1.9. of Art.10 of the Federal law “On competition” prohibits “*creation of entry barriers to the goods market or barriers or leaving from the market for the other economic entities*”.

In a case *N A51-8992/2011*²¹⁶ *OOO “Transneft-Servis”*, subject of natural monopoly, was found guilty of abuse of dominance by refusing to contract with an individual customer. Company addressed to the natural monopoly with a proposal to conclude a contract with regard to render towing, unmooring services and other services needed for ships function and maintenance. However, such proposal was never considered.

According to Art. 8 Federal Law № 147- FZ “On natural monopolies” from 17.08.1995, natural monopoly “may not refuse to enter into contracts to provide commodities to particular consumers given available capacity for producing (selling) such commodities.” So “Transneft-Servis” was held liable under Art. 10.1 of the Federal Law “On competition” for actions or lack of actions which infringed interests of other persons. In particular, the company was liable under & 5 of Article 10.1 for unjustified refusal from contracting, and under paragraph 9 of Article 10.1 for creating the barrier for a market entry.

Moreover, *OOO “Transneft-Servis”* was found guilty under Art. 14. 31 of the Code of Administrative offenses for “the actions deemed abuse of dominance and inadmissible under

²¹⁶ Postanovlenie Federalnogo Arbitrazhnogo Suda Dalnevostochnogo okruga N F03-4196/2012 ot 26 Sentyabrya 2012 po delu N A51-8992/2011 (Federal Arbitration Court’s resolution N F03-4196/2012 from September, 26, 2012 regarding the case N A51-8992/2011, transl. mine)

the antimonopoly legislation of the Russian Federation...”. FAS imposed an administrative fine- 360 335 rubles. The Court supported the FAS decision.

To sum up, the Court established in “Yaroslavl’vodokanal” that any withdrawal of goods from the market this entails the price increase is deemed forbidden because it infringes the interests of consumers and lessens the competition. In addition, in “Kamchatskenergo” the unjustified reduction of production is also prohibited by competition law, but such conduct is allowed for natural monopoly.

Refusal or evasion to contract is also deemed forbidden. In case of natural monopolies this type of behavior is considered to be serious infringement, since the latter does not have a right for refusal to contract even with individual customer like in “Transneft-Servis” case. Also in “Transneft-Servis” Court noted that all the actions which create the barriers for a market entry should be prohibited.

3.3.3. Tying

The next category is devoted to tying cases. These Court decisions include monopoly’s conduct on imposing the terms which are detrimental to the consumer.

Paragraph 1.3. of Art.10 of the Federal law “On competition” prohibits “*imposing contractual terms upon a counteragent which are unprofitable for the latter or not connected with the subject of agreement and economically or technologically unjustified* and (or) not provided directly by the Federal Laws, statutory legal acts of the President of the Russian Federation, statutory legal acts ...; requirements for transferring financial assets, other property, including property rights, as well as consent to conclude a contract with provisions, concerning the goods in which the counteragent is not interested and other requirements”.

In a case *N A40-91849/10-72-374*²¹⁷ *Federal Agency for Railway Transport* (Federal'noye agentstvo zheleznodorozhnogo transporta) was found guilty of abuse of dominance by imposing unjustified contractual terms, in particular, for rendering services for maintenance and protection of wagons and containers with goods. Court stated that Federal agency violated paragraph 1.3 of Art. 10 of the Federal law "On competition", by imposing contractual terms for rendering services for maintenance and protection of wagons and containers during their transit by railway transport, which are economically or technologically unjustified and (or) not provided directly by the Federal Laws, other legal acts etc.

The reason behind the Court's decision was that in the presence of objective capacity to provide services on competitive terms and conclude a contract, the infringer didn't take these actions and impose unreasonably disadvantageous terms for the counterparties. So, Federal agency was found guilty under Art. 14. 31 of the Code of Administrative offenses for "the actions deemed abuse of dominance and inadmissible under the antimonopoly legislation of the Russian Federation...". FAS imposed an administrative fine- 82 377 862 rubles. The Court supported the FAS decision.

To sum up, imposing the contractual terms which are unjustified of unprofitable for the counterparty is prohibited by law. The case when monopoly had an option to act "bona fide", but did not use it, determines the intent of the latter to violate the law.

3.3.4. Exclusive dealing

Since there are no particular exclusive dealing cases in Russian practice, I devoted the last category to price discrimination aspect of such exclusionary conduct. Paragraph 1.6. of Art.10 of the Federal law "On competition" prohibits "*economically, technologically or*

²¹⁷ Postanovlenie Federalnogo Arbitrazhnogo Suda Moskovskoi oblasti ot 22 Fevralya 2012 po delu N A40-91849/10-72-374 (Federal Arbitration Court's resolution from February, 22, 2012 regarding the case N A40-91849/10-72-374, transl. mine)

otherwise unjustified establishment of different prices (tariffs) for the same goods if otherwise is not established by law". Paragraph 1.8. of the same article forbids "*creation of discriminatory conditions*".

In a case *N A24-3726/2010*²¹⁸ OAO "Rostelecom" (OAO "Dal'svyaz") lowered tariffs for only certain type of their subscribers -legal entities, located in the coverage area of PS 26/1, which resulted in the realization of equal service - connection to the local telephone network, at different prices (tariffs) and created discriminatory conditions.

Under Art.4.8 of the Federal Law "On competition" discriminatory conditions are defined as conditions to access the relevant market, conditions for production, exchange, consumption, purchase, sale, other transfer of goods, when an economic entity or several economic entities are in competitive disadvantage comparing to another economic entity or entities.

OAO "Rostelecom" was included into register with a market share higher than 65 %. Thus it was held liable under Art. 10.1 of the Federal Law "On competition", in particular under paragraphs 6 and 8 for creating discriminatory conditions for subscribers not located in the area of PS 26/1 and fixing different prices for an equal service. FAS imposed an administrative fine. The Court supported the FAS decision.

To sum up, in "Rostelecom" Court established that application of rebates or other exclusive dealing schemes is forbidden by law, since it creates a discriminatory conditions and, hence, leads to consumer harm.

²¹⁸ Postanovlenie Federalnogo Arbitrazhnogo Suda Dalnevostochnogo okruga N Ф03-2512/2011 ot 29 Iyunya 2011 po delu N A24-3726/2010 (Federal arbitration court's decree N F03-2512/2011 from June, 29, 2011 regarding the case N A24-3726/2010, transl. mine)

3.4. Conclusion

Over the last twenty years competition policy and antitrust regulation have been developing and enhancing towards the economic reality of the country. Major issues of competition policy were resolved by an establishment of substantial legal framework and aligning it with the goals of economic policy.

Originally, Russian competition policy was created as a passive instrument of economic policy. Due to the different purposes, two of them were overlapping and inhibiting the progress of each other. Since economic policy at those times was associated with pro-monopolization, and competition policy was designed to prevent the latter, the two policies were in contradiction. Competition policy was trying to distance itself from economic one by applying sometimes unreasonably strict rules. But anyway in the beginning economic policy was the one to define the goals, tools and functions of competition policy. Such tendency could not lead to development of the latter. Moreover, in most of the cases it was even detrimental to competition policy.

Isolation of competition policy as independent with specific goals and tools happened after governmental decision to focus on demonopolisation. At this period quantitative approach towards market dominance was implemented automatically banning monopolies with shares higher than 65 %. The regulatory framework spread on advertising activities providing with consistency and clarity in this field. The necessity of competition regulation on particular markets arose. For instance, financial markets, insurance and banking sector were the ones where competition law was implemented.

The complete separation of competition policy from economic one happened on the recent stage of antitrust development, where the relationships between these two policies were understood as “partner” ones. At this period the current Federal Law “On competition” was

adopted followed by number of legal Acts. They addressed number of issues regarding natural monopolies regulation, penalties and damages calculation, extraterritorial effects of Russian competition law. The Strategy was created by antimonopoly authority in order to boost and enhance competition development in a country.

The antitrust enforcement is very active in Russia. Due to the wide responsibilities of Federal Antimonopoly Service and long exhaustive list of abusive conduct, the number of cases FAS faces every year is enormous. The main criteria to enforce the cases are the lessening of competition, infringement of the interests of other persons and impediment of access to the relevant market.

Chapter 4. Comparative Analysis of Antitrust in United States, European Union and Russian Federation

4.1. Comparative analysis of Antitrust in United States, European Union and Russian Federation

In the following subchapter I will provide a comparative analysis of abuse of dominance in the systems of United States, European Union and Russian Federation. I will start with an overview on formation of each of the models in order to see the reasons of fundamental differences between these systems. I will proceed with the comparison of the goals of competition law in each of the models. Then I will analyze the way the dominance is defined under all legislations. And at last, I will compare the abusive conduct in Russia to exclusionary practices in US and EU together with an application of economic doctrines on antitrust.

Although antitrust models in United States, European Union and Russia were formed at different times and economic realities and were aimed to resolve different issues²¹⁹ they still have more similarities than it could have been seen.

Antitrust legislation in the following countries was created with the common objectives. These are primarily protection of unfettered competition, safeguarding consumer welfare and establishing economic liberty. And while US antitrust protects “unrestrained interaction of competitive forces”, which, in its opinion, will lead the best allocation of economic resources

²¹⁹ In US the aim was to stop the process of further capital consolidation in order to prevent private entities from holding too much power. In EC the goal was to establish common market functionality and free flow of goods. In Russia primary market was monopolistic, so Antitrust aimed to rather disaggregate already consolidated capital in hands of big firms.

and safeguarding the political interests²²⁰, Europe focuses more on economic integration and establishment of a common market in which competition policy plays a substantial role.

The Russian competition policy goals mirror European ones with the exception of one provision, which differentiates Russian antitrust system from any other. This provision aims to prohibit governmental actions in case they have an anticompetitive effect. Partially, the reason why Antimonopoly Service considers state government as a possible infringer lies in inconsistency of competition and economic policies, which, consequently, can entail an abusive conduct from the authorities.²²¹ Hence, it is difficult to say whether such rule is an advantage for Russian legislation or rather negative consequence of the system's overall imperfection.

The obligation of safeguarding competition carries out Sherman Act in US, Treaty on the Functioning of the European Union in EU, and the Federal Law "On competition" in Russia.

4.1.1. Monopoly power

In EU competition law dominance of undertaking is identified by its ability to prevent effective competition by acting independently from competitors, customers, and consumers.²²² Under US legislation it is assessed by direct evidence of using the power to control prices and restrict output²²³. Monopoly power in Russia is defined by an entity or group of entities' ability to have a decisive impact on the general conditions of commodity circulation in the relevant market, ability to remove other economic entities from the market or to impede an access to this market.²²⁴

²²⁰ Northern Pacific R. Co. v. United States - 356 U.S. 1 [1958].

²²¹ Rosanova, supra note 148, at 118

²²² United Brands Co. and United Brands Continental BV v. Commission- 27/76 (1978) E.C.R. 207; (1978) 1 C.M.L.R. 429.

²²³ Broadcom Corp. v. Qualcomm, Inc. -501 F3d 297 (3d Cir. 2007)

²²⁴ Federal Law No. 135-FZ, supra note 176, art. 5

Such dissimilarly in definitions reveal the difference in attitude towards the dominance. If in foreign models possession of monopoly power is allowed and only abusive conduct is forbidden, in Russia both are prohibited and intensively controlled by the authorities. However, natural monopolies in Russia constitute an exception from the general rule.

Economic approach towards market power differs among the scholars. For instance, Post-Chicagoans consider monopoly power as a threat to efficiency in the market; therefore, such power should be carefully “looked after”.²²⁵ Populists are even more skeptical than Post-Chicagoans and see the market power as danger to consumers and small enterprises. Hence, they promote market de- concentration as possible solution, which, in their opinion, will lead only to small efficiency loss²²⁶.

Chicago scholars argue that monopolies are likely to be uncommon, since high profits of dominant firms attract new entrants to the market. And when incumbent firms enter, the market power due to its self-correcting ability will adjust accordingly, eliminating the effects of inefficient decision making made by dominant undertakings²²⁷. Chicagoans are against market de- concentration, since it will entail inefficiency loss.²²⁸

Innovation scholars believe that in industries where “greater market share means lower production costs”, monopoly power can be favorable, since it will induce firms to innovate and participate in “dynamic competition process”²²⁹. They also believe that market power should be analyzed in its “dynamics”. The role should be devoted to examination of market structure through application of dynamic model of Porter’s “Five forces” model. Factors such

²²⁵ Atkinson, Supra note 5, at 18

²²⁶ Frederic M. Scherer, David Ross “Industrial Market Structure and Economic Performance” , Boston: Houghton Mifflin (1990) as cited by Atkinson, supra note 5

²²⁷ H. Demsetz, “Economics as a Guide to Antitrust Regulation,” Journal of Law and Economics 19, n. 2 (1976): 381

²²⁸ P. H. Brietzke, R. Bork “The Antitrust Paradox: A Policy at War with Itself”, 13 Val. U. L. Rev. 403 (1979): 412

²²⁹ Richard R. Nelson “Technology, Institutions, and Economic Growth”, Cambridge, MA: Harvard University Press (2005) as cited by Atkinson, supra note 5

as “threat of entry, threat of substitution, bargaining power of buyers, bargaining power of suppliers, and rivalry among current competitors” are applied in order to determine whether monopoly power constitute a threat to welfare or not.²³⁰

To conclude, the approach towards the market power differs among the analyzed countries. In US Chicago school prevail, and EU Post- Chicago, and Russia seems to apply a combination of Populist and Post –Chicago approaches. However, only Innovation school, in my opinion, proposes the most efficient and realistic analysis of market power in accordance to current economic state of affairs.

4.1.2. Dominance

In order to define the dominance market share of a firm on the relevant market should be assessed. In all of analyzed systems an undertaking with the market share over 50 % is presumed to be dominant. However, if in EU and US such index does not play a substantial role in the application of law, in Russia it is a key factor for determining the market power. For instance, financial organization is not considered to be dominant unless its share higher than 10% in the relevant market²³¹. However, even if monopoly power is established in connection to some undertaking, such firm has a full right to prove the authorities otherwise.

So monopoly power is one of the factors assessed when concern of abusive conduct arises. The second factor varies in different legislations. In EU it is an exclusionary conduct carried out by a monopolist, in US and Russia intent of the latter to violate the law is required. Moreover, in Russia refusal of the monopolist to perform is also considered to be abusive and, hence, forbidden.

²³⁰ Carl Shapiro and Hal R. Varian, *Information Rules: A Strategic Guide to the Network Economy*, Boston: Harvard Business School Press, (1999): 173

²³¹ Federal Law No. 135-FZ, *supra* note 176, art. 5

According to general classification abusive behavior is divided into exploitative and exclusionary practices. Exclusionary conduct, consequently, segregated into horizontal and vertical integrations. There is no particular classification of abusive behavior in Russian competition law; just the exhaustive list of prohibited conduct is presented.

By analyzing the case law on the types of forbidden behaviors under all legislations, it is logical to conclude that in US and EU the important criterion to enforce the violation is harm to competition. However, in Russia, although lessening the competition is important, the bigger focus is made on infringement of interests of others. On one side, it is an advantage, since those who got hurt by monopolistic behavior receive stronger protection. But from another side, if competition was not particularly affected, why the antimonopoly authority should carry out functions of enforcement then and why competition law in general should be concerned? Does this focus entail a big number of cases on abuse of dominance carried out by FAS?

For the further analysis of abusive conduct I will apply the general classification. Exploitative practices or excessive pricing is the first category of forbidden behavior.

4.1.3. Exploitative practices

Excessive pricing is not established in United States, since American economists do not consider such conduct to be abusive. For instance, Posner as Chicago scholar argues that high price does not specifically indicate a monopoly²³². He states that high prices and, consequently, high profits attract competitors to enter the market. In this case monopolist has three options. First, he can lower the prices in order to diminish incentives for incumbents to enter the market. Second, he may decide not to do anything. And last, he can reduce production volume in order to compensate its influence on the prices. Hence, first option

²³² D. H. J. Hermann, Review of "Economic Analysis of Law," By Richard A. Posner, 1974 Wash. U. L. Q. 354 (1974): 367

contradicts the definition of monopoly itself, and the last two are the ones dominant firm is likely to choose. However, in any case, share of monopolist in the relevant market will be reduced.²³³ Moreover, American legislators believe, if high prices are deemed illegal, it will diminish the incentives for the firms to compete and innovate.²³⁴

In EU price is considered to be excessive when it is significantly higher than effective competitive level and “above the economic value of the product”.²³⁵ In Russia excessive price definition is substituted by monopolistically high price and it is similar to the one used in EU Competition law.

Monopolistically high price is considered to be unreasonably high if it is above competitive level. And it is defined by the sum of the necessary production and distribution costs and the profits of the dominant entity.²³⁶ Like in “*Kalymacement*” monopolistically high price was established by the discrepancy of a price, entity’s profits and the sum of expenses needed for production and sales²³⁷. However, if such price is fixed by a natural monopoly within the rates determined in accordance with legislation of the Russian Federation is not considered to be monopolistically high.

Chicago scholars believe that approach towards analyzing the production cost of monopolist and referring to the competitor prices for identical products is too generalized and does not carry out necessary analysis. They believe that production cost of dominant firm can be very low, because of the economies of scale and efficiency gains of the latter.²³⁸

²³³ Ibid.

²³⁴ Organization for Economic Co-operation and Development, supra note 82

²³⁵ Motta and de Streel, “Excessive Pricing in Competition Law”, 16
http://www.barcelonagse.eu/tmp/pdf/motta_excessivepricing.pdf

²³⁶ Federal Law No. 135-FZ, supra note 176, art. 6

²³⁷ N A37-947/2009, supra note 210

²³⁸ T. Frazer “Monopoly, Competition, and the Law”, Harvester Wheatsheaf, New York, London, Toronto, Sydney, Tokyo, Singapore, Second Edition, (1992): 43-53

To sum up, the approach towards excessive pricing differs among the legal systems. While in US exploitative practices are allowed, in Russia and EU they are strictly regulated by competition authorities²³⁹. In addition, Chicago scholars argue that analysis based on production costs for identifying excessive price is ambiguous.

4.1.4 Exclusionary practices

Exclusionary practices in United States and European Union are divided into horizontal and vertical. To horizontal practices three types of conduct refer: predation, exclusive dealing and tying & bundling.

4.1.4.1. Horizontal practices

i. Predatory pricing

The conduct of a firm for establishing prices in such low level, which forces other players to leave the market or precludes new ones from entering, called predatory.²⁴⁰ In EU the price is predatory if it is below average variable cost or average total cost of the product²⁴¹, in United States if it is below “an appropriate measure of its rival's costs”²⁴². In Russia predatory price is called monopolistically low price, and its definition mirrors the definition of monopolistically high price. So such price is unjustifiably low, if it below the competitive level or below the sum of the necessary production and distribution costs and the profits of the dominant entity.²⁴³

Hence, the methods for determining the predation is quite similar in every country, however, approach towards establishing an exclusionary conduct differs. In EU the conduct is predatory

²³⁹ In EC such approach is strictly regulated only on paper, since Excessive pricing cases are rare in EC

²⁴⁰ Viscusi, supra note 120 as cited by Bishop, supra note 57, at 292

²⁴¹ OJ L374/1 and case C-62/86 Akzo v. Commission (C-62/86) [1991] E.C.R. I-3359; [1993] 5 C.M.L.R. 215

²⁴² Brooke Group, Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 113 S. Ct. 2578, 125 L. Ed. 2d. 168 [1993]

²⁴³ Federal Law No. 135-FZ, supra note 176, art. 7

if the dominant firm sacrificing or foregoing its short run profits²⁴⁴, in US the recoupment of such sacrifice must be proved, and in Russia restriction of competition as a result must be established. However, natural monopoly is an exception from the general rule, since its prices are fixed with regard to current Russian legislation.

Chicago scholars believe that predatory behavior is anticompetitive only in the cases when competition is completely excluded from the relevant market. Otherwise such conduct can be pro-competitive and increase the consumer welfare by offering low prices. Also Chicago scholars question the rationality of predatory conduct, since the dominant undertaking is usually incurring higher losses than the competitor to be eliminated. Moreover, they argue that it is highly unlikely that monopolist would be able to completely eliminate competition in the market and recoup his losses in the future.²⁴⁵ Populist and Post- Chicago scholars argue that predatory pricing used by dominant firms only in order to gain higher market share, hence it is anti- competitive and should be illegal.²⁴⁶

Innovation scholars state that in case of predatory conduct structure of particular industry should be analyzed, since in one industry such pricing can be detrimental to consumer, and at the same time in another industry consumer can benefit from it. Also scholars believe that predatory pricing can be “welfare enhancing and productive” when the marginal costs of production are low. Besides, when the prices for products with high positive externalities are reduced, it will lead to “overall societal welfare”.²⁴⁷

So, the approach towards defining the predatory conduct is more practical in US and EU than in Russia, since competition can be harmed in a various ways and it is easier to prove such harm rather than to establish a recoupment of investment or sacrifice of short run profits of a

²⁴⁴ Bishop , supra note 57, at 292

²⁴⁵ Glader, Marcus, “The Innovation Markets and Competition Analysis: EU Competition Law and US Antitrust Law”, Lund University, Malmo, 2004, 55-61

²⁴⁶ Atkinson, supra note 5, at 24

²⁴⁷ Ibid.

firm. The above countries seem to apply Populist and Post- Chicago doctrines on regulation of predatory pricing, since they consider only anti- competitive effects of such conduct. However, Innovation Scholars believe that predation can be both pro-competitive and welfare enhancing and it varies throughout the industries. Hence, examination of particular industry can lead to proper application of competition laws.

Russian competition law specifically emphasizes the financial markets and markets of electrical energy, where any price manipulation whether setting up monopolistically high or monopolistically low prices are forbidden. Also it is against violation of pricing procedure by dominant entity. For instance, when “*DSK*” was charging prices for its services without tariffs for the latter fixed²⁴⁸. In order to prove above violations, access to the relevant market or lessening of competition should be established.

The advantage of European and American models is that competition issues are resolved on case by case basis; hence, there is no necessity to emphasize particular markets to control to. Consequently, it seems to me that Russian competition authority thrives to fix all the possible infringements in the one exhaustive list in order to simplify the investigation procedure. However, would not such behavior rather increase the number of enforcement errors, since not all the conduct mentioned above can be strictly anticompetitive?

ii. Exclusive dealing

The next type of horizontal practice is exclusive dealing. Since there are no exclusive dealing cases in Russia as such, I will analyze price discrimination aspect of this type of exclusionary conduct under major foreign models and compare it with price discrimination provisions under Russian system.

²⁴⁸ N A82-15537/2012, supra note 212

From economic point of view price discrimination cases are controversial. On one side, they increase consumer welfare and redistribute consumer gains towards monopolistic seller. On another side, they are used as an instrument for preventing incumbents to enter the market.²⁴⁹ Chicago scholars believe that such practices unlikely would be applied if they were inefficient for the monopolist.²⁵⁰

Legislators define such cases similarly; however approach towards them is different. US identify price discrimination as situation when a particular product is sold to different consumers at different prices. The definition is rather unclear, and it does not provide other specifications on establishing such conduct, however, it states that injury to competition must be proved in order to classify this conduct as abusive. Such cases are investigated under a rule of reason.

In EU definition of price discrimination is similar to American one. However, it specifies that difference in prices should not reflect the differences in the cost of supply²⁵¹. Also it states that any rebates which are directly connected to volume of purchases, but don't take into consideration consumer needs, are forbidden.²⁵² Hence, the harm to consumer should be established. Price discrimination is illegal *per se*, however, Commission proposed to assess such cases based on the merits.

Russian legislation considers "economically, technologically or otherwise unjustified establishment of different prices for the same good"²⁵³ prohibited, if the latter is not established by law. Moreover, Russian law introduced separate provision, which forbids imposing discriminatory conditions on customers. Such conditions are defined as the ones

²⁴⁹ S. Avdasheva, A.E. Shastiko, E.N. Kalmychkova "Ekonomicheskiye osnovy antimonopol'noy politiki: rossiiskaya praktika v kontekste mirovogo opyta", Ekonomicheskiy zhurnal VSE n.4, (2006): 595 ("Economic basics of antimonopoly policy: Russian practice in the light of world experience", transl. mine)

²⁵⁰ Dave O'Connell "The Economics of Exclusive dealing", OECD- GVH, 2012, 6

²⁵¹ Bishop, supra note 57, at 251

²⁵² Bishop, supra note 57, at 250

²⁵³ Federal Law No. 135-FZ, supra note 176, art. 10

when one economic entity or several economic entities are in competitive disadvantage comparing to another economic entity or entities.²⁵⁴ Usually in practice this provision goes together with the one on exclusive dealing like in “*Rostelecom*” when the dominant undertaking was found guilty in imposing discriminatory conditions on the customers by offering different tariffs for the same product.²⁵⁵

To conclude, the approach towards price discrimination differs in all systems. EU model limit such cases to the ones connected to the volume of purchases and apart from the cost of supply. Russian model states that price discrimination should not be “unjustified”, and US system does not provide any limitation for defining the above mentioned cases. Moreover, EU and US investigate the price discrimination cases “on merits”, Russia considers them to be illegal *per se*. With regard to economic scholars, there is no defined opinion on such exclusionary conduct, since price discrimination can be both pro- and anti- competitive.

In Russia price discrimination provision can be applied in any cases when interests of other persons are infringed, hence, in my opinion; there is no necessity to include discriminatory conditions in the list of abusive conduct. Moreover, Russian legislation does not consider that application of such conditions with regard to economic theories can be pro-competitive in some cases; consequently, they should not be illegal *per se*.

iii. Tying and bundling

The tying & bundling cases in European and American practices refer to application of different sales strategies directed to increase the volume of purchase or to retain a customer.

Both of the models consider anticompetitive as well as pro- competitive effects of such conduct, hence in US, the cases with regard to tying are resolved according to the rule of

²⁵⁴ Ibid art. 4

²⁵⁵ N A24-3726/2010, supra note 218

reason, and in EU Commission points out the necessity of assessing such conduct based on the merits²⁵⁶. Moreover, in *Microsoft*²⁵⁷ CJEU defined exhaustive list of conditions which constitute a violation of the competition law.

In Russian legislation there is no particular provision with regard to tying and bundling. However, the conduct based on “imposing contractual terms upon a counteragent which are unprofitable for the latter or not connected with the subject of agreement and economically or technologically unjustified, as well as consent to conclude a contract with provisions, concerning the goods in which the counteragent is not interested” is prohibited in Russia. Hence, such behavior is also aimed to enlarge the sales of the firm and to foreclose competitors. Moreover, in cases when Russian competition authority establishes that monopolist had an opportunity to act “bona fide” and instead it benefited to the detriment of consumer, it claims the latter behavior illegal²⁵⁸.

Economic scholars’ opinion on tying practices differs. Since tying is common practice in commerce, some scholars argue that it is not practically feasible to distinguish between the tying and the tied goods in the real business environment.²⁵⁹ Hence, the regulation of such conduct should be omitted. The classical approach towards tying states that the latter is anti-competitive, however, the regulation of such practices should be less restrictive anyway. The Chicago and Post- Chicago approach, in contrast, emphasizes the pro-competitiveness of tying practices and argues that it is socially efficient.²⁶⁰

To conclude, the legal models highlight the importance of considering both pro-competitive and anti-competitive outcomes of the tying practices. Economic scholars rather argue for lessening the restriction on tying cases, some even consider them to be socially efficient.

²⁵⁶ Bishop , supra note 57, at 291

²⁵⁷ *Microsoft Corp. v. Commission* (T-201/04) [2007] E.C.R. II-3601; [2007] 5 C.M.L.R. 846.

²⁵⁸ N A40-91849/10-72-374, supra note 217

²⁵⁹ “GCLC Research Papers on Article 82 EC”, Global Competition Center, College of Europe, Brugge, July ,2005

²⁶⁰ Ibid.

Regarding Russian legislation, such practices are not regulated there and, consequently, considered to be pro-competitive. The only provision similar to such exclusionary conduct must be fixed contractually, otherwise it will not be considered by the competition authority.

4.1.4. 2. Vertical practices

i. Refusal to supply

Vertical practices are represented by refusal to supply cases. American and European models of such cases were formed under essential facilities doctrine, which referred to a monopolist behavior to apply “bottleneck” by using its market power and, hence, to preclude competitors from entering the market.²⁶¹ The doctrine obliges the owners of “essential” facility to give an access to such facility at the reasonable price.²⁶²

Chicago scholars argue that such approach diminishes incentives for a monopolist to invest in such “essential” facilities, in which he is obliged to provide an access. From another side, competitors also do not have any motivation in creating and investing in their own facilities; because they are aware of the fact that necessary access will be granted. So the application of the above mentioned doctrine will restrict competition in the market and lessen the incentives to innovate.²⁶³

In order to decide whether the monopolist conduct is abusive, CJEU analyzes the potential substitutes of the rejected product and the effectiveness of alternative sources of supply, Supreme Court of US, in turn, focuses mainly on essential facility itself, by whom it is controlled and whether the access to it is achievable. EU Competition law also recognizes a

²⁶¹ http://en.wikipedia.org/wiki/Essential_facilities_doctrine

²⁶² Bishop, supra note 57, at 323

²⁶³ C. I. Nagy “Refusal to Deal and The Doctrine of Essential Facilities in US and EC Competition Law: A Comparative Perspective and Proposal for a Workable Analytical Framework”, *European Law Review*, 32, n. 5 (2007): 664-685

“margin squeeze” conduct which refers to dominant firm dealing with downstream competitors and offering to them the prices that don’t allow the latter to recoup their costs.

In Russia three types of exclusionary conduct can be classified under refusal to supply. For monopolist it is prohibited to withdraw products from circulation in case if such withdrawal resulted in the price increase of the product. Moreover, for dominant firm is not allowed to reduce or completely cut off the production of goods in case when there is demand for the goods or the orders for their delivery are placed and their profitable production is possible. And at last the refusal to contract with an individual customer in the case when the possibility for production or delivery of the relevant goods exists is forbidden for a monopolist.

The major cases on refusal to supply in Russia are referred to a situation when monopoly is dealing with individual customers. For example, “*Yaroslavl’vodokanal*”²⁶⁴ unilaterally refused to perform its contract on drinking water supply and rendering services for sewage discharge for the whole apartment building. Moreover, the refusal to supply cases is common for natural monopolies. For instance, natural monopolies are not allowed to refuse to contract with an individual customer. It is also prohibited for a monopolist and for natural monopoly especially to create an entry barriers to the relevant market or barriers for leaving such market²⁶⁵.

To conclude, Economic scholars emphasize that application of Essential Facilities doctrine in refusal to supply cases leads to rather lessening of competition than protection of the latter. In Russia such practices differ from the ones employed in EU and United States. The list of prohibited actions is very narrow and mostly focused on the protection of individual consumers. The most common infringers in such cases are Russian natural monopolies.

²⁶⁴ N A82-7782/2010, supra note 214

²⁶⁵ N A51-8992/2011, supra note 216

4.2. Conclusion

Although Russian competition law has some similarities with American and European models, it is mostly characterized by its own unique and developing system. Like the foreign systems Russian model was created with the purpose of protecting the competition and safeguarding consumer welfare. However, although both of the objectives are important, the practical application of the law shifts the focus to securing the interests of the latter. Moreover, unlike any other systems, the Russian one asserts that governmental actions can entail the lessening of the competition, so it prohibits such conduct even on the state level.

Russian competition authority prefers the system of active enforcement, since it considers dominance as anti- competitive practice per se. The main of indicator of dominance, market share, plays a substantial role in determining the latter. However, as the foreign models show such indicator cannot be always accurate, the deeper economic analysis needed in order to establish a monopoly power. For instance, dynamic analysis of market structure based on Porter's "Five forces" model provides with deeper insights towards the current economic situation.

With regard to abusive conduct Russia has long list of exclusionary behavior. While dealing with excessive pricing, Russian model applies an economic approach based on production costs in determining the monopolistically high price. Chicago scholars criticize such approach, stating that such analysis is too ambiguous. Hence, the current evaluation of excessive price should be revised with regard to deeper economic analysis. In addition, Russian competition law introduces the prohibition of any price manipulation particularly by financial organizations and in the markets of electrical energy. Also it forbids the violation of the pricing procedure by the dominant firms.

As to price discrimination practices, Russian competition authority introduces additional provision on prohibition of discriminatory conditions. Both provisions are illegal per se, however, economic analysis shows that these particular practices can also be pro-competitive. Hence, such exclusionary conduct should be rather investigated “on merits”, than to be forbidden by default.

As to tying cases, they are not specifically regulated in Russian system. Economic scholars agree with such approach, since majority of them believe that tying practices should be regulated less or not regulated at all. The only provision similar under Russian system to such exclusionary conduct prohibits imposing detrimental to consumer contractual terms.

In refusal to supply cases Russian practices differ a lot from foreign ones, and they mostly focus on protection of individual consumers. The special role is devoted to natural monopolies under Russian competition law. They have special responsibilities before other market players and they are strictly regulated by the government.

In general, the application of Russian competition law is too narrow to be able to apply the rule of reason or investigation “on merits”. Since in European and American models case law plays an important role via creating and maintaining new legal rules and, consequently, improving and customizing competition law towards the economic realities, in Russia, case law does not create a precedent. Court decisions are based solely on particular legal provisions. Thus, the list of abusive conduct is exhaustive and only provisions, regarding discriminatory conditions, creation of barriers to market entry and exit and provisions on reducing or cutting off the production are possible to exclude in practice.²⁶⁶ Additionally, most of the provisions on the types of abusive behavior which Russian legislation considers to

²⁶⁶ “Sravnitel’niy analiz antimonopol’nogo zakonodatel’sstva zarubezhniuh stran I respubliki Uzbekistan”, Centr po sovershenstvovaniyu monopol’noy politiki, 2010 (“Comparative analysis of antitrust legislation of Republic Uzbekistan and foreign countries”) <http://econolawresearch.wordpress.com/>

be illegal *per se*, can also be pro-competitive in some cases. Hence, more economic approach in such investigations should be applied. The Innovation school view on economic analysis in antitrust could become a good starting point.

4.3. Russian competition policy and abuse of dominance control. Major issues and possible solutions

In the following subchapter I will analyze the major problems Russian competition policy currently faces. I will focus mainly on the issues of antitrust regulation and I will proceed with suggestions for modernization of Russian legislation system.

Development of effective competition policy is one of the major priorities for Russian government. However, the understanding of content of such policy and its requisite structure is still stays uncertain and raises many issues. The consequence of governmental uncertainty with regard to design of new realistic methods of modernization of competition policy, gives a priority to antimonopoly policy as a primary focus for further improvements²⁶⁷.

Economists divide Russian competition policy on protective and active one based on the functions it should carry out.²⁶⁸ Protective competition policy, consequently, consists of antimonopoly policy or antitrust and policy with regard to prevention of unfair competition. Active competition policy closely connected to industrial policy with the purpose of new markets creation and development of competition on existing ones.²⁶⁹ Some of the methods it applies include development of competition in industries with natural monopolies,

²⁶⁷ Yakunin, supra note 4 at 7

²⁶⁸ S. Avdasheva, A. Shastiko "Konkurentnaya politika: sostav, struktura, sistema", *Sovremennaya konkurenciya*, n. 1 (19) (2010): 5-20 ("Competition policy: content, structure, system", transl. mine)

²⁶⁹ S. Avdasheva, A. Shastiko "Promyshlennaya i konkurentnaya politiki: problem vzaimodeistviya. Uroki dlya Rossii", *Voprosy Ekonomiki*, n. 9 (2003): 22 ("Industrial and competition policies: problems with interaction. Lessons for Russia", transl. mine)

establishment and enforcement of competition rules in the markets with the state as buyer and seller, lowering the entry barriers and others.²⁷⁰

Despite the structural division, big imbalance still remains between the instruments employed in protective and active policies. Hence, some negative tendencies in Russian competition policy can be traced.²⁷¹

- Imbalance of competition policy measures towards the protective ones, in particular, from prudent and deterrent towards punitive measures. Such tendency leads to additional risks of errors with corresponding effects on the participants of economic exchange.
- Limited ability in application of the principle of comparable markets, which entail oversimplified accounting approach, in particular, towards establishment of monopolistically high and low prices.
- Continuing growth of “regulatory bubble” in antitrust, which refer to initiation of the multiple proceedings of administrative (sometimes even criminal) cases against companies and their officials, including some really unjustified cases.
- Higher probability of errors in the application of antitrust, which consists of poor and unjustified decisions by Federal Antimonopoly Service and by Court. In particular, cases with errors leading to prosecution of an innocent persons or granting excessively hard punishment to the offender.
- Continuously rising costs of implementing protective measures of competition policy.
- Lack of sustained progress in the institutional business environment. Frequent changes in legislation, low quality standards of proof lead to legal uncertainty among the market players.

²⁷⁰ Ibid.

²⁷¹ A. Shastiko “Antitrast v Rossii: byt ili ne byt”, MCSI Leont’evskiy centr, 2012, 16-17 (“Antitrust in Russia: to be or not to be?”, transl. mine)

Due to current economic realities, strong market monopolization and with regard to formation and development of effective competition policy some of the vital measures should be implemented. Such measure can be divided in two types: institutional and practical.

The major institutional change must be done with regard to Russian competition authority-Federal Antimonopoly Service. Strong connections with the State are believed to be detrimental for FAS, hence, status of independency both political and financial must be granted to it.²⁷² In order to provide with regulatory stability, FAS should be completely independent from national and regional governments. Although it still will be financed from the state, the budgeting responsibly should be granted to FAS. Hence, Competition Authority will be able to manage funds freely within its competence. Above measures will protect FAS from political influence within their function area.²⁷³

The next institutional change should be followed by giving some consistency and transparency to the wide range of functions of FAS. First of all, necessary reporting system should be implemented in order to provide market players and government with important and veridical information. For instance, FAS should present its annual performance report to Russian state Duma.²⁷⁴ Secondly, the functions of FAS should be optimized (*See Appendix I*). Hence, FAS currently carries out eleven out of twelve functions, being the only one competition authority which has all of the functions except consumer protection.²⁷⁵ Therefore, FAS should be focused only on specific antitrust functions, and the rest of them should be assigned to other institutions.

²⁷² S. Gabestro "Antitrust po-evropeiski: kak napravit rossiiskuyu antimonopolniyu politiku na razvitie konkurencii", Moscow, 2013, 5 ("European Antitrust: how to steer antimonopoly policy towards competition development", transl. mine)

²⁷³ Ibid.

²⁷⁴ Ibid at 6

²⁷⁵ Ibid at 8

The next change should be connected with regulation and control of natural monopolies. Transparency of their financial activity, their tariff policy and their regulation, in general, are highly questionable. Hence, the registry of natural monopolies should be carefully monitored and effectively maintained.²⁷⁶

In order to reduce the number of enforcement errors the necessary principles of antitrust should be stipulated under Russian legislation. First, principle of proportionality of the punishment and severity of the violation should be implemented. Second, principle of legal stability towards the FAS functions and their decision process should be established²⁷⁷. Hence, these two rules will give the system required predictability from the market players' point of view.

The practical measures should be the following.

Russian competition law is famous for large number of initiated proceedings with a major of them against small and middle scale businesses.²⁷⁸ Moreover, continuous inflow of various complaints from individuals and legal entities only make situation worse. Hence, major of the cases with regard to abuse of dominance are basically cases for consumer protection, although the latter is not stated as the function of FAS. Therefore, cases with regard to individuals should be eliminated leaving only the ones based on complaints of the business entities. Moreover, the registry, which includes the companies with market share higher than 35 % should be cancelled. As analysis showed more than 60 % of the firms included in this registry are small and middle scale enterprises. Additionally, some huge monopolies are not even included there.²⁷⁹ Consequently, it leads to persecution of small business by FAS. The market

²⁷⁶ Yakunin, Supra note 4, at 10

²⁷⁷ Gabestro, supra note 272, at 59

²⁷⁸ Ibid at 27

²⁷⁹ Ibid at 40

structure approach used by “Innovation school” could be a good substitute of the standard market share index.

Federal Antimonopoly Service should define, analyze and investigate relevant markets properly before making a decision on violation of antitrust legislation. Application of Economic-based approach, which is widely used in United States and Europe, would facilitate the proper outcomes of such investigations. Moreover, based on foreign experience, it would only be beneficial if all parties are allowed to conduct and present their own analysis during the investigation process.²⁸⁰

Lastly, in my opinion, with regard to modernization of antitrust legislation, it would be necessary to shift from overprotective function of antitrust towards regulatory one. In particular, in cases on dominance abuse the primary focus should be made on protection of competition, differentiation between anti- and pro-competitive effects of every legislator measure. Some types of abusive conduct should be rather eliminated from the list of violations or combined with similar provisions. For instance, Excessive pricing, predation and price discrimination should be rather investigated “on the merits” than deemed illegal *per se*.

In total, over a past twenty years a lot has been done towards improvement of Russian antitrust system. Regulatory framework based on the best foreign practices was created. However, despite the presence of established legal instruments, the Russian antitrust enforcement practice is far from the international standards and needs serious changes. Hence, Russian antitrust should continue developing and improving with the reference to legislative norms in successful foreign models like in United States and European Union.

²⁸⁰ Ibid at 61

Conclusion

The thesis has examined the effectiveness of Russian antimonopoly regulation and its influence on competition development in a country. The paper has raised number of theoretical and practical issues of dominance regulation in Russia by making a comparison with American system and system of the European Union. Consequently, thesis has provided with the possible solutions for enhancement of antitrust regulation and for establishment of effective competition policy.

During the research it has been established that although Russian competition legislation has some similarities with American and European models, it is mostly characterized by its own unique system. Although objectives of the competition laws in the analyzed models are common, Russian antitrust has a distinctive feature which differentiates it from any other system in the world. Historical inconsistency of competition and economic policies and their implementation can lead to an abusive conduct from the authorities. Hence, Antimonopoly Service considers state government as a possible infringer of antitrust laws and prohibits governmental actions in case of their anticompetitive effect.

The big imbalance of the measures of competition policy has shifted to protective ones sometimes even to punitive measures. Such tendency explains the high level of antitrust enforcement. Antimonopoly Authority tends to initiate multiple proceedings including some really unjustified cases.

FAS consider dominance as anti- competitive practice per se. Hence, the long exhaustive list of abusive conduct exists. Eleven practices are deemed to be forbidden under Russian competition law. In contrast, EU recognizes only five of them and US even less. The main criteria to enforce the cases are the lessening of competition, infringement of the interests of other persons and impediment of access to the relevant market. However, the practice shows

that it is enough to proof consumer harm in order to initiate an antitrust infringement. Thus, big number of antitrust cases in Russia is basically about consumer protection.

In general, the application of Russian competition law is too narrow to be able to apply the rule of reason or investigation “on merits”. Hence, most of the provisions on the types of abusive behavior which Russian legislation considers to be illegal per se, can also be pro-competitive.

FAS have wide range of responsibilities, which is higher than in any other antitrust authority. It leads to higher probability of errors in the application of law, which consists of poor and unjustified decisions. Also the lack of economic analysis during the investigation leads to initiation of antitrust proceedings towards the small and middle- scale enterprises.

In order to improve the current antimonopoly system necessary institutional and practical changes should be implemented. First of all, Federal Antimonopoly service should become independent from the governmental influence. Moreover, the functions of FAS should be optimized and the necessary principles of proportionality and legal stability should be stipulated in order to increase the quality of decisions made. The next change should be connected with regulation and control of natural monopolies. Transparency of their financial activity, their tariff policy and their regulation should be maintained.

Secondly, Russian competition policy should be shifted from overprotective function towards the regulatory one. Federal Antimonopoly Service should apply an Economic-based approach in order to define, analyze and investigate relevant markets properly. In cases on dominance abuse the primary focus should be made on protection of competition, differentiation between anti- and pro-competitive effects of every legislator measure. Some types of abusive conduct should be rather eliminated from the list of violations or combined with similar provisions.

All in all, Russian antitrust should continue developing and improving with the reference to legislative norms in successful foreign models like in the United States and the European Union.

Appendices

Appendix I. Responsibilities of Competition Authorities in Russia, EC and United States.

Responsibilities/ Country	Russia	EC	US
Competition Authority	Federal Antimonopoly Service	European Commission	Federal Trade Commission & Department of Justice
Restriction of competition by dominant entities	+	+	+
Vertical and horizontal agreements	+	+	+
Restriction of competition by the state	+	-	-
The preliminary control of the market concentration	+	+	+
Unfair competition	+	-	+
State procurement	+	-	-
State Aid	+	-	-
Consumer protection	-	-	+
Law on Advertising	+	-	-
Industry regulation (energy and / or transport)	+	-	+
Regulation of foreign investments into strategic enterprises	+	-	-
Control of trade legislation	+	-	-

Source: A. Shastiko, A. Kurdin "Antitrust and protection of intellectual property in countries with transition economies", Voprosy Ekonomiki, 2012 № 1.

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