



COUNTRY STUDIES

Competition Law and Policy in the Russian Federation 2013

Introduction

This report on Competition Law and Policy in the Russian Federation was prepared to assist the OECD Competition Committee in assessing the willingness and ability of Russia to assume the obligations of OECD membership. In doing so, the Competition Committee assessed the degree of coherence of Russia's competition law and policy with that of OECD Member countries. This report, prepared as part of OECD accession review, highlights some of the key challenges facing Russia in the field of competition policy.

Overview

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[Russia – Peer Review of Competition Law and Policy \(2004\)](#)

**COMPETITION LAW AND POLICY
IN THE RUSSIAN FEDERATION**

-- 2013 --



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FOREWORD

This Report on Competition Law and Policy in the Russian Federation is part of a series of reviews of national policies undertaken for the OECD Competition Committee. It was prepared to assist the OECD Competition Committee in its assessment of the willingness and ability of the Russian Federation to assume the obligations of membership in the OECD concerning Competition Policy.

Economic competition has developed significantly over the past two decades and considerable progress has been achieved in establishing the necessary framework for competition in Russian Federation. However, when it comes to implementation of the new laws and policies through administrative and judicial decisions, the speed and scale of the changes give rise to potential risks.

These and other key challenges facing Russia in its implementation and enforcement of competition policy are highlighted in this report. It reflects the situation as of June 2013. The report is released on the responsibility of the Secretary General of the OECD. This review was prepared by Sally van Sicken and Sarah Reynolds under the supervision of the Competition Division of the OECD Directorate for Enterprise and Financial Affairs.

TABLE OF CONTENTS

Executive Summary	7
Introduction	11
1. Foundations and history of competition policy	11
1.1. Early history and development	12
1.2. Recent developments and current priorities	15
2. Substantive matters: content of the competition law	18
2.1. Exemptions generally	19
2.2. Restrictive agreements and concerted practices	20
2.3. Dominance and monopolization	39
2.4. Concentration control	60
2.5. Unfair competition	70
2.6. Acts of state bodies and officials, transfer of rights in state property and natural resources	72
2.7. State and municipal preferences (state aids)	78
2.8. State purchasing	81
2.9. Economics-based assessments	83
3. Institutional issues: enforcement structures and practices	90
3.1. Competition policy institutions	90
3.2. Competition law enforcement	94
3.3. Other enforcement methods	101
3.4. International issues and cooperation in competition law enforcement	102
3.5. Competition and international trade and investment	106
3.6. Competition body resources and caseload	108
4. Limits of Competition Policy: Exemptions and Special Regulatory Regimes	113
4.1. Economy-wide exemptions and special treatment	113
4.2. Regulation and reform of natural monopolies	115
4.3. General Scheme	117
4.4. Electricity	121

4.5. Natural gas	123
4.6. Petroleum products and pipelines	124
4.7. Rail transport	125
4.8. Air transport	126
4.9. General observations about natural monopoly regulation	128
4.10. Other sector-specific rules and exceptions	130
4.11. Conformity with Guiding Principles for Regulatory Quality and Performance and Recommendation of the Council on Competition Assessment	140
5. Competition Issues in Regulatory and Legislative Processes	143
5.1. Competition advocacy in legislative and regulatory process	143
5.2. Government Action Plan (Roadmap) for the “Promotion of Competition and Improvement of Antimonopoly Policy”	146
5.3. Expert councils and other public involvement	149
5.4. Competition advocacy and public information	150
6. Assessment and conclusions	152
6.1. Current conditions and trends over 5-10 years	153
6.2. Implementation of the Six Roadmap Principles	155
References	167

Boxes

Box 1. New methods in cartel investigations yield evidence of intent	29
Box 2. Cases involving public procurement	31
Box 3. Examples of Formal Cautions	33
Box 4. Proper pricing models for dominant enterprises	51
Box 5. Defining “Necessary profit”	52
Box 6. Cases of abuse of joint dominance	53
Box 7. Selective distribution in pharmaceuticals	57
Box 8. Dominance of a dairy	57
Box 9. Merger Case Examples	64
Box 10. Review of conditions imposed for merger approval	66
Box 11. Practice in unfair competition and advertising cases	71
Box 12. Practice in state actions cases	76
Box 13. Violation of Article 17	78
Box 14. Bread, petroleum products and compulsory insurance	83
Box 15. Competition violation in retail trade	139
Box 16. Typical examples of published merger decisions	151

Executive Summary

The development of economic competition is a pervasive and fundamental part of the transformation of the Russian Federation over the past two decades. Today, the role of competition is recognised across a range of government policies, from anticorruption to public procurement, and competitive mechanisms are required for procurement, for award of use rights in important natural resources and for the sale or use of most forms of public property. Despite strong support for competition in the 1993 Constitution and laws other than the competition law, competition was not a high priority during much of the 1990s and later.

The Federal Antimonopoly Service (“FAS”) is well-positioned within government. It is directly subordinate to the head of the Government and has its own funding and staff. It plays a central role in the Government’s response to various economic issues such as price spikes in socially important goods, on-going reform of natural monopolies and promotion of fair public procurement as well as advocacy for competition on other matters. FAS enforces the competition law as well as the laws on public procurement, advertising, trade (in wholesale food markets, for example) and others.

The competition law deals with restrictive agreements, abuse of dominance, mergers, unfair competition, competition restrictions by public authorities and state or municipal preferences (state aid), without sectoral exceptions. In outline, the content is roughly similar to the laws of many OECD countries, with the exception that the law covers actions by public authorities. However, details in the law may sow the seeds for the development of a very distinctive law. In particular, the definitions of “signs of restricting competition” and of monopolistically high and monopolistically low prices have led in some instances to a rigid understanding of lawful market conduct.

Important changes in the competition law and related legislation in the past six years include expanding the geographic scope of coverage, distinguishing cartels from other sorts of restrictive agreements, raising merger filing thresholds, placing merger review procedures into the law, substantially increasing administrative sanctions in the form of turnover-based fines, expanding the ability to undertake investigations, and instituting a leniency program. The introduction of warnings and the adoption of non-discriminatory access rules for natural monopolies and their infrastructure may facilitate competition rule enforcement towards dominant firm conduct.

The structural reform of natural monopoly sectors has often been limited. It has often been limited to the separation of state functions from commercial functions, and the latter separated into distinct legal entities within a single group of companies. The major exception is the electricity sector, where there has been ownership separation. Non-discriminatory access rules to natural monopolies and their infrastructure are in place in many important sectors. Natural monopolies’ tariffs are regulated by the tariff regulator while overall sectoral policy is the responsibility of sectoral ministries and the

Government. This arrangement leaves FAS with a large caseload in applying the competition law to non-pricing conduct of natural monopolies. There remains significant scope for reform in natural monopoly sectors.

FAS has expanded its cooperation with the competition authorities of other jurisdictions, both bilaterally and at multilateral and international organizations. It has signed five new-type bilateral agreements with foreign competition authorities that are aimed at coordination and consideration of mutual interests in specific investigations. However, FAS's most intense cooperation is through the CIS and Eurasian Economic Community. Against this general trend, the potential for additional delays and risks to cooperation due to the legal restriction on the participation of Russian strategic companies in foreign competition investigations forms a stark contrast.

These significant developments do not obscure the remaining major challenges to be addressed. Government policy choices are not always pro-competitive. In the 2000s, a number of state corporations were created that received large transfers of resources and property that may allow control over entire sectors, and in particular allow market dominance or competition distortion. The state retains a significant share in undertakings with market power in a variety of sectors, particularly sectors that provide inputs into major parts of the economy such as energy and banking, and there have been recent moves towards further consolidation both under state control, *e.g.*, oil, and in private hands, *e.g.*, potash. The pace of reform in natural monopoly sectors has been slow.

FAS continues to have a workload that is both very large, opening thousands of cases annually, and very broad. The competition law and related legislation evolve rapidly, with a new competition law in 2006, significant amendments in 2009 and 2012, and further changes planned. While the changes are, on the whole, important and necessary, the combination of the magnitude and breadth of tasks and the need to adapt to continual legal changes risk task overload, dilution of attention and delay in the development of economic analysis skills and investigation practices – problems that have interfered with the work of the Russian competition authority in the past. The development of skills and practices would in turn allow the competition law to be comprehensive and more effective, and greater internal coherence in the understanding of law and analysis would increase predictability.

Although considerable progress has been achieved in establishing the necessary legal and institutional framework for competition in the Russian Federation, the speed and scale of the changes underway give rise to potential weaknesses and risks. This is particularly true regarding the implementation of the new laws and policies through administrative and judicial decisions based on economic and legal analysis.

Recommendations for Future Action by the Russian Federation

In the context of its strategy to transform the Russian Federation, the government is invited to consider the following items, for future action to improve competition law,

policy and practice:

1. Improve the quality of economic analysis and its application to competition enforcement, throughout the competition authority, and in support of improved judicial decisions:
 - a) The review of restrictions of competition, the criterion defined in the law by which case-by-case assessments of abuse of dominance, agreements and concentrations are made, should be based on a sound economic analysis taking into account actual market features.
 - b) “Dominance” in a competition case should be determined on the basis of current information and analysis. The Register of firms with market share exceeding 35% should not have a role in determining dominance.
 - c) Ownership of intellectual property rights should not lead to a presumption of dominance.
 - d) Economic analysis should be an integral part of competition enforcement, including in the regional offices of the competition authority.
2. Improve the coherence between the competition law and the criminal code:
 - a) Remove criminal liability for repeated abuse of dominance.
 - b) Amend the Criminal Code to reinforce the incentives of the leniency programme under administrative law for example by limiting sentencing discretion in instances where administrative law grants leniency.
 - c) Improve cooperation between the competition authority and the criminal law investigatory authorities.
3. Improve the merger control procedure:
 - a) Modify the merger notification thresholds to conform to the 2005 OECD Recommendation on Merger Review and international best practices on nexus, to provide that at least two parties to a transaction have sales or assets in the Russian Federation exceeding a certain material threshold with the relevant sales and/or assets of the acquired party limited to the sales and/or assets of the business(es) being acquired.
 - b) Reduce the number of post-merger notifications, and create a mechanism to intervene in those rare instances where a low-value merger can substantially restrict competition in a small market.
4. Apply an integrated approach to related economic, institutional and

administrative obstacles to competition, as prescribed in the Russian Government's action plan (roadmap) for "Promotion of Competition and Improvement of Antimonopoly Policy" adopted on 28 December 2012.

5. Refrain from placing assets into state corporations when this may result in dominant positions in commercial activities or distortion of competition.
6. Avoid the static use of benchmarking in competition law enforcement, such as establishing a given market index as the reference for whether pricing conduct is lawful, and apply a cost-benefit test to the decisions FAS imposes on market participants' conduct, including decisions relying on commodity exchanges.
7. Put in place adequate safeguards to ensure that the ability of Russian companies to cooperate with and to contribute to investigations of competition authorities from other jurisdictions in a timely manner is not undermined by the requirement under Russian law for strategic Russian companies to get prior permission from a federal body of executive power before providing information to foreign authorities or changing their foreign economic activity.
8. Periodically review regulations under federal law for their effects on competition and transmit the resulting observations to the Government.
9. Ensure that adequate resources are applied to the effective enforcement of competition law and promotion of competition-related policies.
10. Ensure adequate safeguards for the protection and exchange of confidential information:
 - a) Create conditions to enable the exchange of confidential information in the context of trans-border competition violations.
 - b) Apply rules for the treatment of confidential information in judicial proceedings that both protect the information and preserve procedural fairness.

Introduction

This background report is submitted to assist the Competition Committee in its assessment of the willingness and ability of the Russian Federation to assume the obligations of membership in the OECD concerning competition policy, as set out in the accession roadmap. It is based on a number of sources: the submissions by the Russian Federation in 2009 and 2012 of its position concerning the compatibility of its laws and policies with OECD legal instruments; responses to the Committee's request for additional information in several areas after its reviews in 2009 and in 2011, and several Secretariat questionnaires; and findings from the Secretariat's fact-finding missions and research. In general, the date of information is noted.

The first sections of the report describe the policy foundations, substantive law and enforcement experience, institutional structure, sectoral regulatory regimes and exclusions and treatment of competition issues in regulatory and legislative processes. Each also includes a description of the conformity of the Russian Federation competition law and policy with OECD instruments, the trends over the 5-10 years, and as appropriate, recommendations for improvement. The concluding section summarises these findings under the three themes that the Committee has prescribed for its assessment: (1) the current situation of competition policy and enforcement, (2) the magnitude and direction of change in competition policy over the last 5-10 years and (3) the extent of conformity with the particular recommendations in the competition policy instruments that are referenced in the roadmap.

1. Foundations and history of competition policy

The Russian Federation created a competition law and competition authority early in its transition. Strong support for competition was embodied in the 1993 Constitution, in explicit language, and laws other than the competition law. Competition law and policy are influenced by the geography, history, and economy to which it applies. The great expanse of the Russian Federation, with sparsely populated swathes, meant that local official decisions may combine with transport and communication costs to create local monopolies in some goods and services. When the first competition authority and law were created in 1990 and 1991, respectively, the economy had long been dominated by large industrial state-run organizations. The initial expectations were that state enterprises would gradually adjust their patterns of behaviour from state-planning to market while small enterprises would increase the provision of consumer goods and services and help to spur the formation of market

infrastructure. Despite strong support in law, in practice competition was not a high priority during much of the 1990s and later.

The competition authority has regularly been assigned a broad variety of tasks beyond narrowly-defined competition issues, including the regulation of natural monopolies and the development of market infrastructure and promotion of new enterprises. The authority's priority areas of activity have shifted rapidly, and the competition law and related legislation have been amended regularly. Excess task assignment, together with broadly worded provisions of the competition law and lack of enforcement discretion have often created unrealistically large workloads, while lack of investigative power and absence of meaningful sanctions have raised questions about the effectiveness of investigation and enforcement activity. The 2006 law and later amendments have addressed some of these challenges.

1.1. Early history and development

The transition influenced the first Russian competition law and authority, the State Committee for Antimonopoly Policy and the Support of New Economic Structures. Consistent with expectations that most abuses would be controlled by regulation, and also due to fairness concerns about the completely unfamiliar rules, the law contained very limited sanctions for most violations, preferring cease and desist orders and disgorgement of improperly received income to direct fines or the punishment of individuals. To counter habits of state and association coordination of economic activity, the law included provisions prohibiting such behaviour, as well as an article allowing division of a production association or enterprise after repeated violation of the law. A register of enterprise-monopolists was created to facilitate the control of their pricing and other business behaviour. Concentration control was an early feature of the law as well as territorial offices.

A shift in transition strategy from gradual change to rapid privatization placed new requirements on the competition authority and legal framework. Proponents of rapid privatization without prior structural splits of enterprises argued either that no rational choice could be made concerning the desirable size and structure of enterprises, or that other considerations—maintaining political support or pre-empting asset-stripping—required the fastest possible transfer of wealth to private hands. The new strategy would rely on profit incentives to encourage efficiency and restructuring of enterprises, as well as competition from international firms after an abrupt opening of previously controlled foreign trade. The concept of longer term control over the pricing and behaviour of many enterprises was abandoned. Instead, the 1995 law on natural monopolies defined narrowly those areas where Government-designated

regulators would regulate prices. The competition authority was assigned the task of elaborating broad “demonopolisation plans” to eliminate structural barriers to competition, create infrastructure and facilitate entry into highly concentrated markets. The State Committee elaborated formulas, criteria and methods to evaluate the level of competition in markets. Despite the creation of demonopolisation plans for branches of industry and for specific regions and localities in the absence of funds or authority they yielded no significant results.

The Civil Code of 1994 provided for the free movement of goods and services (Article 1) and specifically defined restriction of competition and abuse of a dominant position as abuses of civil-law rights – the only specific abuses that are included in the text of the Code (Article 10). The immediate priorities were for much of the mid-late 1990s measures to ensure the application of federal laws, to eliminate local and regional legislation and regulations in conflict with superior legal rules and to provide for the preservation of the single economic space guaranteed by the 1993 Constitution. Within the competition authority, this was reflected in a shift in priorities toward the enforcement of the legal norms addressing competition restriction by state action at the regional and local levels.

The Ministry for Antimonopoly Policy, as the competition authority became, received additional tasks as a result of the squeeze on government finances from the financial crisis of 1998. New tasks included a voluntary procedure for the competition law review of agreements and enforcement of tender requirements for state purchasing. The Ministry also took a substantial role in the reform of natural monopolies, generating basic concepts for the reform and also supervising the trade administrator on the electricity market and enforcing non-discriminatory access rules to the electricity trading and transmission systems and to rail infrastructure.

The first OECD review of Russia’s competition law and policy (OECD, 2004: “2004 Report”¹) expressed concern about severe task overload and the lack of discretion in enforcement. The lack of investigative and sanctioning authority that prevented enforcement of the law from having any real deterrent effect was also an issue. Competition law coverage of many matters not likely to seriously impact competition, low merger control thresholds and a mandate extending well beyond the competition law left the Ministry without the resources to conduct thorough investigations, to effectively address significant restrictions of competition and to conduct meaningful competition advocacy.

¹ <http://www.oecd.org/daf/competition/prosecutionandlawenforcement/32005515.pdf>

With many cases that did not require complex economic analysis and an unmanageably large caseload overall, the competition authority could not direct sufficient attention to development of the high quality economic analysis that is at the heart of constructive enforcement of competition law and development of successful competition policy. The 2004 Report recommended a substantial reduction of the competition authority's tasks, including transfer of regulation of natural monopolies and supervision of state procurement to other bodies, to allow a tighter focus on competition matters.

The Federal Antimonopoly Service ("FAS"), the current competition authority, was formed in 2004 as an enforcement service, rather than a line ministry, as part of a broader reform of state bodies that was intended to streamline and focus their functions. FAS's early attention was devoted to the wholesale renovation of the legislative basis for its work, as well as advocacy at the federal level to raise awareness of competition issues. The advocacy efforts aimed to generate support for bringing competition law provisions closer to international practices and to make reducing state involvement in competition restrictions a high priority. Two main results were the adoption of a completely new competition law in 2006 and the new law on state purchasing in 2005. (Complementary legislation to increase and to revise the structure of sanctions passed in 2007.) FAS bears primary enforcement responsibility under both laws, and the enforcement as well as the refinement and development of state purchasing rules and systems have occupied significant attention and resources since the state purchasing law's passage. Another early priority, investigation and prosecution of restrictive agreements (particularly cartels) and abuses of joint dominance, coincided in 2007 and 2008 with serious concerns over price movements in markets for fuels, basic foodstuffs and other products. FAS's work in this area, specifically its ability to show visible results in the form of both successful prosecutions and visible effects on market conditions, quickly became a focus of both public attention and political pressure, and the prosecution of these categories of cases remains a high priority.

Not all policies, however, followed pro-competitive directions. For example, a number of state corporations were formed in the 2000s with broad mandates to support innovation in particular spheres or improve performance and competitiveness in a particular area of economic activity. They received large transfers of resources and property that may allow control over entire sectors, and in particular to dominate markets or distort competition through their commercial activities. The creation of dominant positions in markets harms competition. Also, the state retains a significant share in undertakings with market power in a variety of sectors, *e.g.*, the Central Bank is a majority owner of the largest commercial bank, Sberbank. The state is majority owner of Rosneft, which in late 2012 acquired TNK-BP to form Russia's largest oil

company, as well as majority owner of Gazprom, the dominant natural gas company. The combination of regulator and regulated risks is a harm to competition, for example, where the choice of “level playing field” conditions benefits certain competitors over others.

1.2. Recent developments and current priorities

FAS’s embrace of the term “economic procurator” illustrates its adoption of a broad conception of its role, with responsibility for addressing a broad variety of negative behaviour including but not limited to bias, corruption and other forms of illegality on the part of state bodies and officials. Advocacy campaigns, increased attention to abusive behaviour in particular industries, and also pricing patterns observed during and after the sharp rises in oil and food prices in 2007-8 and later have all increased general perceptions of the prevalence and costs of competition restrictions in the economy. The need to increase competition is regularly reiterated at the highest political levels and measures to achieve this are treated as high priorities in the Government and the legislature.

Two sets of amendments, effective in 2009 and 2012 respectively, partly responded to these demands. The “second antimonopoly package” and the “third antimonopoly package” amended the Competition Law, the Code of Administrative Violations and the Criminal Code. The major changes from the first, 2009, set of amendments:

- expanded the notions of “monopolistically high (low) price” and added to the competition law the comparison of suspect prices against prices generated in commodity exchanges markets
- broadened the definition of dominance to admit firms with market shares below 35% based on economic tests
- narrowed qualification requirements for and clarified the leniency programme
- introduced administrative liability for anti-competitive coordination, for example by officials, and
- clarified procedures for concentration control and for investigating antimonopoly violations and introduced a new administrative procedure to investigate complaints related to tenders/auctions.

The major changes from the second, 2012, set of amendments:

- changed the taxonomy of agreements *inter alia* to distinguish cartels both in the Competition Law and the relevant article of the Criminal Code and required more types of agreements to be assessed for their effects on competition rather than being treated on a *per se* basis
- amended the notion of “concerted actions” and clearly distinguished it from the notion of agreement
- revised the geographic scope of coverage of the law and introduced a nexus rule for transaction notification
- introduced as antimonopoly authority tools both “cautions,” regarding conduct that might lead to a violation, and “warnings” to dominant firms to cease conduct having certain indications of antimonopoly violations, and
- introduced rules to require that units under state ownership be sold by auctions meeting conditions that ensure competition.
- shrank the scope of agreements covered by the Criminal Code to cartels
- introduced into the article on agreements an exemption for intellectual property rights

Both sets of amendments:

- raised thresholds for pre- or post-notification of economic concentrations, excluded many intra-group transactions from the pre-notification requirements
- formalized the rules for imposing non-discriminatory access to infrastructure facilities of natural monopolies, and
- increased sanctions including amendments aimed at making operational the criminal sanctions against cartels.²

² Annual Report on Competition Policy Developments in the Russian Federation 2009,
[http://search.oecd.org/officialdocuments/displaydocumentpdf/?cote=DAF/COMP/AR\(2010\)19&docLanguage=En](http://search.oecd.org/officialdocuments/displaydocumentpdf/?cote=DAF/COMP/AR(2010)19&docLanguage=En);

FAS has stated in its 2012 questionnaire response that its priorities both currently and for the next several years are:

- to strengthen the fight against cartels;
- the prohibition of abuse of dominance;
- to reduce administrative burden for business entities;
- control over government agencies;
- to strengthen control over activities of natural monopoly subjects;
- to improve transparency of the antimonopoly agency; and
- to enhance interaction with foreign competition services with respect to the consideration of violations.

The Government Programme for the Development of Competition in the Russian Federation for 2009-2012, amended and extended to 2015, aimed *inter alia* to reduce barriers to market entry and foreign trade, simplify access to the infrastructure of natural monopolies, adopt an accelerated procedure for considering violations of rules for non-discriminatory access to services of natural monopolies, and adopt a more transparent and more accessible system of public procurement. Despite the action plan having essentially been implemented, in FAS's assessment, there have not been substantial improvements in competition itself. FAS is of the opinion that developing competition requires a comprehensive approach, solving related economic, institutional and administrative problems. Improvements in individual market influences, as under the Programme, are not likely to result in any substantial changes in the development of competition. Key ministries, too, must play their part.

The planned next stages in the development of competition are set out in the Russian Government's Action Plan (Roadmap) for "Promotion of Competition and Improvement of Antimonopoly Policy" of 28.12.2012. It replaces the earlier Government Programme and covers the period 2013-2015. It is described in greater detail in section 5.2.

the criminal law point from Linklaters (2009) "Second Antimonopoly Package" at <http://www.linklaters.com>, FAS, 10 January 2012 press release, "The 'third antimonopoly package' came into force," at http://en.fas.gov.ru/news/news_31961.html accessed on 19 December 2012

The Government Commission on Competition and the Development of Small and Medium Enterprises, chaired by the First Deputy Prime Minister and with the Head of FAS at deputy chairman, will coordinate government and representatives of business, and elaborate proposals on implementing the national competition policy.

Three other recent changes are notable. The Duma adopted a new law on state procurement in April 2013. The effect of the law will be partly determined by the implementing regulations which are not yet formulated. The Duma passed at first reading an amendment to the competition law which eliminates post-transaction notifications. FAS submitted a draft law to the Duma in April 2013 which amends Article 178 of the Criminal Code. It removes reference to restriction of competition, but retains both cartels and repeated abuse of dominance as criminal conduct. The conduct must either cause damage exceeding RUB 1 million or increase income by more than RUB 5 million.

The development of economic competition is a pervasive and fundamental part of the transformation of the Russian Federation over the past two decades. The competition authority has broad responsibility, playing a central role in the Government's response to price spikes in socially important goods, its on-going reform of natural monopolies and promotion of fair public procurement. Despite government calls for FAS to respond to competition problems in some markets, it also hinders competition for example in the creation of state corporations and the slow pace of reform in sectors where natural monopolies form only part of the industry. The breadth of authority can aid policy coherence, but also runs the risks of task overload, dilution of attention and delay in development of economic analysis skills and investigation practices – problems that have interfered with the work of the Russian competition authority in the past. In order for the competition authority to be successful in executing the extremely ambitious set of tasks assigned to it by the Russian government, it will have to find ways to avoid these risks.

2. Substantive matters: content of the competition law

Russian competition law is not modelled on the law of any other single jurisdiction. Rather, the law contains several relatively unusual provisions to address special concerns related to Russia's early stage of transition that have been carried over into the new law. These include the ability to divide enterprises after multiple violations of the law and a broad authority to enforce the law against state actions and decisions that limit competition. The latter has played a very important role in the Russian context, allowing the competition authority to address a wide variety of competition-restricting behaviour, including the imposition of barriers to the movement of goods and services and

the use of state authority to advantage specific competitors. Further, the limited scope for sector-specific regulatory authorities means that the competition authority plays an important role in controlling the behaviour of utilities through the dominance abuse provisions and, more recently, establishing rules of non-discriminatory access.

A key concept in the law, appearing repeatedly where a case-by-case assessment is required, is “restricting competition.” The notion that makes that concept more concrete, “signs of restricting competition,” is defined in the competition law at Article 4, part 17. The definition includes any reduction in the number of suppliers, any change in price that “is not connected to the relevant changes in other general conditions of goods circulation on the market,” or setting standards exceeding those set out in law or by public bodies. In the past, language of this kind has sometimes been read literally without any significance threshold. If this risk were realized, the range of lawful pricing behaviour, for example, would be severely restricted. A more nuanced reading would take into account all observable market features as well as indicators, and would apply a significance threshold. A mechanistic perspective on market behaviour can yield competition assessments that do not take into account informational limitations, risks and uncertainties, cognitive and behavioural quirks, and other real world characteristics.

2.1. Exemptions generally

The Russian competition law contains no general exclusions for specific spheres of the economy or particular kinds of enterprises. However, it does not apply to other federal laws or to other acts or actions of the State Duma or the Council of the Federation, and there is an exception for acts and actions by other specified bodies (federal bodies of the executive power, state bodies of the constituent parts of the Federation, bodies of local self government, and bodies or organizations to which their functions or rights have been delegated, the Central Bank) if the adoption of the act or taking of the action is envisioned by a federal law. Although there is no specific exception in the law for labour, the use of the term “economic subject” in the articles of the law that might otherwise apply would exclude the application of the law in that area. (The term “economic subject” does not include individuals, except individual entrepreneurs or those engaged in professional income-generating activity.) The competition law provides, in Article 13, for exemptions of certain actions or omissions by dominant firms, agreements, concerted actions, and transactions if they meet certain criteria. The criteria are similar to those of Article 101(3) TFEU. Article 13 also envisages the adoption of general exemptions (block exemptions) for certain types of agreement or concerted action. A few articles

limit the law's application to intellectual property, and a number of articles allow exceptions to be created by laws or other legal acts.

2.2. Restrictive agreements and concerted practices

The competition law has a general prohibition of agreements between economic entities if it is established that they lead or can lead to restricting competition, but provides for block or individual exemption by the competition authority. The law narrowly defines categories of agreements that are prohibited or permitted *per se*. The law distinguishes cartels, vertical agreements and agreements involving state bodies and officials. Agreements are defined as written or oral understandings, and concerted actions are distinguished from agreements. Intra-group agreements are not covered by the general articles on agreements and on concerted actions.

The law defines various categories of agreements. It recognizes as "cartels", agreements between economic entities that sell goods on the same market. Cartels that lead to or could lead to specified actions or effects, approximating "hard core cartels" in OECD usage, are prohibited *per se*. "Vertical agreements" are defined as agreements between economic subjects, one of which is an acquirer of the goods and the other of which is a seller.

Coordination by a third party is addressed in the article dealing with agreements. The coordination of activities of economic entities by physical persons, commercial and non-commercial organisations is prohibited if it leads to one of the consequences in the cartel list or prohibited vertical agreements list or electricity market price manipulation.

Bid-rigging in public procurement is part of this enforcement against restrictive agreements. The provisions of the public procurement law, particularly those requiring transparency, aim to promote broad participation and discourage customer-bidder conspiracies.

2.2.1. Horizontal agreements

Agreements between economic entities that sell goods on the same market that lead to or could lead to any of the following outcomes "shall be recognized as cartels," according to Article 11, part 1, and are prohibited *per se*:

- Fixing or maintaining prices (tariffs), discounts, markups (surcharges) and (or) additions to prices;

- Increasing, reducing or maintaining prices in the course of competitive bidding;
- Dividing the goods market according to a geographic principle, quantity of sales or purchases of the goods, the mix of goods or a composition of buyers or sellers (customers);
- Reducing or terminating production of the goods;
- Refusing to conclude contracts with particular sellers or buyers (customers).

The formulation “shall be recognized as” aims to tie the term “cartel” in the Criminal Code to the competition law. Article 11, part 1, was amended to introduce the concept of cartels and approach international usage of the term.

Other agreements between economic entities, if they do not qualify for the automatic exemption of certain vertical agreements, are prohibited if it is established that such agreements lead or can lead to restricting competition, in Article 11, part 4. Examples of types of such agreements that are listed in the law include:

- imposing disadvantageous contract conditions or tying unrelated products
- price discrimination on identical goods (unless justified by economic, technical or other grounds);
- creation of barriers to entry or exit for others;
- imposing membership criteria in professional and other associations.

Also, agreements among participants in the electric power industry that lead to price manipulation on the wholesale or retail markets of electric power or capacity are prohibited.

2.2.2. Vertical agreements

While vertical agreements are subject to the same general prohibition and exemption rules as other agreements, they also have particular prohibitions and exemptions. The competition law defines³ vertical agreements as agreements

³ Article 4, point 19.

between a buyer and a seller of the same good. The definition excludes agency agreements. Article 12 specifies that written vertical agreements of commercial concession, such as franchising agreements, are permitted if not between financial organizations. And it specifies that vertical agreements between economic entities (excluding financial organizations) are permitted if the share of each economic entity in any goods market does not exceed twenty percent. Beyond these safe harbours, Article 11, Part 2 specifies that two categories of vertical agreement, resale price maintenance and exclusive distribution, are prohibited with certain exceptions. There is an exception for maximum resale price maintenance. And exclusive distribution agreements that concern the sale of products under a trademark or other means of individualization of the buyer or producer are not prohibited.

2.2.3. *Concerted practices*

Concerted practices are defined⁴ as the absence of an agreement and meeting all three necessary conditions. The conditions are: (1) the outcome is in the interest of the economic entities, (2) actions are known in advance to each economic entity due to a public statement by one of them about exercising such actions, and (3) actions of each of the economic entities are caused by the actions of the others and not due to circumstances equally affecting all economic entities on the relevant goods market. Examples of such circumstances are given, such as changes in regulated tariffs, changes in input prices, and changes in demand that endure at least a year. The 2012 amendments added the requirement of public signalling.

Concerted practices that have the same effect as cartels or that lead to price manipulation in electricity markets are prohibited in Article 11¹. Concerted practices are prohibited if it is established that they lead to restricting competition. The prohibitions do not apply to entities in the same group or jointly controlled, and they do not apply to concerted actions of economic entities whose combined market share is less than 20% and individual market shares are less than 8%.

Public signalling can generate a caution from the FAS. Article 25⁷ provides that the FAS may issue a written caution if the conduct proposed in a public statement by an officer of an economic entity can lead to violation of the competition law, and there are no grounds to initiate and investigate a case of a violation.

⁴ Article 8 paragraph 1.

2.2.4. Exemptions

Article 13 is a broad exemptions article, covering not only individual and general (block) exemptions for agreements and concerted practices, but also actions and omissions by dominant economic entities as well as mergers and share transactions. Economic entities can provide evidence that their conduct can be allowed under Article 13. As noted above, the individual articles, 11, 11¹ and 12, also provide for exemptions within their subject area. Article 13 sets out the criteria for exemption, and provides for the Government to issue general exemptions (block exemptions).

Actions or omissions by dominant firms, agreements, concerted practices, and mergers and share transactions can be recognized as permissible if they do not create for particular persons opportunity to eliminate competition in the relevant goods market, do not impose restrictions superfluous for achievement of the goal of the conduct, and also if the conduct results or can result in:

1. perfection of production, sale of goods or stimulation of technical, economic progress or increasing competitive capacity of the Russian goods in the world market
2. obtaining by buyers benefits (advantages) which are proportionate to the benefits (advantages) obtained by the economic entities in the result of the conduct.

There is a significant difference in the conditions under which horizontal agreements, including those with the listed anticompetitive outcomes, can be exempted under Article 13, Part 1¹. In particular, horizontal agreements are not prohibited from imposing conditions superfluous for achievement of the goal of the conduct. While this may be an inadvertent drafting error, it would seem to allow a horizontal agreement with effects that qualify it for exemption also to impose anticompetitive conditions superfluous to achievement of those effects so long as the agreement stops short of eliminating competition.

The general (block) exemptions issued to date were issued by decree of the Government of the Russian Federation on July 16, 2009 and April 30, 2009, respectively, for terms of five years.⁵

⁵ One general exemption concerns joint research and the use of its results, and forbids such agreements if they concern expenses of the parties that are not related to the joint research or testing activity. The agreements must also contain provisions that allow the rights of the parties to the use of the results

Few individual exemptions under Article 13 appear to have been granted. FAS statistical reporting does not track the use of exemptions. The Article 13 exemption appears to have been applied in the decision approving the merger to monopoly of two potash producers (section 2.4.3 box).

The competition law exempts from the agreements (and abuse of dominance) provisions actions in the exercise of exclusive rights in the results of intellectual activity and in means of individualisation of a legal person or of goods, work or services that are [legally] equated to such rights. Few cases have been brought that could have raised the issue of an exemption under these provisions since they came into force in 2006 (2012 for the agreements exemption), according to FAS. FAS has proposed their elimination.

2.2.5. Sanctions

Sanctions for participation in a restrictive agreement include orders to cease the violation (with fines for failure to execute), an order requiring disgorgement of illegally received income and administrative fines on individuals and companies, as well as possible criminal sanctions. The introduction of turnover-based administrative fines in 2007 substantially raised the level of fines imposed, and 2009 amendments to the article in the Criminal Code dealing with competition matters, Article 178, were intended to make that article operational. A leniency programme, aimed at competition-restricting agreements and concerted actions, was introduced in 2007 and amended in 2009 to restore deterrence.

Administrative fines on legal entities are turnover-based for violations related to cartels, dominance abuse, and some types of unfair competition. Other violations are subject to administrative fines that are not turnover-based. The

obtained to be defined. The second general exemption concerns agreements between buyers and sellers generally, and establishes a series of conditions under which such agreements are presumed permissible (including a maximum 35% market share of one side of the agreement), as well as provisions that are not permissible (primarily addressing resale price and location terms and restriction, with specified exceptions). The third general exemption concerns agreements between credit institutions and insurance companies and appears aimed at creating conditions for competition in the market for insurance taken out by borrowers. Decree of the Government of the Russian Federation No. 583 of July 16, 2009 "On the permissibility of agreements between economic subjects." Decree of the Russian Federation of April 30, 2009 No. 386 "On the admissibility of agreements between credit institutions and insurance companies."

finances range from 1% to 15% of the income from sales of the product in the market for which the violation was committed. But the range is 0.3% to 3% for legal entities who get more than 75% of their income from sales of the relevant product. A fine-calculating formula in the Code of Administrative Violations uses a base amount that is added to or subtracted from depending on the number of aggravating and mitigating factors. FAS had long used such a formula internally, but the inclusion in the Code reduces the discretion of both FAS and the courts. The formula in the Code generally yields higher calculated amounts than the internal formula. This, together with the more constrained ability of courts to recalculate fines, was expected to lead to higher fines in 2012 and beyond.⁶ Table 1 suggests these expectations have been fulfilled.

Individuals are subject to administrative fines, disqualification from specified classes of positions, and, in principle, criminal fines and imprisonment. The maximum administrative fine on individuals is RUB 50 000 (about USD 1 500). Alternative sanctions are disqualification from occupying executive positions in legal entities or civil service positions in federal, regional or municipal bodies for a period of up to three years. Article 178 of the Criminal Code, the article related to competition, designates cartel agreements and repeated abuse of dominance of particular types as crimes. Criminal sanction varies with the circumstances of the crime and the amount of damage caused or illegal income received.⁷

The leniency programme was introduced in 2007 and substantially amended in 2009. It concerns competition restricting agreements and concerted actions. The initial programme attracted about 500 applications in two years, some involving joint applications by all the members of a cartel. The amendments restricted the possibility of full leniency to the first applicant and

⁶ Reynolds, S.J. (2012), "New Directions in Russian Competition Law," *Antitrust* 26:2 (Spring), American Bar Association, p. 80.

⁷ If damages exceed RUB 1 million or illicit income exceeds RUB 5 million, punishment may be a fine of RUB 300 000 to RUB 500 000 (about USD 9 000 to USD 15 000), or one or two multiples of the person's annual income, or imprisonment for up to three years. If the conduct involved abuse of a work position, or if there was damage or destruction of property or threat thereof, or damages/illicit income exceed RUB 3 million/RUB 25 million, then maximum punishment rises to a criminal fine of RUB 1 million (about USD 30 000), or five multiples of annual income or imprisonment for up to six years. If violence or threats of violence are involved, the maximum escalates to seven years of imprisonment with no provision for fines. Increase of penalties due to factors like abuse of a work position, threats of property damage or violence is a standard part of many articles of the Criminal Code.

tightened cooperation requirements. The number of applications fell precipitously to 19, 20 and 13 in, respectively, 2010, 2011 and 2012. In common with many other leniency programmes, for an applicant to get full leniency, it must report its involvement, cease participation and submit information sufficient to establish an administrative violation, and the authority must not have had the information and documents at the time of application.⁸ General principles allow criminal punishment to be moderated or eliminated on the basis of active cooperation of a defendant. But this type of leniency under the Criminal Code is not provided on the same grounds as for administrative fines and it remains at the ultimate discretion of the judge.

Table 1. Cases Concerning Agreements (Article 11) and Concerted Practices (Article 111)

Year	Total cases opened	Complaints			FAS initiative		Decisions		
		Received	Cases opened	Share of all opened cases	Cases opened	Share of all opened cases	Infringement	Orders issued	Sanctions (Rouble millions)
2007	232						94	78	4.3
2008	355	341	98	28%	257	72%	181	171	1657.9
2009	488	897	204	42%	284	58%	293	393	1400.9
2010	607	1283	294	48%	313	52%	376	754	903.5
2011	482	1661	268	56%	214	44%	315	547	2363.2
2012	292	1165	201	69%	91	31%	187	321	2898.7
- Article 11	261	929	190	73%	71	27%	164	297	
- Article 11¹	31	236	11	35%	20	65%	23	24	

Source: FAS statistical reporting, forms 1 and 9. New rules on sanctions for *inter alia* participation in illegal agreements came into force in 2007. 2008 was the first full year in which these rules were applied.

⁸ FAS Anti-Cartel Enforcement Template, Cartels Working Group, International Competition Network, dated 2009.11.09 at <http://www.old.fas.gov.ru/files/30021/Russia.pdf>.

Table 2. Breakdown of Number of Cases Initiated for Violations of Articles 11 (Agreements) and 111 (Concerted Practices)*

Description	2011		2012	
	Article 11	Article 11	Article 11	Article 11 ¹
Total	482	261		31
Fixing or maintaining prices (tariffs), discounts, surcharges (additional payments) and (or) mark-ups	151	24		25
Increasing, reducing or maintaining prices during tenders	104	71		2
Dividing a goods market	34	17		
Reducing or terminating the production of goods	6			1
Refusing to enter into contracts with particular sellers or buyers (customers)	8	2		
Illegally entering into “vertical agreements”	12	22		Not applicable.
Agreements (concerted practices) resulting in the manipulation of prices on the electric power (capacity) wholesale and (or) retail markets				
Imposing disadvantageous contractual terms	58	38		1
Unjustifiably setting different prices (tariffs) for the same goods	9	3		1
Creating barriers to market entry/exit	47	21		1
Fixing the conditions for membership of professional and other associations	1	1		Not applicable.
Other agreements (concerted practices) that restrict competition (with the exception of the aforementioned)	29	48		
Coordinating the economic activities of business entities	23	14		Not applicable.
Of the total: violations of anti-monopoly legislation when placing orders to meet state and municipal requirements	Not provided.	Not provided.		2

* Articles of the Law for the Protection of Competition

Source: FAS

At least until quite recently, agreements were not categorized in a manner comparable to international practice. For example, a collection of cases chosen by FAS in 2008 as illustrative cartel cases⁹ contained, to a striking degree, vertical agreements. The practice reflected the structure of the competition law.

⁹ FAS, “The Struggle Against Cartels: Practice in 2008.”

Until the 2012 amendments placed agreements among competitors into a distinct part of the law and designated certain competitors' agreements as cartels, the distinction between horizontal agreements, generally, and cartels, specifically, was not made in the law's structure. Consequently, the treatment of "hard core cartels" cannot be distinguished in the statistics or public statements from earlier years.

FAS is using greater investigative powers and cooperating with criminal investigatory authorities to uncover proof of cartel agreements as well as evidence of intent. FAS has conducted some unannounced "dawn raid" searches, used material obtained through police surveillance techniques, and used written statements of employees and others as evidence. Box 1 has examples of the use of greater investigative powers and cooperation with police in cartel cases.

2.2.6. Enforcement

FAS has made enforcement against cartels one of the main priorities in investigative activity and a central focus of its advocacy and public education measures. The presence of significant amounts of cartel activity and the difficulties in prosecuting it were among the primary justifications cited for passage of the 2006 competition law. The 2007 introduction of turnover-based fines and leniency provisions were credited by FAS as increasing its ability to investigate and successfully prosecute agreements cases. In 2008, the courts conclusively recognized the ability to prove coordinated action through the use of indirect evidence. In late 2010, the highest court in the economic court system issued guidance clarifying that a firm could defend itself against allegations of co-ordination by showing objective reasons for its behaviour, but it is not clear what would qualify as such in the face of evidence of parallel pricing. Before the 2012 competition law amendments, the vast majority of cases were assessed under a *per se* standard. The amendments moved many cases out of the *per se* category into a category where effects on competition had to be assessed. This change may account for the fall in case numbers.

The tables below show that the number of agreements and concerted practices cases opened peaked in 2010 and had fallen by half to 292 in 2012. Decisions finding the law had been infringed also halved to 187. Cases are increasingly opened on the basis of complaints, with the exception that two-thirds of concerted practices cases are opened on FAS's own initiative. Sanctions increased spectacularly between 2007 and 2008, the first year for which the new sanctioning rules applied. The 2012 total was about RUB 2.9 billion (USD 96.7 million). Over 40% of Article 11 cases were initiated in 2012 under cartel or bid-rigging headings.

Box 1. New methods in cartel investigations yield evidence of intent

1. Liquid chlorine

In an investigation of possible market division in the market for liquid chlorine, FAS conducted unplanned investigations at a number of producers and uncovered a cartel arrangement that had been operating for several years, including agreements on pricing and allocation of customers and volumes to specific producers. Evidence of the cartel included a significant amount of electronic correspondence between senior management employees directly setting prices, discussing terms of allocation, and resolving disputed questions related to the cartel agreement. The companies were found to have concluded an agreement to fix prices and divide markets and the materials of the case were referred for possible criminal prosecution.

2. Coal

After opening a case on possible abuse of dominance by a large coal company, FAS was informed by the police that the coal company might be involved in a cartel agreement or concerted practices with other coal companies in the market. FAS suspended the original investigation and opened an investigation into the possible agreement. The police provided FAS with a transcript of a conversation between senior personnel of two of the competitors discussing a purchaser who had recently switched from one to the other. FAS found the recorded conversation to be evidence that the two companies had concluded an agreement to fix contract terms with customers. The parties brought the FAS to court, and the court decided that, when the entire recorded conversation was considered as well as other evidence, there was insufficient evidence to conclude there had been a cartel.

3. Insurance

FAS received complaints from consumers that when they purchased a car from “KRK” company with payment over a period of years, they were obligated also to conclude an insurance contract with specific companies to insure the car for the whole period of payment. The insurance was costly and the contract was for a fixed sum each year, with no reduction for the declining value of the car over time. At the premises of one of the insurance companies, FAS inspected electronic correspondence in which it found a letter stating “...theoretically, as long as FAS doesn’t know about the additional agreements on the tariff programme, we can just not provide them and there won’t be any basis for the imposition of sanctions for a tariff conspiracy that restricts competition.” This became the basis for a further investigation, and a FAS finding that “KRK” and several insurance companies had agreed to force burdensome contract conditions on customers and agreed upon the terms and charges for insurance. (At the time, such agreements were prohibited per se.)

4. Liquid caustic soda

FAS imposed its largest administrative fine to date on members of a cartel in the market for liquid caustic soda, a total exceeding RUB 912 million (about USD 27.6 million). More than 20 organizations operated the cartel for seven years. Members relied on a joint selling organization to regulate prices and production volumes and share out customers on the basis of volume and territory. The cartel was disclosed in documents and information received in the course of more than 20 unannounced inspections over two years conducted with the participation of law enforcement agencies. The case has been referred for possible criminal prosecution.¹⁰

Prosecution under the Criminal Code is rare. In 2011 and in 2012, respectively two and four criminal cases were opened that correspond to the competition law's Article 11 prohibition of competition-restricting agreements, a category broader than cartels.¹¹

Bid-rigging as well as bidder-customer conspiracies in public procurement are prosecuted under the competition law. The following are examples of FAS decisions on anticompetitive conspiracies between bidders or bidders and customers in public procurement decided under the competition law.

¹⁰ Annual Report on Competition Policy Developments in the Russian Federation 2011, [http://search.oecd.org/officialdocuments/displaydocumentpdf/?cote=DAF/COMP/AR\(2012\)14&docLanguage=En](http://search.oecd.org/officialdocuments/displaydocumentpdf/?cote=DAF/COMP/AR(2012)14&docLanguage=En), pp.17-18.

¹¹ The number of cases referred for criminal prosecution has always been small. In 2012, FAS referred no cases of repeated dominance abuse, 23 cases of anticompetitive agreements, and three cases of agreements involving state bodies. In 2011, these numbers were none, 15, and 18. In 2010, when Article 178 was far broader, FAS referred 11 cases on anticompetitive agreements for possible criminal prosecution, as well as eight cases on concerted practices and four cases of agreements involving state bodies. Two criminal investigations were initiated by prosecuting authorities in 2010 and another three in 2011. As of mid-2011, none of these cases had reached the stage of decision. The press announced in 2011 the criminal conviction of three people in connection with manipulating tender processes under a fraud, rather than the cartel, provision of the criminal code.

Box 2. Cases involving public procurement

1. Two bidders conspired in an auction held by the Ministry of Health and Social Development of the Russian Federation for the purchase of certain medicines. Although both companies, R-Pharm CJSC and Irwin-2 LLC, submitted bids to participate in the auction, the former withdrew and this allowed the latter to win the auction at the starting (ceiling) price. FAS discovered that the withdrawn company sold the medicines needed to fulfill the contract to the auction's winner. The court of first instance and the court of appeals ruled that FAS had not provided direct evidence of the bid-rigging. The court of cassation ruled that the tender participants' conduct was per se evidence of the agreement. In its February 2013 decree on non-referral, the Presidium of the Supreme Arbitrazh Court supported the reasoning and conclusion of the court of cassation.
2. Bidders in an electronic auction held by the Ministry of Labour and Social development of the Omsk region conspired to overestimate the price of electronic transport cards (ETC). The analysis showed that all auctions were divided beforehand among organizations being "in good relations" with officials of the MLSD, and also showed the pattern of rotation of who should win. The Commission of the Omsk Office found that there was no rational explanation for the observed conduct if the bidders had behaved independently and had no agreed strategy. The case was a result of permanent interaction between the representatives of the Regional Office of the Ministry of Internal Affairs and the Federal Security Service Directorate of Russia in the Omsk region. Some results of special investigation activities as well as testimonies of the persons who were organizers and bidders were used as evidence. The respondents did not appeal the case decision or administrative punishment.
3. Three of the nine bidders in an electronic auction held by the Municipal Health Care Institution "Abdulinskaya CRH" for major maintenance in certain departments conspired to exclude the other bidders and win at a high price. According to prearrangement, in the first stage, two submitted very low bids to discourage competitors and one submitted a bid close to the starting level. In the second stage, after the other six had withdrawn, the two low bidders were excluded on formal bases and the initiator of the agreement became the winner of the auction. Electronic correspondence gathered during unannounced inspections and testimony of failed bidders were used as evidence. The decision, orders and administrative influence rulings were not appealed.
4. In an example of a widespread practice, a firm performed specified engineering work, then "won" the auction to award the contract to perform the work. The public procurator's office carried out an inspection that uncovered the evidence of the agreement between the firm and the municipal

administration. The decision of the Commission of the Chelyabinsk Office of FAS was not appealed.

5. An auction was held for a contract to perform certain engineering work within one day. The unique bidder had begun the specified work before the auction was held, in agreement with the buyer of the work. The basis of the case of the Novosibirsk Office of FAS was the materials received from the Investigative Commission at the Public Procurator's Office of the Russian Federation in the Novosibirsk region. FAS's decision was appealed and upheld by the courts at the first, second and third instances.

Source: FAS

The public procurement law is Federal law 94-FZ “Concerning placing of orders...” It was largely authored by FAS, and FAS also assesses complaints and conducts unplanned and planned verifications under the law. The law aims to maximize the participation of potential bidders by *inter alia* promoting the use of a website that is free to use, the publication there of information about tenders, the use of electronic auctions, setting quotas for small businesses (but imposing the same maximum price as for other businesses), and requiring non-customized products to be procured via auction. Communication between the customer and bidders before the auction is prohibited, and the use of electronic auctions facilitates bidder anonymity.

The Russian legislation imposes certain requirements to reduce the likelihood of customer-bidder conspiracies. For example, the Russian legislation requires the customer to contract with the successful bidder, even if there has been only one bidder, whereas the Manual referenced in the Council Recommendation on Fighting Bid Rigging in Public Procurement recommends granting customers discretion not to contract if they suspect a bidders' conspiracy. The Russian legislation also requires a high degree of transparency, for example requiring that the record of assessment and comparison of the applications to participate in a tender and the identities of the winner and runner-up be posted on the relevant website. (Article 28, parts 10, 11) The transparency generated by the law allows potential suppliers across the country to learn about public tendering opportunities and the information collected in the electronic auction system may be reviewed for suspicious conduct by bidders or customers.

A replacement for the existing public procurement law was signed in April 2013, but its substance will be shaped by future implementing regulations. FAS reports that the principal innovations of the law expand available procurement procedures, narrow the scope for procurement from a single supplier, give

greater freedom for procuring entities and, while retaining transparency and competitiveness objectives, place greater emphasis on efficiency.

While the focus above has been on cartels, FAS opened 133 cases of agreements outside the cartel categories in 2012. Economic analysis is used in these cases to measure market shares. Economic analysis is discussed in Section 2.9.

Concerted actions cases are often brought under a theory of co-ordinated practices based on parallel pricing behaviour by enterprises with differing cost structures. This is according to a review of a large sample provided by FAS in 2011. Broader analysis of market behaviour in these cases is limited or absent. They appear to be based on a standard where firms must show “objective” reasons for pricing decisions in the form of changes in cost structures. Other examples indicate a broad interpretation of concerted actions.

FAS may issue a formal caution if conduct that may violate the competition law is contemplated. In 2012, 73 cautions were issued, of which 52 concerned abuses of dominance, ten concerted actions, and eight agreements. In the area of concerted practices, a firm making a public announcement on proposed conduct on a goods market could receive a caution if such conduct could lead to violations of the competition law. One concern is that the overuse of cautions may reduce the information available to a market and thereby reduce the efficiency of that market. (Other federal laws require companies to disclose specified information; the competition law does not affect these disclosures.) Another concern is that practices coordinated through mechanisms other than public announcements by a market participant may not be caught.

Box 3. Examples of Formal Cautions

1. Real Estate Pricing in Novgorod

Two individuals were interviewed for a newspaper article on rising housing prices in Novgorod. The director of a firm of real-estate brokers stated that small apartments were in highest demand and that demand far exceeded supply due to a lack of construction activity, resulting in increasing prices for existing housing. The head of the non-profit local fund for mortgage credit stated that a new wave of the “crisis” in prices was expected in September and he blamed realtors for pushing up the prices charged by their clients for sales of existing apartments. The territorial office of the FAS for Novgorod issued formal cautions to both of the individuals quoted. The cautions stated that the statements “could be understood by other participants in the primary and secondary markets for housing as a signal for pricing policy and provoke action by the sellers of housing (builders and realtors) in the form of unjustified

increase of prices for housing, which may lead to anticompetitive coordinated practices of the participants of the stated markets.”

2. Meat and Milk

The head of an agricultural holding company in Tomsk published an entry on a blog expressing concern about the supply of feed available for the winter season. According to the blog entry, the lack of feed could threaten viability of milking herds and result in the need for butchering of animals before the winter, which would in turn increase milk prices and decrease meat prices. The local FAS office issued a caution, stating that “an analysis of the statements of the official taken as a whole allow the conclusion that the described conduct of [the holding company] could lead to the establishment of monopoly high or monopoly low prices and to unjustified reduction or cessation of production of a good in the face of demand and an ability to profitably produce it.” In explaining its action, the FAS office stated that the holding company holds a dominant position in pork supply and is jointly dominant with others in milk. The head of the office stated that enterprises that are dominant “may not publicly make any predictions, especially about increase of prices, since that could destabilize the situation in the market. Such predictions can determine the behaviour of other subjects in the given market.”

3. Waste Disposal

An article in the web version of a St. Petersburg newspaper reported on the lack of available locations for solid waste disposal and the possibility that a large landfill that accepted waste from the southern part of the city would close due to a dispute over responsibility for fees and fines due to the federal environmental protection body. After a large production facility filed a court case challenging fees for waste production that were applied to it by the federal body, the federal body began to demand that the waste disposal facility pay the fees. A representative of the waste disposal facility was reported in the article to have stated that the law required the producer of the waste to pay, and also that the facility was subject to regulated tariffs that did not include payment of the multi-million rouble fees. The facility’s representative said it would be willing to pay the fees if tariffs were adjusted and it understood that it would be easier for the federal body to deal directly with the waste facility, but that the facility might have to temporarily suspend operations until the issue had been resolved since it could not operate profitably while being charged the fees. The regional FAS office issued a formal caution to the company stating that its statement about planned conduct in the market (closure of the landfill) was grounds for a caution, since such behaviour would constitute a violation of Article 10 of the competition law (concerning abuse of dominance).

4. Bread

On 16 August 2012, the director of a bakery in Chita posted a press release on the local information portal stating that the bakery planned to raise the prices of bread by

5% on 1 September 2012 as a consequence of the increase in the price of flour. FAS issued a caution on the basis that the planned price increase may violate Article 11¹, Part 1.

2.2.7. Trends over 5-10 years

The Russian law concerning restrictive agreements has undergone significant change. The 2004 OECD report concluded that the competition authority was unable to investigate except through repeated document requests and minor fines for noncompliance, making investigations of cartel agreements and other criminally punishable offences nearly impossible. No serious sanctions were available, giving enforcement of the law little or no deterrent value. Amendment to the law had left confusion about its coverage and the formulation of the relevant criminal code provision effectively prevented enforcement.

In 2012, cartels have become defined in the law and distinct from other sorts of agreements. Sanctions against cartels, as well as other competition law violations, have increased substantially with the introduction of turnover based fines on economic entities in the Law on Administrative Violations, but sanctions against individuals and single-product firms remain rather small. FAS's enforcement powers have expanded and cooperation with the procurator's office and the bodies of internal affairs has begun to occur on individual cases. The leniency programme, which had attracted some 500 applications in its first two years, attracted fewer than twenty annually after refinement of the programme in 2009. This is likely due to the fact that criminal leniency is unavailable on the same basis as leniency under the administrative law programme. The scope of criminal liability for agreements¹² was narrowed by the 2012 amendments to those between competitors, and Article 178 of the Criminal Code now expressly refers to "cartels." However, only six cases of competition crime have been opened in the past two years, and there seem not to have been any convictions under Article 178. Leniency is available under the Criminal Code, but is at the discretion of the judge and the basis is not the same as under administrative law.

The structure of the law on restrictive agreements and concerted practices has become clearer. Whereas the pre-2006 law had separate provisions for horizontal agreements that could not receive an exemption, other horizontal agreements, and vertical agreements, the 2006 law had a general provision

¹² Repeated abuse of dominance remained subject to criminal liability.

prohibiting all agreements that restrict competition. Over time, amendment of the law has made the categorization of agreements clearer and their treatment differentiated. Also, more unusual features, such as large numbers of cases involving *per se* prohibited agreements between parties that were neither competitors nor vertically related, and the law covering intra-group agreements and agreements between parties where one controls the other or are under common control, disappeared as the result of various amendments.

While the recategorization of a variety of agreements from illegal *per se* to one where effects must be assessed is welcome, little evidence of the necessary development of economic analysis of effects has been shown. This concern has been highlighted,¹³ but change has not seemed to have occurred. Economic analysis does not seem to have moved over the past 5-10 year on the same trend as the competition law has. This is discussed separately below.

2.2.8. *Conformity with Council Recommendation Concerning Effective Action Against Hard Core Cartels*¹⁴ and with *Council Recommendation on Fighting Bid Rigging in Public Procurement*¹⁵

The Roadmap calls on the Russian Federation to commit to ensuring that competition laws, sanctions and enforcement procedures and institutions effectively halt, deter and remedy hard core cartels. The Recommendation of the Council Concerning Effective Action against Hard Core Cartels focuses on prohibiting cartels, addressing effective control, deterrence and remedy, enforcement processes and powers, sanctions against firms and individuals, exemptions and exclusions, and enforcement co-operation and comity (the issue of co-operation is discussed separately below.) The Russian Federation accepts

¹³ The Programme for the development of competition 2009-2012 acknowledged the potential dangers of an undue focus on pricing, and Section II suggested a change in the way in which anticompetitive agreements and concerted actions are proven to include a fuller consideration of all of the economic circumstances. The Program also suggested that the evidentiary status of the results of economic analysis needed to be raised and that inclusion of the results of economic and market analyses in decisions on violations of the competition law should be made mandatory.

¹⁴ <http://acts.oecd.org/Instruments/ShowInstrumentView.aspx?InstrumentID=193&InstrumentPID=189&Lang=en&Book=False>.
See <http://www.oecd.org/daf/competition/recommendations.htm> for other Recommendations on Competition Law and Policy

¹⁵ <http://acts.oecd.org/Instruments/ShowInstrumentView.aspx?InstrumentID=284&InstrumentPID=299&Lang=en&Book=False>

the Recommendation and has amended its legislation to increase sanctions and improve investigative authority. The Recommendation of the Council on Fighting Bid Rigging in Public Procurement encourages designing public procurement tenders to promote more effective competition and to reduce the risk of bid rigging while ensuring overall value for money. The Russian Federation accepts the Recommendation.

Since 2012, cartels have become more clearly defined in the law and distinct from other sorts of agreements. Sanctions against cartels, as well as other competition law violations, have increased substantially although sanctions against individuals remain rather small by the standards of other large jurisdictions. Changes in FAS's enforcement powers have given more detail and clarity to the procedures to be followed and made clear its ability to enter business and state premises without notice in cases related to agreements. Close cooperation with the procurator's office and the bodies of internal affairs will be required to make the improvements in legislation effective in practice. There is stronger political support for such cooperation and it has begun to occur on individual cases. However, there remain legal hindrances to systematic cooperation. Leniency applications have fallen precipitously, a development which may be cause for concern if it continues.

The competition law distinguishes cartels from all other types of agreements. Five types of agreements among competitors—those involving price-fixing, bid-rigging, market division, reduction of output, or group boycott of specific parties—are prohibited *per se* and, according to Article 11, “are to be recognized as cartels.”

Competition crime is addressed in Article 178 of the Criminal Code. The article also refers to cartels, and criminal liability is limited to cartels and repeated abuse of dominance in particular forms, *i.e.*, monopolistically high or low prices, groundless refusal to contract or restriction of access to the market. The narrowing of the definition of “cartel” in Russian usage from meaning any sort of agreement towards international usage, as well as the narrowing of criminal liability for restrictive agreements to cartels, is welcome. The fact that the abuses of dominance are defined in an open-ended way makes them unsuitable for classification as crimes. It is recommended to remove criminal liability for repeated abuse of dominance.

Maximum sanctions for competition law violations by firms have risen substantially since 2007. For legal entities, for example, they have risen from less than USD 20 000 to 1% to 15% of income from sales to the market affected. However, the maximum sanction for single-product firms is low, and the maximum administrative law sanction on individuals is quite small. Thus, it

is recommended that sanctions effectively deter competition law violations by all market participants.

FAS has a specialist cartel prosecuting unit and uses broader investigative powers since 2009. It has conducted some unannounced dawn raid searches, used material obtained through police surveillance techniques, used written statements of employees and others as evidence, and used electronic communication and other forms of electronic evidence. FAS has thus obtained evidence of intent in a number of agreements cases. However, cooperation with the law enforcement agencies is not yet systematized and remains at the discretion of the criminal investigator. Thus it is recommended to improve cooperation between the competition authority and the criminal law investigatory authorities.

The number of cartel cases under the competition law is unclear for earlier years because they were not categorized separately. In 2012, of the 114 cases opened under the cartel provision, Article 11, Part 1, violations were found in 76 instances. In 2011 and in 2012, respectively two and four criminal cases were opened that correspond to the competition law's Article 11 prohibition of competition-restricting agreements, a category broader than cartels.

The leniency programme, first introduced in 2007, was substantially amended in 2009 to *inter alia* limit the possibility of full leniency to the first applicant and tightened cooperation requirements. The resulting precipitous fall in the number of applications to less than twenty annually is likely due to the fact that criminal leniency is unavailable on the same basis as under the administrative law leniency programme. General principles allow criminal punishment to be moderated or eliminated on the basis of active cooperation of a defendant, but remains at the ultimate discretion of the judge. It is recommended to amend the Criminal Code to reinforce the incentives of the leniency programme under administrative law.

The public procurement law, Federal law 94-FZ "Concerning placing of orders..." of 2005, promotes broad participation in public procurement through transparency and aims to prevent conspiracies between customer (the organizer of the auction) and bidder. According to FAS, this is the most frequent type of conspiracy at auctions in the Russian Federation. FAS addresses conspiracies between bidders as well as between bidders and customers through the bid-rigging prohibition and Article 15, prohibiting competition restrictions by public bodies, in the competition law. Two examples illustrate the greater focus on bidder-customer conspiracies: Russian legislation requires the customer to contract with the successful bidder whereas the Manual referenced in the Council Recommendation on Fighting Bid Rigging in Public Procurement

recommends granting customers discretion not to contract if they suspect a conspiracy. Russian legislation requires a high degree of transparency, *e.g.*, requiring that the record of assessment and comparison of the applications to participate in a tender and identities of the winner and runner-up be published. A replacement law was signed in April 2013, but its substance will be shaped by future implementing regulations.

As now drafted, Article 13, Parts 1 and 1¹ appear to impose fewer conditions on competitor agreements than on other conduct for which an exemption may be sought. It is recommended that the exemption available under Article 13, Part 1¹ to cartels be no broader than the exemption available under Article 13, Part 1 to other agreements, transactions, and dominant firm conduct.

2.3. Dominance and monopolization

2.3.1. Dominance

Dominance is defined (Article 5) as the ability of one or several economic entities to exert decisive influence on the conditions of the circulation of a good and/or to eliminate other entities from the market or to hinder access to the market for others. A single entity (or group of related entities as defined by the law) with a market share of over 50% is considered dominant unless it is shown during consideration of a case (or merger petition) that it is not. An entity with less than a 50% share may be found dominant if the competition authority shows it is dominant on the basis of stability of shares, relative sizes of shares, barriers to entry or other characteristics of the market.

An economic entity with a market share below 35%, a level which had been a safe harbour in earlier versions of the law, may be found to be dominant if it has the largest share of the market and it is able to exert decisive influence on the conditions for the circulation of the relevant product. In addition, all of four conditions must be met:

- the economic entity has the ability to dictate the price of the good unilaterally and to exert decisive influence on the general conditions for the circulation of goods on the corresponding market;
- there are barriers to entry to the market for the corresponding product, including as a result of economic, technological, administrative, or other restrictions;

- the product sold or acquired by the economic entity cannot be substituted in use (including in use for production purposes);
- change in the price of the product does not result in a corresponding change in demand for the product.

FAS reports that it has not yet initiated a case under this provision.

An entity may be found dominant under this new provision only if it is not dominant under the other criteria for single dominance or joint dominance, and sanctions that can be applied to such entities differ significantly from those that may be applied to firms found singly or jointly dominant under the other provisions

Each of several entities may be found to be dominant if all of the following criteria are met:

- the collective share of the three economic entities with the largest shares is greater than 50% of the market or the collective share of the economic entities with the five largest shares is greater than 70%, and none of those entities has a share of less than 8%;
- during a period of not less than one year, or for the whole existence of the corresponding market if that is less than one year, the relative shares of the economic subjects have not changed significantly and there are barriers to entry of new competitors;
- the product sold or acquired by the economic subjects in question cannot be substituted by other goods in use (including in use for production), an increase in the price of the good does not result in a reduction in demand for the good that corresponds to the increase in price, and information on the prices and conditions for the sale or acquisition of the good on the corresponding market are generally available.

There is no requirement that the competition authority show a common pattern of behaviour by the entities alleged to be jointly dominant, nor is it necessary to establish that there is an absence of competition among them. Once the criteria for joint dominance have been met, each of the economic entities is separately considered to be dominant and its behaviour can be evaluated under the legal provisions concerning abuse of dominance independently of that of the others in the “jointly dominant group.” While it might, as a matter of legal theory, be possible for an entity to refer to the general definition of dominance

and provide evidence showing that there is significant competition among the jointly dominant entities and that it possesses none of the characteristics or powers that the law associates with dominance, in practice, as of mid-2009, FAS relies on the descriptive factors listed in the law. Most of the instances in which the joint dominance provision had been applied as of the 2009 Report appear to have involved fewer than five firms and considerably larger shares than the minimum to qualify under the language of the law. FAS reported that cases are most common in the area of natural resources. During the course of 2010, 2011 and the first half 2012, FAS reports that it has brought five cases under this provision of the law; all cases involved oil companies. There has not been, as of mid-2012, any appeal of a joint dominance finding.

Economic entities have the right to present evidence to FAS or to a court showing that their position cannot be considered dominant.

Entities that are operating in a sphere of natural monopoly are to be considered dominant in that sphere. Federal laws may establish specific instances in which a market share below 35% will be considered dominant. One example is the federal law “On Electricity” which defines a market share of 20% or more to be considered dominant in certain electricity markets.

The definition of dominance for financial organizations is performed by Government of the Russian Federation, taking account of limitations envisioned by the Law on Competition. For credit organizations, the definition of dominance is performed by the Government together with the Central Bank, according to Article 5, part 7.

2.3.2. Register

FAS maintains a register of enterprises that have a share of a market of 35% or more. Thousands of enterprises are listed on the federal register or the registers for each of the regional offices (314 and collectively 9427, respectively, in mid-2012). Enterprises are entered into or removed from the register on the basis of a market analysis conducted by FAS, which may be performed as part of a case investigation or a general market study, or a court decision. The specific share of the enterprise at the time it is entered into the register is not recorded (only whether it exceeds 35%, 50% or 65%). Shares, once recorded, are not updated at any particular interval, although they may be updated on the basis of later market studies, case investigations, or information received through the reporting requirements.

Enrolment in the register with a market share exceeding 50% serves as evidence of dominance on the listed market without requiring further

investigation, in the event a case arises in which FAS must determine whether an enterprise is dominant. This is true independent of when the listing was entered in the register. Moreover, this procedural rule may serve to defeat any ability of an enterprise to appeal a decision on the grounds that it is not actually dominant at the time that the case decision is issued. Decisions taken on this basis by FAS have been held by courts to be procedurally proper, and not subject to challenge on the grounds that FAS should have conducted a new analysis of the market. In addition, enterprises listed on the register must file if they are involved in a merger, takeover or share transaction meeting percentage thresholds, regardless of whether the deal meets value thresholds. Enterprises in the register must submit an annual state statistical report on activity regarding the goods for which they are listed in the register, including information on their sales, pricing, costs and profitability. FAS uses the register and reports for a variety of purposes, including monitoring changes in highly concentrated markets and monitoring the behaviour of dominant enterprises for possible violations. Information in the registers has played a role in the construction of regional plans for the creation of competition.

An enterprise has the right to appeal its entry in the register at any time.¹⁶ FAS suggested that the limited number of appeals may be due to the fact that most enterprises entered in the register do have very high shares of markets, making their odds of winning such an appeal low. But lack of appeal may also reflect a lack of accurate information on market shares and the difficulty of knowing when a share has dropped below a specific threshold, as measured by a study of the market over time. A review of the federal register and a number of the regional registers done for the 2011 Update shows a high percentage of entries on the list are enterprises with shares above 65%, but it also shows that there are a significant number of instances in which the order making the entry into the register is dated five, ten or more years earlier.¹⁷

¹⁶ In 2012, 14 enterprises were removed from the federal register and 478 enterprises were removed from the various regional registers. In 2009, FAS figures showed only six appeals, of which one was to the central body of FAS and five to territorial entries. Statistics were not collected from the territorial bodies on this question, so this figure may have understated the number somewhat.

¹⁷ Based on an examination of data in the register in the federal section and in the regional registers for Arkhangelsk region, Saint Petersburg, Bryansk region, the city of Moscow, Ulyanovsk region, the Chuvash Republic, Kemerovo region, Amur region, Zabaikal territory, the Jewish autonomous region, Kurgan region, Sverdlovsk region, Astrakhan region, Volgograd region, the Kabardino-Balkar Republic and the Republic of Dagestan.

2.3.3. Abuse

Abuse of dominance is defined as actions (or omissions) of an entity occupying a dominant position which result or may result in the prevention, restriction, or elimination of competition and/or infringement upon the interests of other parties. Ten types of abusive behaviour are specifically listed in Article 10, but the formulation is an open one and other types of behaviour could be found to fall under the general definition. In practice, increasingly many cases (45% in 2012) fall outside the listed types of behaviour. The list itself both reflects and shapes thinking and enforcement practice in this area of the law. The types of abusive behaviour specifically prohibited by part 1 of Article 10 are:

1. establishment or support of monopoly high or low prices;
2. withdrawal of a product from circulation if the result of such withdrawal was an increase in price of the product;
3. tying of unrelated products or forcing of onerous or unrelated conditions of contract;
4. reduction or cessation of production of a product without economic or technological grounds, when there is demand or orders for the product and it can be profitably produced, and the reduction or cessation of production is not provided for by federal legal acts or by judicial acts;
5. refusal or evasion, without economic or technological grounds, of conclusion of contracts with specific purchasers, if the corresponding product can be produced or supplied and the refusal or evasion is not provided for by federal legal acts or judicial acts;
6. establishment of differing prices for the same product without economic, technical or other grounds, if it is not otherwise established by federal law;
7. establishment by a financial organization of unjustifiably high or low prices for financial services;
8. creation of discriminatory conditions;
9. creation of barriers to entry to or exit from the market for other economic entities;

10. violation of procedures for price formation established by legal acts;
11. manipulating prices on wholesale and (or) retail markets of electric power (capacity).

Non-discriminatory access rules may be established by the Government. Article 10, Part 3 provides for other laws or the Government to establish such rules for access to the goods produced or goods markets supplied by holders of natural monopolies, or the infrastructure used by such holders in the provision of their natural monopoly services. It sets out what these rules must contain. At present, there are non-discriminatory access rules for a range of natural monopoly infrastructure, see Section 4.

Certain types of abuse are eligible for exemption by FAS on the basis of the general exemption Article 13.¹⁸

The competition law exempts from the abuse of dominance (and agreements) provisions actions in the exercise of exclusive rights in the results of intellectual activity and in means of individualisation of a legal person or of goods, work or services that are [legally] equated to such rights. Few cases have been brought that could have raised the issue of an exemption under these provisions since they came into force in 2006 (2012 for the agreements exemption). The competition authority states that it interprets the abuse exemption as applicable only to the “exercise of the intellectual property right” – defined as the use of the intellectual property by the right holder in its own activities or the sale or licensing of the right to others. Exercise does not, however, include activities putting products in which the intellectual property is used into circulation, such as their sale. This understanding of the exemption narrows it significantly in relation to abuse of dominance. Indeed, it would appear to apply only to possible abuses by means of the imposition of inappropriate or burdensome conditions in contracts for the licensing or sale of the right to use the intellectual property. A right holder that chooses to use the intellectual property in its own manufacturing processes and to sell the resulting good will, if found dominant, be subject to all of the law’s restrictions on abuse of dominance in relation to those sales.

¹⁸ These are action or omission that involves reduction or cessation of production of a product for which there is demand (point 4), creation of discriminatory conditions (point 8), creation of barriers to entry or exit for others (point 9), manipulating electricity prices (point 11), and abuses not listed.

2.3.4. Sanctions for abuse of dominance

There has been an attempt in recent years to better match the sanction to the abuse and abuser. New provisions of the Code of Administrative Violations distinguish between fines for violations of the competition law that restrict competition in markets and fines for violations that do not do so.¹⁹ If a dominant firm, not a natural monopoly, violates the competition law in a way that does not restrict competition, then officials are subject to an administrative fine of RUB 15 000 to RUB 20 000, and legal entities RUB 300 000 to RUB 1 million. If the violation may restrict competition, then officials are subject to an administrative fine of RUB 20 000 to RUB 50 000 and disqualification of up to three years, and legal entities fines of 1% to 15% of the income from sales in the market where the violation occurred, but not more than 2% of the violator's aggregate income and not less than RUB 100 000. A single-product firm (that is, a firm getting in excess of 75% of its income from sales to a single market) or a firm in a market with regulated prices, is subject to a fine of 0.3% to 3% of income from sales in the market where the violation occurred, but not more than 2% of the violator's aggregate income and not less than RUB 100 000. Statistics on the implementation of the scheme, new in 2012, were not available. Despite the reduction in administrative fines for exploitative abuses, repeated abuse of dominance is subject to criminal prosecution, as discussed above with criminal treatment of cartels. Other sanctions available are "cease and desist orders," and there are sanctions available for failing to carry out an order.

FAS retains the option (in Article 38) of filing an action in court seeking the break-up or split of an organization in a dominant position that engages in "systematic conduct of monopoly activity." Although Russian competition law has had a provision of this kind since 1991, it has never been used. Repeated abuse of dominance of certain forms is a crime under Article 178 of the Criminal Code. Abuse qualifies as "repeated" if the person in question has been subjected to administrative sanctions for abuse of dominance more than twice within a period of three years. There is no evidence that these criminal sanctions have ever been applied.

¹⁹ The large number of abuse cases involving exploitative abuse of individual customers meant that the introduction of turnover-based fines could result in very large cumulative fines on, for example, public utilities. Thus, fines for abuses of dominance that do not restrict competition were capped. However, natural monopolies do not benefit from the distinction between competition-restricting and other abuses, so the effect of the fine cap may be limited. (Reynolds, *op. cit.*)

2.3.5. Enforcement

The table below shows that the number of cases of abuse of dominance peaked in 2011, but remains high at 2582 cases in 2012. “Other violations”—other, that is, than the list of specific forms of abusive conduct—constitute 45% of the total and has been growing. Violations of legal rules on pricing are about 15% of the total. The second most cited form of abuse was groundless reduction of production, with abusive conditions of contract, refusal to contract, monopoly high pricing and discrimination (prices and conditions) rounding out the top six. Complaints are the main basis for opening cases in all categories. At the 2009 review, FAS reported that it expected reductions in abuse of dominance caseloads, first as higher fines deterred more and, second, as rules for natural monopolies were clarified. The reduction did not occur. The two-thirds drop in number of cases of abusive conditions of contract in 2012 versus 2011 may be attributable to the institution of “warnings.” About 90% of abuse cases are opened on the basis of complaints; although FAS has obligations to respond, it need not open a case.

Table 3. Abuse of dominance cases by type

	2008	2009	2010	2011	2012
Total	1639	2411	2736	3197	2582
Monopoly high price	66	161	130	159	118
Monopoly low price	4	7	6	7	5
Withdrawal of goods from circulation	2	6	9	10	9
Abusive conditions of contract	393	448	543	471	198
Groundless reduction of production	217	317	296	369	333
Refusal to contract	231	380	357	481	168
Unreasonably high price financial services	41	72	63		1
Unreasonably low price financial services	3	2	4		
Unjustifiable different prices			63	66	58
Discriminatory conditions	77	56	58	73	66
Creation of entry/exit barriers	53	88	98	99	45
Violation of legal rules on pricing	210	366	394	529	407
Manipulating electricity prices					7
Other violations	342	508	778	933	1167

Source: FAS statistical reporting, forms 1 and 9.

Table 4. Abuse of dominance cases by type and basis

	2008			2009			2010			2011			2012		
	Total	Basis		Total	Basis		Total	Basis		Total	Basis		Total	Basis	
		Com-plaint	Own initiative		Com-plaint	Own initiative		Com-plaint	Own initiative		Com-plaint	Own initiative		Com-plaint	Own initiative
All Abuse of Dominance Cases Opened	1639	1481	158	2411	2061	350	2736	2419	317	3197	2891	306	2585	2274	308
Monopoly high price	66	46	20	161	91	70	130	100	30	159	101	58	118	92	26
Monopoly low price	4	3	1	7	4	3	6	6	0	7	6	1	5	4	1
Withdrawal of goods from circulation	2	2	0	6	2	4	9	8	1	10	9	1	9	8	1
Abusive conditions of contract	393	373	20	448	415	33	543	513	30	471	453	18	198	185	13
Groundless reduction of production	217	211	6	317	312	5	296	288	8	369	358	11	333	325	8
Refusal to contract	231	227	4	380	371	9	357	345	12	481	479	2	168	166	2
Unreasonably high price financial svcs	41	25	16	72	43	29	4	3	1				1	1	
Unreasonably low price financial svcs	3	2	1	2	2	0									
Unjustifiable different prices							63	37	26	66	40	26	58	40	18
Discriminatory conditions	77	68	9	56	45	11	58	47	11	73	61	12	66	50	16
Creation of entry/exit barriers	53	49	4	88	84	4	98	85	13	99	96	3	45	42	3
Violation of legal rules on pricing	210	153	57	366	233	133	394	265	129	529	438	91	407	316	91
Manipulating electricity prices													7	7	
Other violations	342	322	20	508	459	49	778	722	56	933	850	83	1167	1038	129

Source: FAS statistical reporting, forms 1 and 9.

“Warnings” were introduced into the competition law to respond to the large number of abuse cases. FAS may issue a warning if it detects signs of violation of the antimonopoly law. This is one of the criteria for initiating a case, but a warning is perceived as a less burdensome procedure. The deadline to respond to a warning must expire before a case may be opened. FAS issued 1423 warnings under Article 39¹ in 2012. Of these, 75% were executed within the time limit. 245 warnings were not executed, and 185 formal cases were opened. A range of types of abuse may, or may in the future, be addressed by warnings.²⁰

2.3.5.1. Monopoly pricing

Pricing violations have been a particular focus of enforcement under abuse of dominance provisions. FAS opens more than a hundred cases involving monopoly high prices annually, and this form of violation has been central to some of its highest profile cases. A price fixed by a natural monopoly in conformity with legislation cannot be found to be monopoly high or monopoly low. The competition law articles defining monopoly high and monopoly low prices have been substantially reformulated to address difficulties encountered in proving pricing violations, particularly monopoly high prices, to the satisfaction of the courts. The most recent amendments added comparisons with prices formed on commodity exchanges.

Briefly, the definitions of monopoly high²¹ and monopoly low²² prices are based on the assumption that, if market participants are law-abiding with respect

²⁰ The competition law allows FAS to issue warnings to stop actions (omissions) that have signs of violating the antimonopoly law, in specified instances (Article 23, Part 32). One set of instances are those involving signs of abuse by a dominant firm (Article 39¹, Part 1). At present, a warning must be issued and the period for compliance with the warning must have expired before FAS may open a case for two particular types of abuse, burdensome contracting terms and unjustified refusal to deal (Article 10, Part 1, clauses 3 and 5), under (Article 39¹, Part 8). FAS plans to expand use to unjustified refusal or evasion from concluding a contract and creation of discriminatory conditions (Article 10, Part 1, clauses 6 and 8); Article 10 on unfair competition, with certain exceptions; and Article 15 on actions (omissions) by federal executive authorities.

²¹ Monopoly high price is defined in Article 6 as a price that exceeds the sum of the necessary costs for production and sale of the product plus profit and that exceeds the price that would apply in competitive conditions on a market that is comparable in terms of the composition of buyers and sellers, conditions for the circulation of the goods and for access to the market, and state

to their pricing behaviour, price will be no higher and no lower than the sum of necessary costs and profit, and no higher and no lower than the price in a comparable but competitive market in the Russian Federation or elsewhere. Also, new prices following a change are suspect if the difference does not

regulation (including taxation and customs regulation), if such a market exists within or outside the Russian Federation. It further defines monopoly high price as a price that results from an increase over previously established prices if (1) the costs for production and sale of the product have not changed or changes do not correspond to the change in the price of the goods, (2) the composition of buyers and sellers of the product have not changed or have not changed significantly and (3) the conditions for circulation of the product on the market, including those resulting from state regulation including taxation and tariff regulation, have remained unchanged or changes do not correspond to the change in price. A monopoly high price is also defined as a price that is maintained and not reduced if (1) the costs for production and sale of the goods have been significantly reduced, (2) the composition of buyers and sellers of the product allows for the possibility to reduce prices, and (3) the conditions for circulation of the product on the market, including those resulting from state regulation including taxation and tariff regulation, allows for the possibility to reduce prices. A price is not monopoly high if it is fixed at the exchange and (1) the quantity sold by a dominant economic entity exceeds thresholds set by the FAS and appropriate regulator, (2) the number of participants at a trading session meets certain thresholds, (3) affiliation disclosure requirements are met, (4) dominant firms' actions are not market manipulations, (5) dominant firms supply the market sufficiently smoothly throughout a month, (6) dominant firms register off-exchange transactions, (7) minimum size of an exchange lot does not prevent entry into the relevant market, (8) rules applied to organized trading, including on confidentiality, are respected.

22 Monopoly low prices are defined by Article 7 of the law to be prices that are lower than the sum of the necessary costs for production and sale of the product plus profit and lower than the prices that would apply in conditions of competition on comparable markets, if such markets exist within or outside the Russian Federation. It further defines monopoly low price as a price that results from a reduction below previously established prices in terms comparable to those for Article 6, but the reverse. As with monopoly high prices, prices set by natural monopolies within the bounds of the tariff established for them do not qualify as monopoly low prices, nor does a price that is not lower than the price that would be formed in conditions of competition on a comparable market. A price also may not be found to be a monopoly low price if it did not result and could not have resulted in restriction of competition by reduction of the number of unrelated economic entities operating on the corresponding market.

reflect differences in costs or in the composition of buyers and sellers or in conditions of circulation on the market. The recent encouragement of the development of commodity exchanges appear to result from a belief that they will generate presumably competitive prices to provide a yardstick against which to compare suspect prices, particularly prices for oil and petroleum products.

These definitions, particularly when combined with the broad definition of dominance in the law, have the potential to create a series of undesirable effects and difficulties. They essentially establish a legal requirement that dominant enterprises price in accordance with their costs plus some undefined measure of adequate profit, rather than in accordance with the interaction of supply and demand in the market. This may lead to situations of chronic shortage if price is not allowed to rise to a market clearing level when demand increases. Similarly, if prices cannot be reduced during a period of reduced demand, economic entities may sustain losses that are far higher than necessary and limit capacity expansions when demand grows. The somewhat cryptic reference to changes in the composition of buyers and sellers seems as though it might allow some consideration of changes in supply and demand, but this does not occur in practice. There is no definition in the law concerning what costs qualify as “necessary” and what levels of profit are to be included in the calculations. If these are too low, investment may be retarded in areas where new entry is needed to increase supply and reduce dominance, as potential investors view the overall market price as too low to allow sufficient profitability and are confirmed in this belief by a view of the profitability of the existing large firms. The perpetuation of dominance that may result is precisely the opposite of the desired outcome. Multi-product firms, long-lived assets, risk and uncertainty and non-unit pricing complicate the relationship among prices, costs and profits. The difficulties in obtaining accurate information on costs and the ease with which accounting data can be distorted or falsified are notorious, and this is likely to make FAS’s task in enforcing these limits difficult.

Domestic prices would be compared with prices in international markets to screen for possible violations of the competition law requiring further investigation, according to a proposal made public in December 2012. For markets with net exports, FAS would use a netback minus (price minus avoided costs) or average weighted price method (undefined). For markets with net

imports, FAS would use international price plus logistical costs. For markets with no net trade, prices would be compared with comparable markets.²³

A majority of monopoly high pricing cases focussed their analysis almost entirely on costs and profit levels, in a sample of cases from 2009 and the first half of 2010, provided by FAS. The cases concerned a variety of goods, with auto fuel cases the most common but also aviation fuel, local waste disposal services, bread, milk, repair services of various kinds, and others. Cost information provided by defendants is reviewed and is often adjusted by the reviewing FAS office. Adjustments may be made because the costs are viewed as “unjustified” or “too high” or because they are not allocated in accordance with rules for tax calculations or other reporting principles, or for other reasons.²⁴ Few cases in the sample discuss other market characteristics, with the exception of a small number that find the respondent in the case not to be dominant on the grounds that there are few or no barriers to entry. Absence of barriers does not, however, appear to serve as grounds to conclude that the threat of entry can discipline pricing in any of the sample cases. Considerations of shifts in demand and their possible effects on pricing are rare, and even where pricing appears to be responsive to demand shifts, this does not always protect the respondent from a finding that its prices are too high:

Box 4. Proper pricing models for dominant enterprises

In April 2009, a territorial office of FAS opened an investigation of a supplier of construction sand and gravel. In evaluating the level of competition on the market, FAS used data for the period of 2006-2007, and concluded that the company occupied a dominant position. Analysing the company’s costs and profitability for 2008, FAS found that the prices of its products were more than twice their cost of production, making them significantly higher than the “necessary costs of production and profit” that the law uses as the standard. The company stated that it was subject to competition, including from imported material, and that it priced its products on the basis of market conditions. FAS did not dispute that the prices in 2008 had been set on

²³ FAS press release, 19 December 2012, “Andrey Tsarikovskiy: a balance between free prices and fairness of prices for consumers is always necessary” at http://en.fas.gov.ru/news/news_32655.html accessed on 30 December 2012.

²⁴ This occurs significantly more often in the later cases, which may be a result of a training programme on enterprise pricing models and accounting and reporting practices that was conducted for FAS staff members.

the basis of demand, but nonetheless found them to be in violation of the law:

“[the respondent] explained that due to the fact that the enterprise did not know that it occupied a dominant position in 2008, it applied a method of price formation based on the theory of demand for the product (competitive price formation), and the prices for the products were established on the basis of the production capacity of the enterprise and the needs of buyers, taking account of inflationary processes in the economy. The representatives of [the respondent] admitted that the prices for their products in 2008, and in particular on construction sand, exceeded the sum of expenses and profit necessary for the production and sale of that product.”

In February 2010, FAS found the company guilty of having violated the law by setting monopoly high prices in 2008. FAS noted in its decision that prices for the products had declined beginning in May 2009 (a month into the investigation) and that the new prices did represent the necessary costs and profit. For this reason, it did not impose a fine or order, considering that the respondent had voluntarily eliminated the violation. Although the decision had specifically referred to the production costs and profit per unit of product in 2008, the conclusion that the new prices are acceptable is not accompanied by any statement of current costs of production or profit levels.

Measures for acceptable profit levels appear to vary considerably, although this is a difficult comparison as case decisions do not often state what would be acceptable under the law in terms of amount or percentage. Instead, cases rely on a comparison of the rate of change in profitability with the rate of change in costs, or compare a current, increased level of profitability with a prior level that is presumed to have been sufficient and acceptable to the respondent.

Box 5. Defining “Necessary profit”

A territorial office opened a case concerning retail gasoline prices, applying the provisions of the competition law concerning failure to reduce price in the face of declining costs. In addressing whether the new, higher profit level is adequate, the FAS decision states:

“Reduction of expenses (the cost of purchased fuel) at a rate that is greater than the rate of decline of retail prices means an increase in profit. In the period of high prices for oil, the income of retail sellers of gasoline was sufficient to provide for the production and sale of the product, that is, for the financing of the necessary expenses (including for purchases of the good) and receipt of the profit required for the normal functioning of the

dealers. Since in this case it is retail prices for gasoline sold at filling stations that are under consideration, the definition of the costs and profit necessary for the sale of auto fuel should be limited to the purchasing and technical operations necessary for this, namely the wholesale purchase price and margin of the trader when selling the oil products at retail. Thus, the income from retail sales of [the defendant] increased due to the more rapid decline of wholesale prices [compared to retail prices] and the stated firm was able to receive profit above the level necessary to provide for the sale of the given product.”

In addition to the cost method, the law also requires comparison of prices in a similar market under competition, if such a market is available. Many cases find that no such market exists. In order to be eligible for such a comparison, the law requires that the market must be comparable in terms of the composition of buyers and sellers, conditions for the circulation of the goods and for access to the market, and state regulation, and also that there be adequate competition on that market. A number of the cases on gasoline cite an explanation issued by FAS concerning competition on oil markets that explained that because competition is poorly developed in most parts of the country, pricing in similar regions may not be a reliable indicator of a competitive price. In cases where comparison is discussed, the depth of analysis underlying comparisons and the choice of a price for comparison vary, but most comparisons look to neighbouring areas with similar size and distribution of population, and most discuss an average price for the good in the other markets. Most decisions, even those that discuss comparable markets, come to the conclusion that there is no market that is sufficiently comparable to meet requirements, and rely instead on the cost analysis.

Box 6. Cases of abuse of joint dominance

1. Oil

The “third wave” of competition cases against oil companies was brought under the abuse of dominance provision. In one part of the case, FAS Russia found TNK-BP Holding OJSC had violated Article 10, part 1 by discriminating in the wholesale gasoline market, as well as fixing and maintaining monopolistically high prices in that market in the period from April to September 2011 (FAS Russia No. AG/523 of 13 January 2012).

Domestic gasoline (petrol) prices reached a low in late February-early March 2011, but rose throughout April and May. The price of premium gasoline (analog of

AI-95) was 6.7% higher in May 2011 than in March 2011, according to news agencies. Domestic prices rose more than twice as fast as world prices. Domestic prices remained high in May 2011 despite changes in export duties designed to lower domestic prices by decreasing the profitability of export. Also, between May and June 2011, world prices fell but domestic prices fell less or not at all. Thus, FAS found that the increase in prices of gasoline in the domestic market was not conditioned by the changes in the world market prices, but rather by the actions of market participants, who are able to exert a decisive influence on the general conditions of the relevant commodity market. FAS's press release when opening the case suggested that the price rises occurred at the time other companies' refineries were undergoing repair, suggesting limited domestic production capacity. However, confidentiality concerns meant that the decision was unavailable, so it is not clear whether or how this possible explanation for restricted supply was treated.²⁵

Additional insight into the economic analysis underlying the third wave cases was provided, although these facts and analysis concerned different products and an earlier period. Discrimination and monopolistically high prices were alleged in the wholesale markets for diesel and jet fuel by Gazprom Neft OJSC, TNK-BP OJSC, Lukoil OJSC, NK Rosneft OJSC, and Bashneft OJSC (henceforth, vertically integrated oil companies). In one part of the case, the profit margin of filling stations belonging to the vertically integrated oil companies was compared with that of other filling stations (difference not provided), and the average profit margin of the independent stations was compared in September 2010 and December 2010 (decline from 26% to 5%). Also, the difference in diesel prices in September 2010 and December 2010 was compared with the difference in input prices at the same dates. Investigation found that the cost of unrefined petroleum had not risen, nor had excise taxes, and refining costs had fallen. Common costs were allocated according to accounting rules, which specified allocation proportionate to the value of sales of the various products. FAS found that wholesale diesel prices rose faster than input costs and concluded that consumers were harmed by the monopoly high price and discrimination in favour of the vertically integrated filling stations. Gazprom Neft, Lukoil and Rosneft voluntarily recognized the fact of fixing monopolistically high prices in diesel and jet fuel markets.²⁶

²⁵ FAS press releases 7 October 2011 "FAS Russia initiated cases against "TNK-BP" Holding" OJSC and "Bashneft" ANK" OJSC" at http://en.fas.gov.ru/news/news_31760.html, 30 June 2011 http://en.fas.gov.ru/news/news_31512.html, and 2 March 2012 "TNK-BP Holding" OJSC is fined over 1.3 billion Rubles for creating discriminatory conditions and fixing monopolistically high prices for gasoline" at http://en.fas.gov.ru/news/news_32067.html.

²⁶ FAS press release 23 December 2011, "FAS Russia found that "TNK-BP Holding" OJSC violated the antimonopoly law" at

In another part of the case, the absence of harm to consumers was established by comparing profit rates in two periods and finding that they did not differ significantly. Lukoil's gross profits from jet fuel in the third and fourth quarters 2010 were compared. Upon finding that an increase in the jet fuel price did not increase profit rates, FAS concluded that consumers were unharmed by the price rise.

Fines imposed and paid under the "third wave" of cases were approximately RUB 1.3 bn (TNK-BP), over RUB 900 million (Gazprom Neft), RUB 1.7 bn (Rosneft) and RUB 778 million (Bashneft).²⁷

2. Potash

FAS received a complaint from two fertilizer manufacturers about monopoly high pricing for potash (KCl) and opened an investigation. In analyzing the market, FAS found that KCl is produced in Russia by only two firms (Silvinit and Uralkali) in the Perm region and sold primarily to producers of mineral fertilizers. FAS calculated the shares of the firms as: Silvinit 64.82% in 2005, and 67.2% in 2006; Uralkali 35.18% in 2005 and 32.6% in 2006. In each year the share of the two largest producers was over 50%. FAS also took into account evidence showing little or no reduction in the sale of potash on the domestic market despite significant price increases, concluding that there was low elasticity of demand. The two producers were found to be jointly dominant. FAS rejected the argument that the market is a world market, noting in its decision only that the legal conclusion of an outside consultant presented in support of that argument contained confidential information and an author's restriction on use. Pricing in world markets, however, far exceeds pricing in the Russian domestic market and the majority of the product is sold for export. FAS also rejected a petition from one respondent asking that the case include examination of the market for complex mineral fertilizers and the profit levels of the companies exporting them (including the petitioners), stating that the market in question was for potash rather than exported fertilizer.

FAS analyzed the price increases for potash, finding that they significantly exceeded the overall rate of inflation and the increases in the price index for producers of industrial goods and consumer goods. FAS also concluded that no comparable markets for potash exist for comparison and analyzed the pricing of the two producers from the point of view of the necessary costs for production and distribution plus

http://en.fas.gov.ru/news/news_31949.html?print=1&isNaked=1 accessed 30 December 2012.

²⁷ FAS press release 25 July 2012, "380 million Rubles is the last fine paid by "Rosneft" group of persons under the "third wave" of antimonopoly cases," at http://en.fas.gov.ru/news/news_32374.html?print=1&isNaked=1 accessed 30 December 2012.

profit. It generally accepted the calculations of cost presented by the producers, noting in a few instances items that could not reasonably be included in production costs (such as profits tax). FAS calculated base prices for each producer for 2007, taking into account also the exported volume of potash and the price for export, which would provide for all costs for the production and sale of the product, including investment, plus a profit acknowledged by the producer as acceptable. The prices calculated for the producers were not the same, due to a significant difference in the costs of their investment plans. Those prices were then compared to the prices actually set by the producers for 2007 and the overage found to be monopolistically high. Each producer was ordered to pay the overage into the budget as illegally earned income, and for the next five years to file an investment plan at the end of each year with FAS and to present a report on its execution.

Source: FAS

2.3.5.2. Dominance, intellectual property rights and selective distribution

A particular concern for FAS appears to be situations where a right holder, particularly of pharmaceuticals, selects few distributors and public purchasers specify the trademarked product in tenders. One concern is that the selected distributors are advantaged not only in selling products for which they are selected distributors but also when selling other products specified in the same tender. Another concern is that the use of intellectual property rights (“IPRs”) may create apparent product differentiation without a factual, clinical basis. Selective distribution can be efficient, for example where the quality of the product suffers unless specific conditions are maintained and it is costly to regularly inspect distributors. And if patented or trademarked products are indeed interchangeable, then public procurement rules can prohibit unnecessarily narrow specifications which can limit competition and be a tool of corrupt public procurers.

FAS’s principles of market definition in pharmaceuticals presume markets to be defined by international non-proprietary name (“INN”), formulation and dosage, but therapeutic substitutability can overturn the presumptions. The principles define the boundaries of the product market as all medicines registered in the country having one INN, drug formulation and dosage. However, the market is narrowed or expanded if investigation shows that different commercial names having the same INN are not therapeutically equivalent or, to the contrary, if investigation shows different drug formulations, dosage, and even INNs have the same therapeutic effect. If more than one commercial name within an INN is registered in the Russian

Federation, then in this relation there is competition between their manufacturers or suppliers. However, during the term of protection of the exclusive rights certified by a patent registered in the country, there is no competition within that INN.

Box 7. Selective distribution in pharmaceuticals

Novo Nordisk (“NN”) supplies drugs into the Russian Federation which are distributed through pharmaceutical distributors. It began supplying the Russian market in 2005 when it had 12 distributors, rising to 40 in 2006 and falling to 20 in 2007 and five in 2008 and subsequently. NN was found to be dominant on the basis of its 100% market share of its trademarked products, and to have abused its dominance, violating Article 10, part 1, paragraphs 5 and 8, by refusing to contract with customers with whom it was technologically and commercially feasible and creating discriminatory conditions. The complaint was brought by discontinued distributors. NN products accounted for significant shares of the revenue of the distributors. The distributors were inspected by NN with respect to their financial and legal situation, warehouses and transport means. NN explained that poor transport and storage conditions could lead to deterioration of the drugs, harmful both to patients and the company’s reputation. Also, distributors’ non-compliance with the United States’ and the United Kingdom’s anticorruption laws would also be harmful to NN. Counterarguments were that the entire supply chain is not inspected by NN and that the NN inspections and evaluations duplicate the activities of a designated state licensing body.

NN appealed, and subsequently FAS and NN reached a settlement agreement in 2011 according to which NN will accept any distributor meeting the company’s published distributor policy and NN paid a reduced administrative fine of RUB 53.5 million.

2.3.5.3. Role of the register

The box below contains an example where the fact that a firm was enrolled on the Register of enterprises with market shares exceeding 35% was sufficient to prove that it was dominant.

Box 8. Dominance of a dairy

A dairy in Bryansk, Bryansk Milk Combine (BMC) was found by FAS to have abused its dominant position in 2007. BMC’s dominance was established by the dairy being listed in the Register of enterprises with a share of a market greater than 35% by

an order of May 31, 2000. The order assigned BMC a share of more than 50% for some products or processing. During FAS's consideration of the case, further evidence of BMC's dominance in the form of share stability, entry barriers or other evidence was not considered, on the basis of a FAS procedural rule indicating that a share of more than 50% in the register is grounds to proceed on the basis of dominance of the firm in the products and within the boundaries indicated. On an appeal of the decision, the court of first instance noted market analysis data presented by FAS showing BMC's share of the market at 42.2% in 2005, 37.5% in 2006, and 36.6% for the first 9 months of 2007, but stated that BMC had not appealed its inclusion in the register of enterprises and that the inclusion was sufficient to establish dominance. The appellate court overturned this decision on the dominance issue, stating that it should have been examined and BMC should have had a chance to present evidence that it was not dominant. This decision was reversed and the original decision reinstated by the cassational instance.

2.3.6. Trends over 5-10 years

The number of complaints and cases of abuse of dominance remains high more than two decades after the transition to a market economy. In 2004, it was reported (OECD 2004) that abuse of dominance cases usually accounted for half or more of violations cases, *i.e.*, excluding merger control petitions. Of these, cases involving natural monopolies accounted for well over half, and sometimes as much as three quarters.

Changes have since been made to reduce the cost of, or avoid, repetitive abuse cases. These include the institution of warnings and the establishment of a framework for non-discriminatory access rules for natural monopolies. Nevertheless, there were 2585 abuse cases in 2012, about half of all competition law cases, and 48% of Article 10 cases concerned natural monopolies.²⁸ Some of the persistently high number of abuse cases could be explained by the relative paucity of sector-specific regulators who address conduct issues, as complements to the Federal Tariff Service that addresses investment and pricing issues.

The statistics attribute a decreasing proportion of abuse cases to specific types of abuses. If this indicates an actual increase in abuses found outside the enumerated list, then the development is concerning. It can be difficult for dominant firms to avoid inadvertent violations unless these abuses are

²⁸ Earlier proportions of Article 10 cases that concerned natural monopolies are: 2008 (37%), 2009 (29%), 2010 (40%), 2011 (40%). Source: FAS

obviously similar to enumerated abuses. Publication of substantive summaries of abuse cases could limit inadvertent violations and foster public discussion of whether the conduct is indeed abusive.

A firm that is enrolled on the “Register of enterprises with market share above 35%” with a market share above 50% is presumed dominant according to FAS’s Administrative Rules. According to rules adopted by the economic courts, a firm bears the burden of proof that its market share is not equal to that recorded in the Register. The information in the Register can be five, ten or more years old. Facts related to dominance would normally be collected in the course of an investigation. Thus, it is recommended that dominance in a competition case be determined on the basis of updated information and analysis. This would imply the Register of firms with market share exceeding 35% having no role in dominance presumptions if the factual basis for enrolment is not up-to-date.

Selective distribution can be efficient, for example where the quality of the product suffers unless specific conditions are maintained and it is costly to regularly inspect distributors. Bundling selectively distributed products with products that have a large number of distributors can restrict competition. Disentangling the competitive effects of different practices is a prerequisite to identifying which conduct to prohibit in given circumstances. Thus, it is recommended to ensure that specific practices, for example selective distribution arrangements, are analyzed under the competition law for their effects on competition.

Repeated abuse of dominance in particular forms, *i.e.*, monopolistically high or low prices, groundless refusal to contract or restriction of access to the market, remains a crime under Article 178 of the Criminal Code. This is addressed above in the discussion of competition crime in the context of cartels.

Warnings were introduced into the competition law as a less burdensome procedure than opening a formal case. FAS may issue a warning if it detects signs of violation of the antimonopoly law. This is one of the criteria for initiating a case. Given that the standard for issuing a warning is no greater than the standard for opening a formal case, non-execution of a warning should not prejudice any subsequent infringement investigation.

The development of commodity exchanges for oil, petroleum products and coal is encouraged in the belief that, despite no change in underlying market structure, the exchanges will generate presumably competitive prices which provide a yardstick against which to compare suspect prices and a means of

forcing subsidiaries of vertically integrated oil companies to trade at arms length. Commodity exchanges have the same suppliers as in the negotiated market, so purchasers have no additional choice of supplier. It is unlikely that changing the format will change the degree of market power. Further, it is possible that the commodity exchanges attract certain kinds of transactions or purchasers. For example, those customers who can only negotiate high prices or who prefer the contract conditions imposed by the exchanges will buy through exchanges, possibly resulting in systematically higher exchange prices than negotiated prices. Then the exchange prices would not reflect the sought after “competitive price.” Thus it is recommended to assess the costs and benefits of requiring the use of commodity exchanges. More generally, it is recommended to avoid the static use of benchmarking in competition law enforcement.

2.4. Concentration control

The competition law provides for a two-tier concentration control system, with prior notification and approval for the largest transactions and post-transaction notification for a second tier of the same kinds of transactions. A concentration or transaction may be refused if it may lead to restriction of competition, including as a result of the creation or strengthening of a dominant position. However, the exemptions under Article 13 are available.²⁹ Approval may depend on the fulfilment of specified conditions. Procedures for consideration of concentrations, including documents to be filed, are specified in the law.

2.4.1. Thresholds for application or notification

The concentration control provisions apply both to mergers and similar combinations of entire firms (Article 27) and to transactions involving acquisitions of shares or transfers of control (Article 28). Basic thresholds are calculated on the basis of the most recent balance-sheet value of the assets of the companies involved, *i.e.*, the acquirer and its group of persons and the target and its group of persons, and their annual turnover. (Unless retaining some control, the figures for the erstwhile parent of the acquired entity do not contribute towards the sum.) Transactions must be notified if either of the thresholds is met. A nexus threshold excludes some foreign firm transactions from the notification requirement.

²⁹ Permission may also be refused if information in the filing that has significance for the decision is found to be false or if a party has failed to supply necessary information that is in its possession and that was requested by FAS.

Pre-merger notification and approval is required for mergers and other similar combinations of firms in which the combined value of the assets of the firms involved exceeds RUB 7 billion or combined annual turnover exceeds RUB 10 billion, or one of the firms is included in the Register of economic entities. For transactions involving the acquisition of only part of a firm, then the second threshold is met when both the combined annual turnover exceeds RUB 10 billion and the most recent balance-sheet value of the assets being acquired exceeds RUB 250 million. (For share transactions, triggering events are particular ownership percentages.³⁰) Thresholds for financial organizations are different, and differ for different types of activities.³¹ Post-merger notification thresholds for the asset value and annual turnover parameters are RUB 400 million, and acquisition value parameter is RUB 60 million. The deadline for these transactions is 45 days after the merger or acquisition.

³⁰ Pre-approval and post-transaction notification requirements apply to transactions in which the purchaser first achieves a total 25%, 50%, or 75% share in a joint stock company or first achieves a one-third, one-half, or two-thirds share of a limited liability company. These shares are associated with the ability to control company decisions – a blocking share, a majority, or a share sufficient to prevent a block on supermajority decisions.

³¹ Prior approval of a merger or a deal to acquire a certain degree of control is required for insurance companies, insurance brokers, mutual insurance companies, and credit consumer cooperatives if the value of their assets exceeds RUB 500 million. For various business entities operating in asset and investment management markets, the threshold is RUB 200 million. For stock and currency exchanges, RUB 1 billion; for pension funds, RUB 2 billion; for companies managing investment funds and specialized depositaries, RUB 200 million; and for leasing companies, RUB 3 billion. For registrars, the threshold is RUB 200 million; for medical insurers, RUB 100 million; for brokers, RUB 200 million. For credit institutions, prior approval of a merger is required when the total asset value is more than RUB 22 billion, and post-deal notification when the asset value is lower than this. Prior permission is not required for deals to create a new institution through the contribution of shares and securities if the total asset value is more than RUB 22 billion. Also, securities transactions require prior approval if they include acquisition of more than 10% of the total amount [of the securities' value]. (Sources: Decision of the Russian Government No. 334 dated 30 May 2007, in the version dated 01.06.2012, "On Establishing the Amount of Assets of Financial Organisations (Excluding Credit Institutions) for the Purpose of Exercising Anti-Monopoly Oversight", and Decision of the Russian Government No. 335 dated 30 May 2007, in the version dated 01.06.2012, "On Establishing the Amount of Assets of Credit Institutions for the Purpose of Exercising Anti-Monopoly Oversight.")

The Russian nexus requirement, set out in Article 26¹, says that:

"[The following] shall be subject to state control according the rules of this chapter: transactions and other actions in relation to the assets of Russian financial organizations and to basic means of production and/or intangible assets located on the territory of the Russian Federation, or in relation to stocks (shares) or rights in Russian commercial and noncommercial organizations, as well as in foreign entities and/or organizations engaged in the supply of products to the territory of the Russian Federation in a sum of more than one billion rubles during the course of the year preceding the date of the conclusion of the transaction (other action) that is subject to state control."

2.4.2. Procedures

The administrative procedures for handling concentration control petitions and notifications, based on the provisions of the Competition Law and providing further detail and guidance for staff, are created by FAS, confirmed by order of its head, and registered with the Ministry of Justice.³² The law specifies a list of documents to be submitted to FAS simultaneously with the petition or notification. Within 30 days of the receipt of a petition for pre-transaction approval, FAS must issue a written response indicating the decision taken and the grounds. Petitions are considered to have been received when all of the information required with the filing has been submitted. As of mid-2009, for information that cannot be submitted, an indication must be provided concerning why the information cannot be submitted and how it can be obtained. Foreign location of information cannot be used as a reason for failure to submit it, if it should otherwise be available to the submitting party. An estimate may be submitted for some kinds of information, providing a party indicates the source of the information and the method used to make the estimate.

The period for the consideration of a petition can be extended if further information needs to be gathered or further consideration is required, but the maximum extension the FAS can make is two months. If the transaction falls under the requirements for review of foreign investment in strategic sectors, the

³² Legal rules of this type that affect the public are required to be registered with the Ministry of Justice, which reviews them for conformity to other legal rules and principles.

consideration of the petition may be suspended until that review is completed. FAS may also extend the consideration of a petition for approval for a period of not more than nine months to allow the parties seeking approval to fulfil specified conditions that would allow FAS to approve the petition. Once issued, approval for a transaction is effective for a period of one year. An issued approval may contain conditions that are to be met by the participants in the transaction, including requirements for the sale or transfer of property, for provision of access to facilities, licensing of rights to technology, and other similar matters. If the reviewing office believes that there is indication of a possible restriction of competition, it will call for additional information and discussion on this issue, and information will be posted on the competition authority's website. The parties to the transaction and third parties may submit comments or additional information on the possible restriction of competition.

2.4.3. Practice

Examples of FAS practice are provided in the box below, both examples provided by FAS and those from the FAS website. The representativeness of these cases is unknown. More is known about the practice of conditional approval, since a sample of 60 cases from 2009 and 2010 was reviewed. This review is reported in the succeeding box. The table below reports the number of pre-transaction applications and post-transaction notifications, rejections, and conditional approvals for the past near decade. The effect of successive increases in reporting thresholds can be traced in the table, but the number of filings remains large compared with the number of rejections and conditional approvals. Figures from 2008 concerning concentration control processes involving foreign participants did not show significant differences in outcomes, with a slightly lower percentage of refusals for stock transactions involving foreign parties and a slightly higher percentage of refusals of mergers or reorganizations. In 2010, 297 cases were examined in-depth, according to a FAS report to the Global Competition Review. This amounts to about 10% of pre-transaction applications or 6% of the total pre- and post-transaction filings.

Table 5. Oversight of Mergers

Year	Applications considered	Notifications considered	Consent withheld	Conditions/ preconditions ¹
2012	2494	1943	55	226/3
2011	3282	2124	74	348/12
2010	2964	1810	83	266/7
2009	4160	1709	145	252/11
2008	5821	2160	170	448/9
2007	6097	2581	95	356/5
2006	10559	10548	74	No data
2005	7122	11654	346	No data

Source: FAS statistical reporting using form 5. ⁽¹⁾ Preconditions – participants were required to complete certain actions before consent might be granted. Other conditions were put forward simultaneously with the granting of consent. Prior to the adoption of the new law on competition in 2006 there were no clear requirements regarding conditions. Therefore, there is no data for 2006 or 2005.

Box 9. Merger Case Examples

1. Gazprombank, a banking entity within the Gazprom group, wished to acquire for fiduciary management 50.9% of the voting shares of the transmission company in the Moscow region. FAS rejected the proposed transaction on the grounds that the Electricity Law prohibits the combination of activities related to generation, sale or purchase of electric power and those related to transmission and dispatch.
2. Gazpromtrans wished to acquire 100% of the voting share of OJSC SG-Trans, which has a dominant position in the rail transport of liquefied petroleum gas (LPG) and in the LPG loading and unloading markets in a number of regions. FAS rejected the proposed transaction on the grounds that the transaction would result in a dominant position in a number of natural gas and LPG markets, including extraction, transport, transshipment, loading and unloading and sale, at both federal and regional markets.
3. Other applicants wished to acquire 100% of the voting share of OJSC SG-Trans. FAS issued orders to require non-discrimination between vertically-related and not vertically-related users of SG-Trans's services and to require notification and justification within thirty days of price increases exceeding 10% over six months.
4. OJSC Federal Grid Company of United Energy System ("FSK EES") wished to acquire the right to act as sole executive body of OJSC Holding of Interregional Distribution Grid Companies ("MRSK Holding"). FAS

approved the transaction subject to the condition that MRSK dispose of its holdings in electricity generating and trading companies within one year. The holdings violated inter alia the Electricity Law.

5. LLC Investor wished to acquire 50% minus one share of United Grain Company. (The remainder is reserved to the state.) United Grain Company acts as the state agent in procurement and trade interventions for agricultural products and owns a flour mill and grain elevators that are listed on the register of dominant enterprises. The transaction would give Investor a blocking vote and ability to influence the general conditions of the relevant market. Investor indirectly controls Novorossiysk, the main commercial port on the Black Sea. FAS approved the transaction on condition of non-discriminatory access and prior notification of any closures of grain facilities.
6. The merger of Russia's two potash producers, Uralkali and Silvinit, in 2011 was approved with conditions by FAS. FAS explains that it took into account that 85 to 90% of their production was exported and that the transaction would strengthen the competitiveness of Russian producers on the global market through greater efficiency and lower costs, thus meeting the conditions for exemption in Article 13 of the competition law. The conditions included that the merged entity shall publish and adhere to non-discriminatory terms of sale to various categories of domestic buyers, shall notify FAS in advance of planned domestic price increases, and shall reserve for domestic sale the same quantity as was bought at the same period of the preceding year.³³ This merger decision was preceded by two other FAS decisions concerning the same firms. A vertical agreement among Uralkali, Silvinit and Mineral Trading Ltd. had been found in December 2009 to establish the resale price of potassium chloride, thus to violate Article 11, part 1 of the competition law.³⁴ The finding was confirmed by the Moscow arbitrazh court on 26 August 2010. In 2007, FAS had found that Uralkali and Silvinit were jointly dominant and had infringed the competition law by charging monopolistically high prices. The prices were assessed by comparing domestic prices of potassium chloride

³³ FAS press release "The Federal Antimonopoly Service (FAS Russia) approved a petition of Uralkali OJSC about merging with Silvinit OJSC," 4 April 2011 at http://en.fas.gov.ru/news/news_31340.html?print=1&isNaked=1 on 2 January 2013.

³⁴ Executive Summary, Report of the FAS on Competition Policy in 2010, at http://en.fas.gov.ru/reports-and-analytics/reports-and-analytics_30662.html on 2 January 2013.

with the necessary costs. Domestic demand was highly inelastic, but world prices far exceeded domestic prices.³⁵

7. The merger between Rosneft and TNK-BP was approved with conditions by FAS in 2012. The two firms had been found to be jointly dominant in a series of FAS decisions. Rosneft is the largest and TNK-BP the third-largest vertically integrated oil company in Russia. Filling stations where the combined company's share exceeded 50% had to be spun off within a certain period, according to the sole structural condition. In addition, the firm was required to sell at least 10% of gasoline, diesel, reactive motor fuel and heavy bunker oil destined for domestic consumption through the commodity exchanges. It was required to send its trade practices, *e.g.*, practices in setting price and in choosing with whom to contract, to FAS.

Box 10. Review of conditions imposed for merger approval

A sample of 60 concentration control cases in 2009 and 2010 in which conditions were imposed for approval was provided by FAS. A review found that the vast majority of the conditions were behavioural rather than structural. Among those that might be seen as focused on market structure, there was a single case in which a participant was required to remove a particular type of activity from its charter to avoid competition restriction in that activity, and another in which any further acquisitions in the same field of activity were forbidden. In two additional instances, the parties were obligated to inform the relevant office of FAS of any further acquisitions in the same field, which could lead to later requirements or objections. In another instance, however, the FAS office reviewing the matter noted that the transaction may create a dominant position, but approved it with the imposition of conditions that amount to instructions to avoid committing abuse as defined by the law.

Pre-conditions for approval were imposed in three of the examples. Two of these involved state entities engaged in the provision of transport infrastructure and services; the preconditions involved the issuance of appropriate decrees preventing cross-subsidisation and ensuring non-discriminatory access to the infrastructure for all carriers. In the third instance, the precondition was alteration of the merger contracts to prevent any of the production assets from being repurposed for a period of fifteen years.

The remaining cases involved behavioural conditions imposed concurrently with issuance of approval or at the time of review of a post-transaction notice. In about half

³⁵ "Introduction, Report of the Federal Antimonopoly Service on Competition Policy in 2006" at http://en.fas.gov.ru/reports-and-analytics/reports-and-analytics_30345.html on 2 January 2013 and 2009 Report.

of the cases, the condition was an obligation not to violate the competition law. Slightly less common were conditions that require the maintenance of levels of production or supply of the product and/or prohibit any change in the use of the assets of one or more of the participants in the transaction. These conditions varied in their severity, from a requirement for prior notification or consent of FAS to outright prohibition of reduction for any reason, including a voluntary liquidation or bankruptcy of the entity involved. Conditions on production volume were frequently, but not universally, accompanied by pricing conditions. In about a third of the sample, one or more of the parties to the merger was obligated to contract with those outside the group formed by the merger on the same price and other terms as those within it. In a quarter of the sample, conditions related to price were imposed. The majority of these were requirements that entities report price increases of more than a stated percentage to FAS and provide a justification for the increase. The percentages at which the reporting requirement was triggered range from 5% to 20% of the average weighted price for a prior period. Conditions vary concerning whether the report is to be made before or after the price increase.

Not all of the examples provided clearly concerned a transaction that was expected to change market concentration or create conditions that might result in discriminatory access to important facilities or inputs. In some instances it appears that the transaction involves only a change in the ownership of a dominant entity, with the imposition of additional reporting requirements on the entity as the price of approval.

Another sort of condition has been noted outside of the sample described, according to which a firm is required to publish its commercial practices including pricing practices. While the intention may be to force the firm to credibly commit to non-discrimination among customers, this information may facilitate coordination or cartelization.

2.4.4. Trends over 5-10 years

Fewer transactions must be notified now than five to ten years ago.³⁶ For example, the asset value trigger for many transactions has risen from RUB 3

³⁶ Pre- and post-transaction notification thresholds have risen substantially over the past decade. The 2006 law significantly increased thresholds but numbers of petitions and notifications remained quite high. Innovations were also made in the treatment of transactions within groups of related entities in an effort to reduce unnecessary filing burdens. Prior to 2009, the pre-merger petition thresholds were RUB 3 billion for combined value of the assets of the firms or RUB 6 million for combined annual turnover of the firms. For a share transaction, the same thresholds plus a threshold on the asset value of the target (RUB 50 million) applied. The 2009 amendments made several changes designed to further reduce unnecessary filings, including another

billion before 2009 to RUB 7 billion. Also, the scope of transactions that must be pre-approved or notified has been narrowed to exclude, for example, transactions between entities related to one another by full control. A Russian nexus requirement was introduced at the beginning of 2012. Merger control procedures have been clarified and specified in greater detail and provide for notification and comment by parties where a possible restriction of competition is seen (meaning there may be a refusal) and also for publication and opportunity for comment by third parties. Decisions on petitions and notifications are published on the competition authority website, with protection for confidential information (which must be identified by the parties upon submission).

The narrowing of transactions that must be notified continues: Amendments authored by FAS to eliminate post-transaction notifications were approved in the first reading in the Duma in March 2013.

2.4.5. Conformity with Council Recommendation on Merger Review

The Roadmap calls on the Russian Federation to commit to ensuring that review of mergers is effective, efficient and timely, following the standards of the 2005 Council Recommendation concerning Merger Review³⁷. This Recommendation provides best-practice guidance about merger control. It deals with effectiveness, efficiency (in terms of jurisdiction, notification, and information gathering), timeliness, transparency, procedural fairness, consultation, third-party access, non-discrimination, protection of confidentiality, resources and powers and enforcement co-operation (the issue of co-operation is addressed separately below). Russian Federation accepts this Recommendation.

The Russian law provides for a two-tier concentration control system, with prior notification and approval for the largest transactions and post-transaction

substantial increase in thresholds, limitation of filing requirements to transactions in which meaningful forms of control are acquired and elimination of requirements for approval for transactions conducted between entities related to one another by full control. The “third antimonopoly package” raised thresholds for mergers to the same RUB 7 billion/ RUB 10 billion as for share transaction and allowed for the exclusion of certain assets from the count, as well as introduced a Russian nexus requirement.

³⁷ <http://acts.oecd.org/Instruments/ShowInstrumentView.aspx?InstrumentID=195&InstrumentPID=191&Lang=en&Book=False>

notification for a second tier of the same kinds of transactions. Basic thresholds to identify which concentrations must be notified are calculated on the basis of the most recent balance-sheet value of the assets of the firms involved, *i.e.*, the acquirer and its group of persons and the target and its group of persons, and their annual turnover. (Unless they retain some control, the figures for the previous parent of the acquired entity do not contribute towards the sum.) Transactions must be reported if either of the thresholds is met. Transactions that should have been reported but were not may be invalidated.

The reach of the merger control provisions has been considerably refined through several substantial increases in thresholds and limitation on filings within related groups. Notification requirements and consideration procedures have been clarified and opportunity for consultation with parties and for third party comment provided in instances where a refusal appears possible. Outcomes for transactions with foreign party involvement do not differ from others. Parties may designate information as confidential, with the exceptions provided by law for information that may not be designated a commercial or business secret. Some decisions are published and available on the competition authority website. Usually, no summary of the factual basis or the reasoning is published, but only the fact of the acceptance or denial of the transaction. A recommendation to publish such a summary is made in section 2.9.

The nexus threshold, introduced in 2013, may not exclude transactions without significant and direct effects on competition in Russia. The annual sales threshold of about USD 33.3 million is low and the threshold can be breached if only one party to the transaction has assets or sales in Russia. Moreover, there does not appear to be a threshold for the value of intangible assets, for example trademarks and other intellectual property rights “located in Russia” or of the value of assets owned but not controlled by Russian financial institutions and not used to produce goods or services sold into Russia. The law’s definition of “signs of restricting competition” would seem to make it difficult to successfully argue that a transaction that eliminates a significant potential competitor restricts competition, so it is unclear why transactions where this is the main possible anticompetitive effect—that is, where only one party has assets or sales in Russia—should trip the notification trigger.³⁸ Therefore, it is

³⁸ The annual sales threshold for filing of USD 33.3 million is at the low end. By comparison with the practice in three OECD Members, chosen for economic size and composition, in Germany, notification is required if one party’s turnover in the country exceeds EUR 25 million and the other’s exceeds EUR 5 million. In France, notification is required if two parties each have turnover in the country of EUR 50 million. For Canada only assets or

recommended that the nexus requirement be monitored to determine whether it successfully excludes from merger control procedure transactions having no direct or significant effect on competition in Russia.

The number of post-transaction notifications has fallen, but given the low incidence of refusal or conditional approval of these transactions, it would seem reasonable to eliminate post-transaction notification altogether, as would occur under a bill under consideration in the Duma in 2013. This proposal is supported, provided that the possibility is created to intervene in those rare instances where a low-value merger can substantially restrict competition in a small market.

Some of the behavioural conditions imposed by FAS for approval of mergers may not be useful, or indeed harm competition. The obligation to notify price changes before they become effective reduces market flexibility since there is usually a delay between notice and change, and the benefit of a post-notification is unclear. The incremental benefit of a firm agreeing not to violate the competition law, which it is obliged to do anyway, is unclear. And the obligation to publish a firm's commercial practices, including pricing practices, might perversely facilitate coordination or cartelization with rivals. FAS might wish to study the effects of the various behavioural conditions imposed, identify the combinations of market characteristics and behavioural conditions where the conditions promote or preserve competition, and modify its practices accordingly.

2.5. Unfair competition

Unfair competition is defined generally (Article 4) as any action of an economic subject that is directed toward the receipt of an advantage in the conduct of entrepreneurial activity, that violates the legislation of the Russian Federation, the customs of business activity or the requirements of honesty, reasonableness and fairness and that caused or may cause losses to another economic subject that is a competitor or caused or may cause harm to their business reputation. Article 14 prohibits unfair competition, including (but not limited to) the circulation of false information, inaccurate comparisons of products, illegal receipt or use of information that is a commercial secret,

revenues “in, from or into Canada” contribute to the size of transaction or size of party tests, although Canada asserts jurisdiction over any merger affecting Canadian markets. (International Competition Network Merger Notification and Procedures Template for, respectively, Germany (May 2009), France (May 2009), Canada (March 2011))

circulation of goods that make illegal use of intellectual property or of the means of identification of firms and products and the creation of confusion about the qualities or quantities of products or the identity of producers or place and means of production. Article 14 also specifically prevents unfair competition connected with the acquisition and use of trademarks or other means of identification of firms and products. FAS's decision on such a violation may be sent to the federal body for registration of intellectual property (currently Rospatent) so that protection may be removed from the trademark or other registered identification that is in violation of the law.

In addition to the provisions of the competition law on unfair competition, FAS is also responsible for enforcement of the law on advertising.³⁹ The law covers most aspects of advertising, including restrictions applied to specific products and to specific advertising media, protection of children, false or misleading claims and statements and other similar matters. In contrast to the unfair competition provisions of the competition law, which are directed toward preventing injury to competitors, the law on advertising is directed toward protection of the public. FAS may issue a mandatory order requiring cessation of a violation. It may also go to court to request an order requiring the correction of false or misleading information through the distribution of counter-advertising.

Box 11. Practice in unfair competition and advertising cases

1. The mobile telephone company "Vimpelcom" adopted a practice of making calls to the subscribers of other mobile telephone providers and proposing that they conclude a contract with "Vimpelcom" for communications services. The representatives of "Vimpelcom" proposed to test the sim-cards of clients of "Megafon" so that they would be able, if they chose, to transfer to services of "Vimpelcom." FAS found this to be an act of unfair competition, and imposed a fine in the amount of RUB 100 000.
2. A large and well-known maker of vodka under the registered brand name "Russian Standard" began to sell a premium vodka under the name "Russian Standard Platinum" in 2002. Although the brand name "Russian Standard" had been registered, the word "Platinum" had not been. Another company registered the name "Platinum" for vodka with Rospatent, and began to demand money from "Russian Standard" for its use. FAS opened a case and found the registration to be for the purpose of obtaining the

³⁹ Federal law No. 38-FZ of March 13, 2006 "On Advertising."

payment and an act of unfair competition. Once this decision had been taken, an approach was made to Rospatent, which annulled the registration.

3. "Rockwool," a well known brand of insulation, is sold in large rolls with a characteristic red and white striped colour scheme on the packaging. Another manufacturer began to sell its own insulation product under the name "Rocklite," using a nearly identical packaging design. The design was clearly intended to lead consumers to confuse the two products or to believe that "Rocklite" was another product from the same manufacturer. FAS ordered the company to stop using the packaging design.
4. In March 2013, The Kostroma territorial office banned an "unethical" advertisement that a local organization said was insulting to "the world's revered bread." The advertisement involved five spelling changes which transformed the word for bread into the word for taxi, according to Moscow Times.

2.6. Acts of state bodies and officials, transfer of rights in state property and natural resources

The competition authority has relatively unusual power to enforce the competition law prohibitions of acts, actions and agreements of state bodies that prevent, restrict or eliminate competition (Articles 15 and 16). The prohibitions apply to federal bodies of the executive power, to all state bodies of the subjects of the Federation (its constituent parts) and to bodies of local self government, as well as to other bodies or organizations to which the functions or rights of such bodies have been delegated, to extra-budgetary funds and to the Central Bank of the Russian Federation. They do not apply, though, to federal laws or other acts or actions of the federal representative bodies of power (the State Duma and the Council of the Federation), and there is an exception for acts and actions by the other specified bodies if the adoption of the act or taking of the action is envisioned by a federal law. An amendment under discussion would require prior permission from FAS before state bodies and officials could establish new public companies, a move aimed to limit evasion of the general framework.

The provisions on competition-restricting acts or actions (Article 15) specifically include omissions (failures to act) within the prohibition, allowing them to be used to respond not only to direct interference in markets but also to failures of a state body to respond that are sufficient to cause difficulty (such as a failure to respond to licensing requests from new entrants into a monopolized market). Separate points of Article 15 specifically prohibit limitations on

creation of new enterprises or on their conduct of specific kinds of activity; obstruction without basis of the economic activity of any economic actor; restriction or prohibition of trade among regions or localities or restrictions on the sale of goods or services; mandatory instructions concerning the priority supply of specific customers; restriction of purchasers in their choice of suppliers of goods; priority provision of information to specific economic subjects; the provision of state or municipal preferences in violation of the rules established by chapter five of the competition law, creating discriminatory conditions, and other specified conduct. The list is not exhaustive, however, and other acts or actions of state bodies may also be found to improperly restrict competition. The specific prohibition on priority provision of information was inserted by July 2009 amendments and is particularly relevant to cases concerning bidding and auction processes for state and municipal purchases. The specific prohibition on the provision of state or municipal preference in Article 15 was also inserted by the amendments, which makes improper provision of such preference subject to the penalties discussed below.

Part 3 of Article 15 states a general prohibition on the combination of commercial activity with the exercise of state power, whether in the form of commercial activity by state bodies or in the form of delegation of state powers to private entities. An exception for the combination of commercial activity with the exercise of state power is made if such combinations are authorized by federal laws, edicts of the president of the Russian Federation or decrees of the Government of the Russian Federation. The prohibition on the delegation of state power to private entities does not contain these exceptions, allowing for such delegation only as provided by the federal law creating the state corporation “Rosatom,” which is responsible for state supervision in relation to a number of atomic energy issues. The specific exception for Rosatom was inserted into the law to bring it into accord with the law creating Rosatom, but FAS is opposed to this practice and favours the strict separation of state authority from any form of commercial activity.

Article 15 also contains (in part 2) a prohibition on the delegation to a body of state power of a constituent part of the Russian Federation or body of local self government of any powers the exercise of which will or may lead to the prevention, restriction or elimination of competition. An exception is provided for delegations under the terms of federal laws. The provision is worded broadly and it does not specify whether an exception for a delegation established by federal law would require a delegation of the specific authority to the regional or local bodies or could also be created by a federal law that contained a general allowance for delegation of related authorities to regional and/or local bodies. Since a wide variety of authorities that are commonly

exercised by state bodies and officials at the regional and local levels have the potential to restrict competition, a strict reading of this provision could be quite limiting and could force federal lawmakers to include large amounts of detail in federal laws concerning the bodies and levels for their execution. It is not clear whether this provision of the law has ever been enforced in the abstract case, that is, where the issue was delegation of an authority the exercise of which might restrict competition rather than delegation of an authority that was shown to restrict competition in the particular case.

A separate article of the law (Article 16) prohibits the listed state bodies from entering into agreements or engaging in coordinated actions, if these have or may have as their result the prevention, restriction or elimination of competition. Both agreements between (or among) state bodies and those between state bodies and economic entities are prohibited. A list in the article specifically prohibits agreements or coordinated actions that affect prices, divide markets, establish differing prices on identical products without economic, technical or other basis, or restrict access to or exit from the market or concern the elimination of competitors. The list is not exhaustive and other agreements that meet the general criteria may be found to violate the law. With respect to agreements concerning prices, there is a specific exception for instances in which such agreements are envisioned by federal laws, or by normative legal acts of the President of the Russian Federation or normative legal acts of the Government of the Russian Federation. While instances of agreements between economic entities and state bodies or officials are not uncommon, and have indeed been the focus of special enforcement efforts in recent periods, it is not entirely clear how a state body could engage in coordinated action under the definition of such actions contained in the law.

Upon finding an act or action of a state body to violate the law, FAS may issue an order requiring that the violation be stopped by repeal or amendment of the relevant document or decision. If the act or action is not corrected by the relevant body or official, FAS may go to court to have it voided. It is not unusual, however, in cases concerning violations by state bodies for the violation to be eliminated prior to the completion of the formal consideration of the case by FAS and the issuance of an order. Individual state officials may also be subjected to administrative sanctions for acts or actions that did or could restrict competition or that restricted movement of goods or restricted economic freedom. As of July 2009, a fine of RUB 15 000 to 30 000 can be imposed for a first offence and a fine of RUB 30 000 to 50 000 or disqualification for up to three years for a second offence by an official who has already been sanctioned

once for a similar violation.⁴⁰ Officials who failed to correct a problem in response to an order could also be subject to sanctions for failure to execute it, although in practice questions of chain of command, job responsibility and ability to cause a collective body to act would create complications. Sanctions against officials who conclude competition restricting agreements or engage in concerted action are harsher and include a fine of RUB 20 000 to 50 000 or disqualification of up to three years for the first offence. These sanctions are in the same article of the Code of Administrative Violations that provides for sanctions against other individuals and legal entities involved in restrictive agreements, and they are specifically covered by the leniency provisions. FAS maintains a Register of persons subject to an administrative penalty for violation of the antimonopoly legislation of the Russian Federation. If an official, already enrolled on the Register, is found to have committed a similar administrative offence, FAS may send the case file to court for a decision on fining or disqualifying the person. In the first half of 2012, territorial offices sent 53 officials' files to court and the central office had sent none. No court judgments had been handed down by mid-2012.

Historically, cases in this area of the law have tended to focus on actions of state bodies that are themselves in violation of legal rules (such as failure to conduct a required tender). This has slowed the development of standards for a more complex analysis that would take into account the needs that the state action was intended to meet, the means available to the state body to do so and the costs of the options. Indeed, it is not clear that the provisions of the current competition law would support such an analysis, since they do not contain a "least restrictive means" standard, but rather a simple prohibition on restriction of competition. Nonetheless, as practice under these articles moves away from simpler types of violations it seems clear that analyses that take these factors into account will be needed in order to prevent conflicts between the competition laws and the reasonable use by local and regional bodies of zoning rules, local taxation scales and other common tools of local governance.

⁴⁰ Article 14.9 of the Code of Administrative Violations, as amended by Federal Law No. 160-FZ of July 17, 2009. The prior version of the same article provided for administrative sanctions only for instances of obstruction of the free movement of goods and services.

Box 12. Practice in state actions cases

1. The Mordovia territorial office of FAS received a petition from individual entrepreneurs who reported that the local office of the federal tax service had refused to accept their tax returns in printed form and had demanded an electronic form instead, instructing them to conclude a contract with the “authorized accountant” – another individual entrepreneur Mr. B. who would send an electronic form to the tax office. The territorial office opened a case and issued a decision finding the tax service office in violation of Article 15 of the competition law both for requiring the electronic form (which is not required by law) and for restricting the choice of taxpayers of which accountant to use for services. The tax service was issued an order to cease the violation, which it executed.
2. The Rostov office of FAS received a complaint from the limited liability company “Aksai-Auto” about the announcement by the Aksai district administration that an open bid competition would be held for the right to carry out passenger transport on routes inside the district that had been independently developed by “Aksai-Auto.” If this had occurred, Aksai-Auto could have been deprived of the right to continue business on the routes that it had itself developed and could have been forced out of the passenger transport market in the district. An order was issued to the administration requiring the termination of the stated open bid procedure, which was executed.
3. The Kirov territorial office of FAS received a communication from the procurator concerning an act passed by the Kirov city дума (representative body) that established different coefficients to determine the cost to use land plots for permanent and for temporary markets. For permanent markets the coefficient was 3, while for temporary markets it was set at 100. The Kirov territorial office adopted a decision requiring the city дума to repeal the point of the decision establishing different coefficients for the use of land for temporary and for permanent markets and to establish a single coefficient for use for both types of markets, and also for automarkets (where goods are traded from trucks).
4. The central office of FAS Russia investigated the circumvention of the procurement rules by the City of Angarsk in 2011. Rather than select organizations to perform various work (landscape, local road repair and maintenance, operation and maintenance of the burial grounds) according to the official procedure for order placement, the local authorities of Angarsk had begun to use a different procedure. They would communicate the desired municipal work to an autonomous institution, which in turn worked with an enterprise to contract with external businesses to perform the work. The businesses were also paid with public monies through the enterprise.

Thus, other businesses who should have had equal access to public funds instead could not enter into direct contracts but had to contract with the intermediaries. FAS found a violation of part 1 of Article 15 of the competition law.

5. The Stavropol office of FAS Russia examined a case in 2011 concerning the Stavropol Town Planning Commission and a business entity. The Commission and the business colluded to eliminate competition and to create preferential conditions for the business to participate in a tender. During examination of the case, it was established that when placing a municipal order for the construction of a children's playground, the customer had specified a completion deadline of 3.5 months, when, in fact, according to construction standards, more than 12 months was required for this work. As a result, bone fide contenders could not bid in the tender due to the intentional setting of an unrealistic deadline. Without having received a construction permit, the business commenced construction of the facility six months before the tender was held. The territorial office found they had violated Article 16 of the competition law.

Article 17 part 1, added to the law by an amendment on June 30, 2008, establishes a positive requirement that all contracts for the use of state or municipal property must be concluded on the basis of an auction or open tender for the right to conclude the contract. This requirement applies to leases on premises, land or other property, contracts for trust management of assets, agreements providing for uncompensated use, and any other type of contract or agreement that provides the right to the possession or use of state or municipal property. Transfers of rights to use property for less than a total of 30 days are also excepted, but there is a prohibition on the use of such exception by any individual recipient more often than once in every six month period. The addition of Article 17 part 1 closed a large loophole that allowed non-competitive award of a wide variety of valuable use rights to be used to advantage particular firms or individuals. It is intended to increase competition by opening possibilities for entry and also to reduce opportunities for corruption and maximize return on state and municipal property.

Box 13. Violation of Article 17

FAS found the Department of Health of the Moscow Government to have violated Article 17 part 1 of the competition law by including trade names of drugs in a tender request in 2008. This was seen as potentially limiting participation in the auction and preventing, restricting or eliminating competition. The Department was ordered to use international non proprietary names, except as provided by law.

Provisions in the codes that govern the use of natural resources provide for auction or open tender requirements for leases and other kinds of use rights, and in some instances they establish upper limits on the award of such rights to a single economic entity or group of related entities. The insertion of these provisions was the result of a significant advocacy effort by FAS. They are intended to stop the practice of award of large and extremely valuable resource use rights through non-competitive and non-transparent procedures. As with Article 17 part 1, the provisions have significance both for the promotion of competition and for anticorruption efforts.

Table 6. Review of legal acts (both generally applicable and not generally applicable) found to be inconsistent with antimonopoly legislation

	Acts considered	Acts found to violate anti-monopoly legislation	Number of acts in which the comments of the anti-monopoly agency have been taken into account without judicial intervention
2010	288 589	5 488	3 662
2011	269 840	3 890	2 702
1H2012	244 175	1 563	1 122

2.7. State and municipal preferences (state aids)

State and municipal preferences or state aid may be provided for specified purposes after the consent of FAS on the basis of a written petition. State or municipal preference is defined as the provision by a state or municipal body or by a body or organization exercising their functions of advantages to specific economic entities which provides them with better conditions for their activity by means of the transfer of state or municipal property or objects of civil-law

rights or by means of the provision of privileges having a property or monetary value, or state or municipal guarantees.⁴¹

State or municipal preference may be provided on the basis of legal acts issued by federal executive bodies, or by any type of regional body or body of local self government (or those exercising their functions) for one of a list of fifteen purposes, including provision for populations in the regions of the far north and other regions equated to them by legislation, development of education and science and support of scientific research, protection of the environment, development and support of culture and preservation of cultural heritage, physical culture and sport, provision for defence, support of agriculture, social protection of the population, protection of health and of labour and support of small and medium sized enterprises. Although the list is exhaustive (preference may be provided “solely” for one of the listed purposes), the final item in the list allows the provision of preference for any other purposes that are defined by other federal laws, normative legal acts of the president of the Russian Federation or normative legal acts of the Government of the Russian Federation, so the list is in actuality open to expansion. The provision of property or other rights on the basis of a properly conducted auction or through the procedures envisioned by legislation on state purchasing, the provision of property to economic entities under the civil-law rights of full economic control or operative management and the provision of property on the basis of a federal law or by decision of a court are not considered the provision of preference. Likewise, provision of state or municipal property or funds for the purposes of eliminating the consequences of emergency situations, military actions or the conduct of counter-terrorist operations is not classified as the provision of preference.

The provision of preference requires the prior consent of FAS on the basis of a written petition. Preference may not be provided for purposes that are not consistent with those stated in the petition for consent. Prior consent is not required for preferences that are provided on the basis of federal, regional or local laws on the budget that define (or specify a procedure for defining) the amount of the preference and those to whom it is to be provided. This does not insulate aid provided by regional and local laws on the budget from review, however, since regional or local laws are subject to challenge by FAS on the basis of Article 15’s prohibition on acts or actions of state bodies that restrict competition. Preferences provided through the use of reserve funds to cover unforeseen circumstances as provided by the federal laws on the budget do not

⁴¹ Article 4, point 20.

require prior consent, nor do those do not exceed the maximum allowable cash transaction limit between legal entities established by the Central Bank,⁴² provided they are not granted more than once a year to a single recipient.

The body intending to provide the preference is responsible for submitting the required written petition to FAS, and the petition must be accompanied by a draft of the act by which it will be provided stating its purpose and amount. In addition, the petition must be accompanied by a significant amount of information on the proposed recipients of the preference, specified in Article 20. FAS is required to issue a decision on the petition within a month of receiving a petition that conforms to legal requirements, with a maximum two month extension of that period for instances when more information is required. For petitions in which the assistance to be provided does not qualify as a state or municipal preference under the law (and so does not require consent) or petitions that do not meet the requirements for content and appended information, the period for response is ten days.

FAS may consent to the provision of the preference, refuse consent if the proposed preference does not correspond to its stated purposes or if it will result in restriction of competition or consent to the provision of the preference with specified limitations on time periods, purposes, amounts provided, recipients or other aspects of its provision. If restrictions are specified in FAS's consent, the petitioning body must submit within a month of provision of the preference the documents specified by FAS in its consent that will confirm that the restrictions were observed. Provision of preference in violation of the rules established by the competition law is grounds for the issuance by FAS of an order to the body that provided the preference and to the economic entity that received it concerning return of property or funds provided or requiring cessation of the use of other forms of preference.

FAS began to play a significant role in the monitoring and control of grants of state aid only with the passage of the 2006 competition law. Numbers of matters addressed under Articles 19-21 of the law had been growing steadily since 2007 (first full year), but have dropped off in recent years. In 2007, FAS reviewed 33 petitions on state aid, opened a total of 149 formal cases concerning possible violations (most of these on its own initiative), found a total of 66 violations and issued 59 orders for correction. In 2008, these numbers

⁴² As of mid-2009, that amount was RUB 100 000 (about USD 3 334), established by the Instruction of the Central Bank No. 1843-U of 20 June 2007.

more than doubled to a total of 89 petitions and a total of 343 formal cases opened, with violations found in 192 instances and 131 orders issued. For 2009 the numbers appear on track to double again, with 178 petitions, 236 formal cases, 171 violations and 142 orders reported for the first half of the year. By 2011, there were 50 petitions and 111 formal cases, 107 violations, and in 2012, 56 petitions, 65 formal cases, and 57 violations.

2.8. State purchasing

A federal law on state purchasing adopted in 2005⁴³ regulates the processes for purchasing for state and municipal needs. The law is complex, detailed and modern, envisioning and regulating the use of web-based solicitation and acceptance of bids and quotes and the use of electronic trading and auction procedures as well as more traditional methods of purchasing. It was developed primarily by FAS, and FAS is the body authorized to perform many of the functions it requires in relation to enforcement. FAS's duties under the law include review of petitions for consent and also post-event notifications concerning closed competitions or auctions or the conclusion of a contract through a single-source procedure, as well as the conduct of planned and unplanned verifications (reviews) of the activities of bodies purchasing for state and municipal needs. FAS's powers of access to premises and information for the purposes of performance of planned and unplanned verifications mirror those for enforcement under the competition law. A replacement for the existing public procurement law was signed in April 2013, but its substance will be shaped by future implementing regulations. The principal innovations are reported to be to expand available procurement procedures, give greater freedom for procuring entities and to place greater emphasis on efficiency.

The provisions of the public procurement law, particularly those requiring transparency, are aimed at promoting broad participation and discouraging customer-bidder conspiracies. Bid-rigging in public procurement forms part of the enforcement against cartels under the competition law and is addressed above.

The periods for the filing and review of complaints (the basis for the majority of unplanned verifications) and the issuance of decisions by FAS are extremely short and are designed to quickly stop improper processes or

⁴³ Law of the Russian Federation No. 94-FZ of 21 July 2005 "On the Placement of Orders for the Supply of Goods, Performance of Work, or Provision of Services for State and Municipal Needs," hereinafter the law on state purchasing.

invalidate their results so that a legally correct procedure can be conducted for the corresponding purchase. Complaints may be filed immediately during the purchasing process (for example concerning the accreditation of participants) but in most cases cannot be filed more than a very limited number of days after the posting of the results of the corresponding purchase method. A properly documented complaint must be considered within five days of its receipt by a collegial body (that is, it cannot be considered by a single official). On the basis of its consideration of the complaint, FAS may issue an order requiring that a violation be corrected, by annulment of a bidding process or auction if required or by other means, or may file suit in court to have an order that has already been placed held to be void due to violations in the procedure for its placement. Orders for the elimination of violations are required to state with specificity what actions must be taken in order to do so. Where an order for the elimination of violations has been issued, the contract for the corresponding state or municipal purchase may not be concluded until the order has been executed. Administrative sanctions in the form of fines may be imposed on officials and legal entities participating in the purchasing process for a wide variety of violations of the relevant legal requirements. The sanctions are regulated in an unusual degree of detail in the Code of Administrative Violations and ranged, as of mid-2009, from RUB 3 000 for a violation related to information posting to RUB 500 000 for a legal entity that fails entirely to publish or place on the relevant website information about a purchase that is subject to such publication.

The volume of work associated with the performance by FAS of its functions related to supervision of state and municipal purchasing is extremely large and has been increasing steadily. The increase in the number of authorize staff by nearly a thousand from 2007 to 2008 was primarily intended for staff assigned to state purchasing issues. Figures for 2008 give a sense of scale. In that year, FAS considered 3 721 petitions for prior consent for single sourcing and 4 243 post-placement notifications concerning single-source placement.⁴⁴ The number of petitions for prior consent for a closed auction process declined from the previous year due to a shift in responsibility for review of such petitions to the Federal Service for Defence Purchasing where the reason for closure is the need to work with information that constitutes a state secret. Also, FAS conducted 872 planned verifications and 17 465 unplanned verifications.

⁴⁴ Statistics for 2008 and 2009 cited here and in the paragraph below are based on the detailed reports on FAS activity in enforcing the laws on state purchasing that are available of FAS's website at <http://www.fas.gov.ru/stateorder/reports>.

Many of the verifications involve the review of a large number of such transactions (particularly planned verifications, which may involve the review of all of the work of a particular body over a specific period of time). In all, FAS reported the review of a total of 82 834 orders placed for state and municipal purchases during 2008.

2.9. Economics-based assessments

Several provisions of the competition law require economic analysis to assess the effect of conduct on competition or on market participants. For example, most types of agreements, dominant firms' conduct, and mergers are evaluated as to whether they lead or may lead to restriction of competition. Economic analysis is required to avoid a literal interpretation of the definition of "signs of restricting competition," that is, to put the indicators into context and make a reasoned assessment taking into account all the observable features and indicators. FAS has made clear that its rules require a full analysis of the state of competition on the market in cases in which market shares must be calculated to establish dominance or to apply safe harbour thresholds. However, questions remain as to how economic analysis is used to assess the effect of specific conduct on competition, as the law requires, and the whether the capacity to perform high quality economic analysis is sufficiently widespread within FAS. The economic courts, too, must have a capacity to assess economic arguments in competition cases.

FAS was asked to provide examples to illustrate the use of economic analysis to evaluate the effects of actions by officials or dominant firms or agreements to determine whether a violation has occurred. One example proffered was part of the "third wave" of investigations of monopolistically high pricing by the oil companies. The second case concerned the imposition of new market participation rules that spurred the exit of large numbers of suppliers. These are described in the box and a brief assessment is made below. The first case in the box, however, was reported in the Russian press.

Box 14. Bread, petroleum products and compulsory insurance

1. Bread in Penza

In early October 2012, two related bread factories in the city of Penza notified the Penza territorial office of FAS of their intent to raise wholesale prices on their products by 15% as of October 17, 2012. The factories were required to send the notice because they are listed, as a group of two related companies, in the Register of companies with

shares of the market above 35%. The factories stated that the price increase was necessary due to increased costs in, among other things, flour, energy and labour, and pointing out that the previous price increase had occurred in April of 2011. However, FAS disagreed and within days of receipt of the notice opened a case against the factories for abuse of dominance.

FAS first examined whether the factories were dominant. The decision named eight other wholesalers in the market and stated that there were also additional unnamed wholesalers, but no information about their production or sales was used. Rather, the size of the Penza wholesale market for bread was estimated by multiplying a statistic for per-capita consumption of bread by the total population of the city of Penza, and this figure was compared to the total tonnage of all bread and bread products sold by the two factories to buyers in the city. FAS then stated that sanitary regulations on bakeries and the need for expensive premises and equipment are significant administrative and economic barriers to entry, and found the factories dominant in the wholesale market for bread with a share of more than 50%.

FAS then analyzed the changes in the cost of inputs into four specific types of bread, comparing current costs to costs at the time of the last increase in bread prices, April 2011. It found that prices for higher quality flour had increased by as much as 14%, but prices for other types had risen less or not at all. It stated that 10 to 16% increases in wage and energy charges could not justify a 15% price increase because those expenses account for only 4% of the production cost for bread. FAS concluded that the total production costs across all products had risen by 3% to 17%, but only by 3.9% to 7.3% on the specific types of bread analyzed, over the period April 2011 to October 2012. The opinion does not discuss the fact that 2012 was a drought year with low grain production or the possibility that flour prices might continue to increase through the sales year until the next harvest (as had occurred in 2010-2011 after a poor 2010 harvest).

FAS then examined the change in profit per unit (loaf) of bread before and after the announced price increase. The number of rubles received per loaf above production cost was compared in the two periods. Thus, if revenue exceeded cost by 1 ruble per loaf in April 2011, and by 1.6 rubles per loaf in October 2012, this was characterized as a 60% increase in profit. On this basis, the decision stated that “with an increase in production prices of 3.9-7.3%, there was an increase in profits of from 63.9-143.3%.” FAS also compared its estimate of the rate of profitability of the specific types of bread after the October 2012 price increase (20% to 27%) with the overall profitability for the sector for 2011 (12.5%), finding the difference to be further evidence that the October increase was not justified. Earlier in the decision, however, FAS had stated profitability in April 2011 of 8.7% to 18% on the same products, which would appear to be in line with the sector average for that year.

Some comparison prices charged by the other wholesalers are also stated in the decision. While at least some of these suggest that defendants prices after the October increase would be nearly identical to those charged by others in the market for the same

product (e.g. 30 vs 30.17 rubles/kilo for “Peklevannyi Novyi” bread), the decision itself does not make this direct comparison and contains no comment on the comparison prices. It simply followed them with the statement that FAS established an increase in prices of 15% in the face of an increase in costs of only 3.9-7.3%. The decision also emphasized the fact that reductions in the price of flour from highs in April 2011 through August 2012 allowed the factories to earn a higher return than was “confirmed” for them at the time of their April 2011 price increase, and that the factories did not reduce prices during that period. Although the factories were not accused of monopoly high pricing during that period by failure to reduce prices when possible (a potential violation under the law), the decision nonetheless stated that, “the fact that the level of profitability during the period from April 2011 to June 2012 significantly exceeded that confirmed at the time of the last increase in prices for the given products indicates that the bread factories have no grounds for the increase in prices as from October 17, 2012.”

FAS found the prices charged for the kinds of bread analyzed to be monopolistically high after the increase and stated that the factories received groundless profit in October-November of a total of 4.6 million rubles. No explanation of the calculation was provided, but it is presumably based on prices with and without the rejected increase. The factories were ordered to reduce their prices “by the amount of the groundlessly excessive profits.”

2. Oil markets

Discrimination and monopolistically high prices were alleged in the wholesale markets for diesel and jet fuel by Gazprom Neft OJSC, TNK-BP OJSC, Lukoil OJSC, NK Rosneft OJSC, and Bashneft OJSC (henceforth, vertically integrated oil companies). In one part of the case, the profit margin of filling stations belonging to the vertically integrated oil companies was compared with that of other filling stations (statistics not provided), and the average profit margin of the “other” stations was compared in September 2010 and December 2010 (decline from 26% to 5%). Also, the difference in diesel prices in September 2010 and December 2010 was compared with the difference in prices of inputs at the same dates. According to the investigation, the cost of unrefined petroleum had not risen, nor had excise taxes, and refining costs had fallen. Common costs were allocated according to accounting rules, which specified allocation proportionate to the value of sales of the various products. FAS found that wholesale diesel prices rose faster than input costs and concluded that consumers were harmed by the monopoly high price and discrimination in favour of the vertically integrated filling stations.

Gazprom Neft, Lukoil and Rosneft voluntarily recognized the fact of fixing monopolistically high prices in diesel and jet fuel markets.⁴⁵ Fines imposed and paid

⁴⁵ FAS press release 23 December 2011, “FAS Russia found that “TNK-BP Holding” OJSC violated the antimonopoly law” at

under the “third wave” of cases were approximately RUB 1.3 bn (TNK-BP), over RUB 900 million (Gazprom Neft), RUB 1.7 bn (Rosneft) and RUB 778 million (Bashneft).⁴⁶

Table A. Incremental price and cost of diesel fuel from September, 2010 to December, 2010

	Companies		
	OOR	MOR	YaNOS
Cost increase	22.98%	14.52%	10.48%
Price increase	42.71%	37.93%	42.02%

In another part of the case, the absence of harm to consumers was established by comparing profit rates in two periods and finding that they did not differ significantly. Lukoil’s gross profits from jet fuel in the third and fourth quarters 2010 were compared. Upon finding that an increase in the jet fuel price did not increase profit rates, FAS concluded that consumers were unharmed by the price rise.

3. Insurance

An association of insurance companies allegedly restricted competition by imposing stricter conditions than those set out in the relevant law. The entry into force of Federal Law No. 225-FZ on 1 January 2012 required owners of dangerous installations to purchase civil liability insurance for dangerous installations, which had been voluntary until then. The law requires insurers who provide that type of insurance to be members of the professional association of insurers, the NSSO.

Twenty-seven members of NSSO established stricter membership rules than those specified in the law, including two years experience in providing the relevant type of insurance and joining and membership fees in the amount of RUB 6 million (USD 200 000). The FAS Commission investigating the case interviewed insurance companies

http://en.fas.gov.ru/news/news_31949.html?print=1&isNaked=1 accessed 30 December 2012.

⁴⁶ FAS press release 25 July 2012, “380 million Rubles is the last fine paid by “Rosneft” group of persons under the “third wave” of antimonopoly cases,” at http://en.fas.gov.ru/news/news_32374.html?print=1&isNaked=1 accessed 30 December 2012.

exiting the market and assessed the state of competition in the market for voluntary insurance. It found that, of the 258 insurance companies that offered the relevant insurance in the voluntary market, about 200 that met the license requirements set out in the law could not enter the compulsory market due to NSSO's fees. NSSO was found to violate Article 11, part 4, clause 4 and ordered to change its charter and rules.

Source: FAS and additional sources as noted

The economic analysis in the Penza bread case leaves much to be desired. Market shares are crucial to the finding of dominance under the law. In this case, the denominator—the size of the total market—is estimated from a per capita consumption statistic rather than from estimates of total current sales of bread in Penza. The sum of recent annual sales of the other named wholesaler suppliers and the factories under investigation would give an estimate, although likely biased towards an underestimate and thus towards a finding of larger market share. The finding of an abuse rests on the comparison of the rate of price increase with the rate of input cost increase. Other reasons why prices might rise—increase in bread demand or reduction in supply by rival bread-makers, increase in fixed costs, or anticipation of higher flour prices combined with the administrative cost of instituting a price change—were not addressed. It is noteworthy that the factories under investigation would, by raising their price as notified, then bring their price in line with that of a rival in the market. If the cost of switching bread supplier is low, then price differences, if prices were freely chosen, would not persist in a single market. It could have been informative to compare prices with those in other markets with similar costs but thought to be competitive. The Register's role was to impose an obligation to notify the price increase, which triggered the investigation and ultimately the order to reduce price.

Significant elements of an economic analysis are missing from the descriptions of the oil cases provided. It is not known whether the analysis was performed but not provided, or not performed. Most noticeable is the implicit assumption that prices track accounting costs, unless a dominance abuse occurs.⁴⁷ This assumption also appears to underlie the definition of

⁴⁷ Among other parts of the analysis not presented are: how the dates were chosen; the sensitivity of the results to date choice; why prices at the first date are considered to be an appropriate benchmark; the pattern of price movements across longer time periods; why the investigators considered accounting data to correspond to economic cost concepts despite the cases

monopolistically high prices, as described in the section above about abuse of dominance. While a handful of markets do have the features that lead to this kind of pricing conduct, most markets do not. In addition, the idea that profit rates of retailers may differ systematically for reasons unrelated to possible discrimination in pricing of their major input, for example having more or less profitable locations, was not explored in the description provided.

The second case, involving the association in which membership is mandatory increasing the cost of entering an insurance market, indicates more economic analysis. However, the materials provided neglect to draw a connection between a reduction in the number of competitors from 258 to about fifty and harm to competition, for example harm to buyers of the insurance or indeed to persons injured by dangerous installations. If suppliers are differentiated, for example by specialization in types of dangerous installations or geographic location, then the antitrust markets would be narrower and there would likely be fewer than fifty competitors in each market.

Other cases presented in this Report also point to weak economic analysis. The decision in the case concerning selective distribution of products

involving multi-product firms with long-lived assets operating in a somewhat unpredictable environment.

Analysis based on a difference in differences method, based on prices in the two markets (domestic and international) at the two (or more) dates, along with a showing that all other possible explanations for the differences could be excluded (for example, supply disruptions or different shifts of demand or changes in tariffs) would have been more reliable. Contemporary press reports mention a comparison of changes in domestic diesel prices and export netback prices (export prices adjusted for taxes and transport costs avoided if the good is not exported), between the two dates. Descriptions of cases of monopolistically high prices in wholesale gasoline markets, involving TNK-BP and ANK Bashneft OJSC, suggest a comparison had been made of changes in world prices with changes in domestic prices, between February and May 2011. But the remainder of the analysis, excluding all other possible explanations of the difference, was not reported. “FAS has also noticed that the price of diesel on the domestic market over the last two months has grown significantly compared to export netbacks, marking possible violations, [Anatoly] Golomolzin said.” Platts Press release 28 December 2010 Russia antimonopoly service mulls third wave of oil company fines. <http://www.platts.com/RSSFeedDetailedNews/RSSFeed/Oil/6702471> accessed 21 December 2012.

embodying protected intellectual property raises at least two questions of economic analysis: how do intellectual property rights enter the analysis for the delineation of product markets, and how are the effects on competition distinguished from the effects on disappointed would-be distributors? With respect to cases where a caution was issued for concerted practices, how could the pricing conduct of owners of housing be affected by the comments of a real-estate broker? If indeed the broker's comments provided new information to the market, it would normally be thought to increase the market's efficiency.

Three related weaknesses are of concern. First, the use of modern economics-based assessments in competition cases remains weak. Several provisions in the law, in accordance with the common approach of modern competition regimes, require an assessment of the effect on competition of the conduct under review, a demand made both on the competition authority and the courts. If the difficulty of performing economic assessments results in the non-enforcement of certain provisions, or erroneous application, then competition law becomes less comprehensive and less effective. Second, a misapprehension that competition in actual markets should closely resemble concepts of competition in economic theory can result in erroneous application of the competition law, with market distortions or even directly anticompetitive effects. Third, the implementation of the competition law in the territorial offices, which affects the conduct and treatment of the vast majority of Russian businesses, may not match the implementation in the Central Office, with its greater exposure to interactions with other competition regimes and agencies and the sharing of foreign competition law experience. The effects of errors or distorted application of competition law rules are magnified by the risk of significant sanctions. These concerns follow from a pattern of decisions made under the competition law.

From the foregoing, it is recommended to improve the quality of the economic analysis of FAS in competition enforcement throughout the competition authority. Complementary changes in the use of economic analysis in the judicial process and decisions help to spur and reinforce improvements in the authority. To meet this objective, three elements are needed: first, ensure that the definition of "signs of restricting competition," is read in a rounded manner, taking into account market features and indicators and limited to significant restriction. Second, ensure that dominance in a competition case is determined on the basis of contemporaneous information and analysis. Among other things, this would mean that enrolment on the Register of firms with market share exceeding 35% would not have a role in dominance determination. Third, ensure that specific practices are analyzed for their effect on competition rather than on specific competitors.

Increasing the transparency of the competition authority's approach to economic analysis would foster discussion and could lead to improved analyses. In order to increase transparency, it is recommended that FAS accompany its publication of its enforcement decisions with a summary of the factual basis and the reasoning behind the decisions concerned, while respecting the requirements for confidentiality. This applies to a large fraction of decisions across the range of competition law topics.

3. Institutional issues: enforcement structures and practices

3.1. Competition policy institutions

The Federal Antimonopoly Service is responsible for the enforcement of the competition law and certain other economic laws, and the Ministry for Economic Development is responsible for the general development of competition policies. The separation of tasks occurred as part of a larger restructuring of the executive and administrative bodies of the Russian Government in 2004 which saw the creation of several "services." While the separation might have initially suggested a more restricted position for FAS in the development of competition policy, FAS has in practice taken the lead in promoting the rapid changes in competition law in recent years, focusing on the development of new legislation and playing a very active public advocacy role.

FAS is a federal body of executive power that is a part of the Government of the Russian Federation. Its Head is appointed by an act of the Government for an undefined period and reports to the Prime Minister, as well as to a Deputy Prime Minister who is assigned responsibility for the subject area and to the Government as a whole. FAS's position as a part of the Government gives it the ability to comment on all draft laws and draft acts of the Government, as well as to participate in policy formation. According to FAS, its ability to participate in these processes is one of its most important tools to promote and protect competition.

FAS consists of a central (federal) body (referred to simply as FAS) and subordinate territorial offices located throughout Russia. The central office investigates cases with larger economic impact or involving national economic issues, and it is responsible for organizing law enforcement activities and providing for the functioning of the system as a whole, including budgetary support, educational measures, legislative work, analytical work and the creation of methodological guidance. It is divided into a number of departments, some of which are responsible for the enforcement of specific laws for which FAS is responsible other than the Competition Law (such as state purchasing

and strategic investment review) or for specific functions within FAS (such as legal, analytical and financial). Activity in the enforcement of the Competition Law has traditionally been divided among departments responsible for particular sectors of the economy, including those focusing on fuel and energy, transport, chemical and agro-industrial enterprises, electricity, housing and communal services and others. This structure is thought to allow staff members to be more knowledgeable about the markets in which they are enforcing the law and to be familiar with the important enterprises operating in those markets and the normal patterns of dealing. Enforcement of the rules on unfair competition is separate from the industry-based groupings and is combined with enforcement of the advertising law. More recently, as emphasis on enforcement on specific types of cases has increased, several special departments have been formed to focus work in those specific types of cases, such as those involving anticompetitive conduct by state bodies and agreements between enterprises.

The 83 territorial offices of FAS are responsible for the enforcement of the laws in each of the constituent parts of the Russian Federation, and they take part in analytical work, policy development, and prognosis of economic conditions in their areas. The size of territorial offices varies widely, from as few as ten to, in the Moscow territorial office, nearly a hundred.

Where a case (or petition) concerns two or more territories, the territorial office that receives the petition is obligated to seek the instruction of FAS on which office should pursue the case. Cases (or petitions) concerning violations of the law by federal bodies of executive power or other federal bodies are to be filed with and considered by the central FAS. In most other respects, the territorial administrations act quite independently, being guided by the procedural rules, methodological recommendations and other documents issued by FAS. Violations of the Russian Code of Administrative Violations by a territorial office can be appealed to FAS Russia, *i.e.*, the central office,⁴⁸ but this is a rare occurrence. Decisions of the territorial offices regarding competition law violations can only be appealed directly to a court. The central office collects statistical information from the territorial offices concerning their cases and other activities, but FAS has only a limited ability to supervise their current work in detail.

FAS instituted a statistically-based method for the evaluation of the work of the territorial offices in 2008. This was partly in response to the challenge of

⁴⁸ A violation of the law or procedural rules by an individual official is appealed to the head of the relevant office.

supervising the territorial offices and partly to meet the requirement that state bodies funded from the budget must evaluate their efficiency. The top territorial offices receive benefits such as bonuses, awards and additional staff, while, at least in 2008, the bottom ranking offices are to be examined to determine the reasons for their low productivity. The current performance rating system considers compliance with the competition law, advertising law, trading law and law on placing orders to meet state (municipal) requirements. The initial choice of indicators (used to evaluate performance in 2008) reflected an underlying concern about limited overall case numbers in some territorial offices and an underlying assumption that large numbers of violations were going undetected, particularly agreements and violations of state purchasing rules by state bodies. The indicators were constructed to give territorial offices greater incentives to detect those kinds of violations and violations in the electricity sector. The incentives to choose among different types of cases today are not known, and could anyway be rather attenuated given the large number of laws to which the incentives apply. The initial programme gave incentives to find violations in as large a percentage of investigations as possible, to attach specific requirements for the preservation of competition to responses on concentration control, and to impose administrative sanctions. The percentage of orders actually executed and the number of decisions or orders reversed by a court were also considered. While the percentage of violations remedied as a share of violations identified and the rate of reversal in court remain, now the amount of fines enters the score, as do two qualitative measures, activities related to competition advocacy and assessment of very important cases and test cases in the reporting period. All of the indicators are then adjusted based on the number of staff in the corresponding territorial office, so that large and small territorial offices are compared not on the basis of raw numbers but rather per capita numbers.

This system clearly produces incentives for territorial offices to increase their activity, and this is reflected in the trends in enforcement numbers shown below. However, it just as clearly creates problematic incentives by giving staff members an interest in finding a violation in each case considered, in maximising the number of cases in particular categories and in otherwise producing numbers that will ensure higher rankings in the overall evaluation. The use of indicators reflecting the number of cases in which decisions are reversed by a court may moderate this incentive somewhat, although it is problematic while courts remain unfamiliar with competition law cases and may itself also have the negative effect of discouraging the pursuit of more difficult cases. Adjustments were made subsequently to try to moderate but not eliminate incentives to skew case choices in particular directions.

The scope of responsibilities of the competition authority waxes and wanes. At present, in addition to the enforcement of the Competition Law, FAS also has primary enforcement responsibility for the federal law regulating advertising (6 151 complaints reviewed and 3 508 cases opened as the result of own-initiative investigations in 2012, with a total of 5 509 formal cases pursued)⁴⁹, primary enforcement responsibility under the law on state purchasing (18 337 verifications conducted in 2008), and responsibility related to review of foreign investment in strategic sectors. The laws on various kinds of natural resources (forest resources, water, land give FAS a role in supervising tenders for use rights and transfers of ownership rights to prevent the creation of monopoly or dominance and preserve competition in economic activities based on the use of the corresponding resource. It also supervises auctions on specific goods on which stated price regulation is being lifted.

FAS expends considerable resources on its continuing roles both in day to day supervision of natural monopolies and participation in the reform process and the creation of a regulatory regime. FAS is actively involved in the elaboration of each stage of reform, often leading the drafting process for new legislation and regulations concerning electricity, rail, and other regulated sectors. Under the law on natural monopolies, FAS reviews purchases by natural monopolies of assets not related to their sphere of regulated activity as well as purchases of ownership shares in companies operating in a natural monopoly sphere. A representative of FAS sits in the management board of the Federal Tariff Service. FAS is responsible for ensuring that rules for non-discriminatory access to the goods and services provided by natural monopolies are created and confirmed and for enforcing their observance through Article 10 of the competition law. In the sphere of electricity reform, FAS is supervising the legally required separation of transmission functions from those of generation and supply, as well as the supervisor of the electricity markets.

FAS works together with the Ministry for Economic Development on its proposals for legislative change and policy development in various spheres, for example the 2009 Program on the Development of Competition in the Russian Federation. This contained a variety of measures to reduce barriers to entry into markets, with special concentration on administrative barriers and restrictive

⁴⁹ In 2008, 3 305 cases resulted in a finding of violation and 2 058 orders were issued. The figures for 2007 are 2 465 complaints reviewed, 5 169 verifications undertaken on own initiative resulting in 2 493 own initiative formal cases and a total of 3 301 formal cases. Violations were found in 2 789 cases and 1 553 orders issued. FAS statistical reports, Form 8 for 2007 and 2008.

behaviour of state bodies and officials, improve access to goods and services produced by natural monopolies, support small business development, and provide greater access for all businesses to public procurement processes. In addition to the Ministry, the Federal Service of Financial Markets participates in the formation of competition policy on financial markets and the Bank of Russia participates in both policy making and enforcement of competition law rules in markets for banking services.

3.2. Competition law enforcement

The basic outline for handling competition law enforcement matters has not changed since 1991. There is a two or three stage procedure. In the early stage, FAS enquires whether there are indications of a violation of the law. In the second stage, a commission formed of FAS staff members formally considers the case. In the third stage, the imposition of a penalty, the procedures followed are those specified in the Code of Administrative Violations. The procedural rules for both stages under the 2006 competition law have become considerably more detailed, and in many respects are modelled on those used by the *arbitrazh* (economic) courts.

The grounds for FAS to open an inquiry concerning a possible violation are specified in the law. They include receipt of materials from other state bodies concerning a possible violation, the result of an investigation (verification) conducted by FAS, petition from a legal entity or individual person and reports in the mass media that indicate possible violation. An additional point lists “discovery” by the competition body of indications of a violation – a catch-all category that would seem to cover any other source of that information. A case can be considered by the office of the competition body located at the place where the violation was committed or at the place of the legal entity or individual concerned. The central office can consider any case, regardless of the locations involved.

Petition-based matters impose deadlines and an obligation to respond. Where a petition has been received concerning the violation, FAS must consider it within a period of a month and reply to the petitioner. If additional time or the collection of additional evidence is required, that period may be extended by up to two months, with written notice to the petitioner. At the end of its consideration of the petition, FAS will either issue a decision concerning the opening of a formal case concerning a potential violation (providing notice to the petitioner and also to the respondent(s) in the case) or a decision refusing to open a case on the grounds that there is no evidence of a violation (providing a notice to the petitioner containing and explanation of the grounds for that

decision). Like its predecessor bodies, FAS does not have discretion to refuse to pursue a petition which appears to state, or may after further investigation state, a violation of the competition law. It is obligated to investigate and respond to each such complaint or petition, without exception. It is irrelevant whether the possible violation is technical or insignificant or not fitting in with FAS's current enforcement priorities. An improper refusal by FAS to pursue a case, or a failure to respond within the legally required time period, may be appealed by a petitioner to a court or be the subject of a complaint to a procurator responsible for supervising the enforcement of the law by executive bodies.

If FAS is not certain whether a petition indicates a violation of the law, or if additional information is required at any stage of an investigation or consideration of a case, it may make demands for information from state and private entities and persons under Article 25 of the Competition Law. Article 25 obligates parties to provide, on the basis of a written demand from FAS containing justification, documents, explanations, and other information that is necessary to FAS in performing its duties. Failure to respond may result in a fine, imposed by FAS under the Code of Administrative Violations, of from RUB 1 500 to 2 500 on individuals, RUB 10 000 to 15 000 on company and state officials, and RUB 300 000 to 500 000 on legal entities (fine levels as of mid-2009). The fines are small in comparison to the resources of a large company, with a maximum equivalent to about USD 16 700, and they are the same for the provision of false information as for simple failure to respond. In practice, if information is still not provided after a fine has been imposed, FAS may be forced to make a new demand for the information and repeat the process of recognizing a failure to provide it and fining the violator. It may also go to court to attempt to force the provision of the required information. Information that constitutes a commercial or other legally protected secret must be provided to FAS when requested (except for information constituting a banking secret), but only subject to the legal rules concerning the treatment of such information. Staff members of the competition body bear liability for improper disclosure of the information, and damages caused by such disclosure are to be compensated by the federal treasury.

In addition to the ability to make written requests for information, FAS staff members have a right under Article 24 of the competition law to "unhindered access" to the premises of commercial and non-commercial organizations, federal and regional bodies of executive power, bodies of local self government and extra-budgetary state organizations for the purpose of collecting evidence and documents necessary for the exercise of FAS duties. Staff members must present their official identification and the order of the head of the competition authority concerning the conduct of an investigation. This

provision is analogous in content to others that have existed in Russian competition laws since 1991. They have all been difficult or impossible for the competition authority to use in practice, thus effectively limiting information gathering to the use of the time consuming procedures for written demand of evidence and preventing the body from obtaining the kind of evidence that is easily hidden or destroyed where notice is provided.

In order to remedy this problem, the July 2009 package of amendments inserted six new articles⁵⁰ into the law detailing the procedures for the conduct of “verifications” by the competition body. These articles provide FAS with the right to conduct both planned and unplanned verifications of federal executive bodies, all types of regional and local bodies of state power, state extra-budgetary funds, commercial and non-commercial organizations and individual persons. Planned verifications concern the observance of the competition law generally, may be conducted no more often than once within a three year period and require three days’ notice to the person or entity that is the subject of the verification. They are to be conducted on the basis of a confirmed plan of work for the competition body.

Unplanned verifications may be conducted on the basis of petitions or information received that indicates a possible violation, although the verification is not limited to the possible violation indicated in the information and may concern observance of all of the requirements of the competition legislation. Any verification that is not included in the adopted plan for verifications for the relevant period qualifies as unplanned and requires a procurator’s sanction before it can be conducted. Twenty-four hours notice must be given to the subject of the verification, except in instances where the unplanned verification is being conducted in relation to possible violations of Article 11 (agreements). Unplanned verifications may also be conducted after the time period for execution of a previously issued order has expired, in which case the subject of the verification is limited to the execution of that order.

Both planned and unplanned verifications must be conducted on the basis of a detailed order of the head of the competition authority defining (among others) the purposes and subject of the verification, the persons authorized to conduct it and the period during which it is to be conducted. The initially defined period for conduct of the verification may not exceed one month, but extensions of up to two months are available on the basis of justified request by the officials conducting the verification. During a verification, the staff

⁵⁰ Articles 25 part 1 through 25 part 6 of the law.

conducting it have the right to enter any territory or premises belonging to the subject of the verification, except for residential premises. If access is denied, the officials conducting the verification are to record this denial in the form established by the competition authority. The consequences of such a refusal did not yet appear to be defined in the law as of 2009, nor do the new provisions concerning the verification process discuss other possible responses to a denial of access, although public discussion of the new provisions often implies that police assistance may be sought to allow immediate access. Staff may inspect documents and other items and make photographs or video recordings or electronic copies. Two individual witnesses must be present during the inspection, and these may not be staff of the competition authority and may not have an interest in the case. Experts and specialists may be called to participate in a verification where necessary. The official conducting the verification may also make a formal demand for documents and information to be presented to the competition body within three days of the demand, in certified copies. If the information cannot be provided within three days, the subject of the verification may so inform the competition authority and request that another period for their submission be established. Article 25 part 4 notes that refusal or failure to provide the demanded documents and information within the established time period entail the penalties established by law, presumably the same fines provided under Article 19.8, part 5, concerning other failures to provide information. The results of a verification are to be recorded by the staff conducting it in a formal act, which may serve as the basis for the opening of a formal case concerning alleged violations.

The developing practice of working with police to gather information about competition law violations was described in section 2.2.6 above.

The terminology concerning verifications, the distinction between planned and unplanned verifications and many of the formal aspects of the procedure are consistent with broader legislation governing the procedures by which executive and administrative bodies may carry out inspections of the premises and activities of economic entities. The broader principles are designed to bring order and definition to the work of such bodies and to limit both the disruption and the potential for corrupt behaviour related to repeated inspections or audits and identification of minor violations. Observance of the competition law, however, is not quite the same as observance of the fire safety codes, and there may be some question about whether planned verifications of a company's observance of competition law rules is an effective or appropriate enforcement tool for any violation other than those related to accounting and pricing practices.

Formal consideration of a case concerning a possible violation of the law is conducted through a quasi-judicial procedure by a commission made up of an odd number of staff members of FAS and headed by the head or deputy head of the FAS office considering the case. For cases concerning violations on the market for banking services, staff of the Central Bank form half of a commission with an even number of members, and an analogous rule applies to cases concerning financial organizations with licenses issued by the executive body that oversees securities markets. The period of limitations for competition law cases is three years, so the formal case must be opened within three years of the commission of the violation, or for ongoing violations within three years of the cessation of the violation or of its discovery. Consideration of a case must generally be completed within a period of three months, but extension of up to another six months is available if necessary.

Consideration of the case must take place in sessions of the commission, about which the participants must be properly notified. A commission is competent to act in the presence of at least half of its members and resolves matters by majority vote. The petitioner (if one is involved in the case), the respondents, and third parties whose rights and interests may be affected by the outcome of the case must be notified concerning the opening of the formal consideration of the case and from that time have the right (directly or through representatives) to be acquainted with all of the materials of the case, to submit their own evidence, explanations, arguments, and petitions, and to respond to those submitted by other parties. Grounds, time periods and notification requirements for various acts and actions of the commission during the consideration of the case (joining and separation of cases, calling of experts, delay or suspension of consideration, and so forth) are defined in detail in the competition law.

A commission terminates consideration of a case if it concludes that there was no violation of the competition law, and also if the only respondents have disappeared through death of individuals or liquidation of legal entities or the matter has been resolved by a court decision. The law also provides for a case to be terminated on the basis of the voluntary elimination of the violation and of its consequences by the person or entity that committed it, and the decision on termination reflect the fact that a violation of by the respondent was established.

Where a commission finds that a violation of the competition laws has occurred, it issues a decision containing its conclusions and (in most cases) one or more orders. An order generally requires the cessation of the violation, and it may also require the violator to take actions to eliminate the consequences of the violation and/or ensure competition. Orders may require that illegally

received income be paid into the federal budget, that contracts be signed, abrogated or altered or that monopolies or dominant entities provide access to facilities or services, and they may require or forbid the transfer of rights in specific property. They may also establish reporting obligations or restrictions on the future actions of the violator, such as a requirement to report prices or sales of goods to the competition body at specific intervals or a restriction on increases in price or other changes without approval of the competition body. Such requirements are a relatively common feature of orders in cases concerning abuse of dominance. With respect to many state bodies, orders may require the repeal or amendment of acts that violate the competition law, termination of illegal agreements, or return of property or termination of rights improperly transferred as state aid (preference).

In some cases, FAS may specify the actions that must be taken to remedy a violation of the law, such as ordering that contracts be available to all customers on equal terms in a discriminatory conditions case. FAS does not, however, have the authority to specify the terms of contract between a petitioner and respondent, or to dictate in its order the correct content of a decision of a state body that it has found to violate the law (although it may review and advise on this). Similarly, FAS'S order cannot serve as the basis for mandatory enforcement by the bailiff service of forfeit of illegal earned profits. If such violations are not corrected after the issuance of an order, FAS may directly impose the available fine for failure to execute the order, but to obtain actual performance it must file a case in court seeking a court decision requiring the conclusion of a specific contract, invalidating the illegal act or decision of the state body, mandating the forfeit of a specific sum of illegal income, or other actions. The court may impose costs upon a party that improperly fails to comply, but there are no provisions allowing the court to impose additional, punitive damages or fines upon the violator outside those envisioned in the Code of Administrative Violations.

Failure to execute a legal order issued by FAS is subject to administrative penalties including fines and, in some cases, disqualification. Amendments to the Code of Administrative Violations in 2007 introduced detailed provisions differentiating the ranges of penalties for failures to execute FAS orders depending upon the type of violation concerned, with maximum fines as of 2009 on officials of companies and of state bodies of RUB 20 000 (about USD 670) and on legal entities of RUB 500 000 (about USD 16 700). While these fines are not large, they are multiples of the standard fines in the same code for failure to execute orders of bodies of control and supervision (a maximum of RUB 2 000 or disqualification for officials and RUB 20 000 for legal entities).

In addition to the issuance of orders on the basis of a decision finding a violation, FAS may impose direct penalties on the violator under the Code of Administrative Violations, which provides for fines on legal entities of up to 15% of turnover in the product market on which the violation occurred (for restrictive agreements and some abuses of dominance), and also for fines and, in some cases, disqualification of individual officers of companies and of state bodies. In order for FAS to impose penalties under that Code, it must follow the procedures specified in the Code, which differ substantially from those under the competition law. On the basis of the decision under the competition law concerning the violation, FAS must initiate a case on an administrative violation and meet all of the notice and procedure requirements for such a case. The need to complete an entire second set of legal proceedings in order to impose fines specifically designed to apply to violations found under the competition law creates additional delay and complication yet it serves little protective purpose, since the procedural guarantees in the first procedure exceed those required for the second. Arguments to avoid duplicate proceedings were not successful.

A respondent may appeal FAS's decision or order, or the administrative penalty imposed, to an *arbitrazh* court (a court handling economic disputes). In addition to the initial consideration of the case in a first instance court, full de novo reconsideration on appeal and a cassational reconsideration are also usually available. A "supervisory" review of the case may also be available through the highest court in the *arbitrazh* court system, but this is discretionary and most requests for such review are denied. For purposes of consideration of the case at any level of the courts, the burden of proof of the factual circumstances and of the correctness of its decision and order are placed upon FAS.

In previous years, courts have had difficulty in a variety of areas when reviewing competition law cases, including definitions of dominance, market definition and what constitutes an actual or possible restriction of competition. Proof of agreement and the definition and proof of coordinated action have been especially problematic, as have cases in which the competition law's provisions related to contracts (obligation of dominant entities to contract, illegality of boycotts or discrimination) overlap the provisions of the Civil Code and other laws, and FAS lost a significant portion of such cases. More recently, the courts have been significantly more amenable to FAS's arguments. In 2008, the highest court in the *arbitrazh* court system issued general guidance on issues arising in the consideration of competition law cases. Among other principles, the court instructed lower courts in the system that agreements and concerted action under the competition law can be proved using indirect evidence, including evidence that there is no other reasonable explanation for the

behaviour of the respondent parties. This change appears to have contributed significantly to FAS's increased success in bringing and defending concerted actions cases.

3.3. Other enforcement methods

Private action for damages is possible under a combination of direct prohibitions in the competition laws on particular behaviour with the general tort claims provisions of the Civil Code. Although there have been some debates as the law regulating such matters has changed concerning the limits of improper behaviour sufficient to warrant civil tort liability, a long tradition of interpretation of similar provisions of previous civil codes establishes that illegal behaviour that has been recognized as such by the proper authorities gives rise to the right. One of the first significant judgments awarding damages in a private action involved a customer of a monopoly supplier of concentrated calcium phosphate winning a judgment of almost RUB 2 billion on the grounds that the price charged led to the "unjust enrichment" of the seller.⁵¹ There have also been some cases of the successful use by parties of the competition body's recognition of unfair competition as evidence in a civil suit for damages. Cases of this kind were rare as of 2009, but may become more common due to the increased attention to competition law cases and the strong public focus on the large economic damage caused to contracting partners by violators.

Another potential avenue for enforcement of competition law is through the procurator, or public procurator. Procurators have some legal responsibilities related to protection of the public and supervision over the proper observance of the laws by state bodies. In this capacity, procurators have in the past sometimes brought suits in court demanding that the court void acts of state bodies that violate the competition law or related provisions, including those of Article 8 of the Constitution and Article 1(3) of the Civil Code regarding the free movement of goods and services. Procurators, through their

⁵¹ The case facts are somewhat unusual, in that the plaintiff had been forced to buy the product on an exchange at extremely high prices compared with other purchasers. The exchange trading of the product was suspended by the Federal Service for Financial Markets due to numerous violations and manipulation of prices through the use of multiple intermediaries. Other purchasers of the product were buying under long term contracts at prices recommended by FAS in relation to a different case. In calculating the amount of the unjust enrichment, the court compared the price charged to the plaintiff with the weighted average price of the same product delivered to other purchasers under direct contracts.

authority to take actions to protect the public interest or to address violations that affect large or undetermined groups of persons, could in theory file suits in court or petitions with FAS concerning broad violations such as improper behaviour by a monopoly utility in relation to its customers across the board. This does not appear to occur in practice.

3.4. International issues and cooperation in competition law enforcement

The competition law applies to agreements and actions that affect the state of competition in the Russian Federation, specifically including those agreements reached or actions performed outside the Federation, as well as involving foreign persons. This provision, Article 3, Part 2, was made more expansive by the 2012 amendments.

In practice, international issues arise most frequently in the performance of merger control over stock transactions, in which the participation of foreign firms is relatively common. In 2008, for example, about a quarter of petitions and notifications relating to such transactions involved foreign firms. It is sometimes difficult to obtain accurate information on all related parties or the identity of the beneficial owners of foreign corporate entities and shares. FAS sometimes addresses this issue by directing requests for assistance in obtaining and verifying necessary information to the competition bodies in the relevant countries. It is also prepared to provide information in response to requests within the bounds of confidentiality and the terms of cooperation agreements.

The competition law specifically authorizes FAS to cooperate with international bodies conducting work in the area of competition and with the competition authorities of foreign countries and to participate in the development of international instruments and treaties related to competition. FAS participates in the ICN, UNCTAD, APEC as well as the OECD. In addition to forty-seven bilateral agreements that provide for the exchange of public information and arrangement of joint events, FAS has signed a new type of bilateral agreement aimed at facilitating cooperation on particular transborder cases with five competition authorities. These agreements provide for the exchange only of non-confidential information, but also that mutual interests should be considered in investigation of transborder violations and the coordination of activities during investigations.

Some of FAS's closest work in coordination of competition policy is conducted through the Commonwealth of Independent States. The CIS has a treaty and related agreements that allow for coordinated conduct of antimonopoly policy, cooperation and information-sharing, including of

confidential information, and a permanent mechanism for joint competition investigations. Such investigations have been carried out, for example in the passenger air transport and the mobile telephony markets. Within the Common Economic Sphere of Belarus, Kazakhstan and the Russia Federation, the Agreement on Common Principles and Rules of Competition, effective from the beginning of 2012, provides for tools for cooperation in the field of competition. In particular, the Parties may send requests for information, requests and orders for carrying out various procedural actions, exchange information, coordinate enforcement activities, as well as enforce laws at the request of one of the Parties. The Agreement provides for the exchange of confidential information, although this has not yet been used. Confidential information gained through the Agreement may be used only for a purpose defined in the Agreement, must be protected as confidential, and may not be used or transferred to third parties without the written permission of the Party to the Agreement who provided it.

The competition law as well as general principles of Russian law prohibit the competition authority from disclosing information that is subject to protection as a commercial or other legally protected secret. Specific procedures for the protection of such information are not defined by law, however, and the stated prohibition is secured by a relatively modest liability on the part of an individual who reveals the information and a general state of liability of the Russian state treasury for damages caused by such revelation.

FAS sees waivers as the most acceptable tool to enable exchange of confidential information in the context of specific cases of competition law violations and merger review. However, waivers are of little use in cartel investigations or others where information would prove violation of the law. In 2009-2010 FAS participated for the first time in the use of such waivers in connection with the Sun Microsystems-Oracle acquisition. Questions of the treatment of information-sharing related to leniency applicants have not arisen.

According to FAS, a number of legal changes would be needed in order to share confidential information with foreign competition authorities. They begin with signing an international treaty or agreement and proceed with conforming amendments in several laws including the competition law and the Code of Administrative Offences, and then a FAS regulation duly registered with the Ministry of Justice. Similarly, FAS reports that a number of legal changes would be needed in order for it to be empowered to refuse to share confidential information about a Russian company or individual received during an investigation with other Russian bodies such as the tax authorities, criminal investigation authorities, and others. FAS reports that if FAS received

confidential information about a foreign company or individual from a foreign competition authority, FAS would be empowered to refuse to supply the information to other Russian authorities, such as for tax or criminal investigation, only if the international treaty or agreement prohibited it and the foreign competition authority providing the information had specified the limited purposes and addressees.

There is no uniform court practice for persons participating in judicial proceedings to familiarize themselves with court records that contain commercial secrets and which were submitted by another person. Lacking legal regulation in this area, some courts, for the purpose of protecting the rights and legitimate interests of the owner of this information, prohibit others from having acquaintance with the materials, while other provide some access so that parties can adequately present their cases. The applicable procedural code does not clearly regulate the treatment of confidential information by courts. The difficult case, in which FAS has relied on confidential information in its decision and a defendant seeks access to that information on appeal, appears not to have been addressed. It is recommended to apply rules that protect confidential information and preserve procedural fairness.

In September 2012, a presidential decree was issued that requires strategic Russian companies⁵² to get prior permission from a federal body of executive power before providing information to foreign authorities or changing their foreign economic activity. It was introduced when Gazprom was under investigation by foreign competition authorities. Given the role company-provided information plays in the analysis of competition cases, the additional time lag and the risk that requested information will not be forthcoming can hamper competition investigations. The decree raises concerns about the extent of commitment to international cooperation in competition matters.

3.4.1. Trends over 5-10 years

FAS has expanded its cooperation with the competition authorities from other jurisdictions, both bilaterally and at multilateral and international organizations. It has signed, with five competition authorities, a new type of

⁵² These include among others Gazprom, Rosneft, Transneft, Zarubezhneft, railway RZD, airlines Aeroflot, Inter RAO, and Rushydro, shipping company Sovcomflot and several defence-related companies. ITAR-TASS “Presidential decree to help Gazprom in standoff with European Commission,” 12 September 2012. <http://www.itar-tass.com/en/c39/518529.html>.

bilateral agreement aimed at coordination and consideration of mutual interests in specific investigations. FAS participated for the first time in the use of waivers for sharing of specified confidential information in connection with merger control in 2009-2010. The Interstate Council on Antimonopoly Policy of the CIS has instituted a standing body for cooperation in investigations of competition problems or violations affecting several member states. Against this general trend, the September 2012 decree that hinders certain Russian companies from cooperating with foreign competition authorities' investigations forms a stark contrast.

3.4.2. Conformity with Council Recommendation Concerning Co-operation⁵³, and Competition Committee best practices on information exchange

The Roadmap calls on the Russian Federation to commit to co-operating in investigations and proceedings applying competition laws, through notification and co-ordination pursuant to the 1995 Council Recommendation concerning Co-operation between Member Countries on Anticompetitive Practices affecting International Trade, and through implementing the Competition Committee's Statement of Best Practices for the Formal Exchange of Information between Competition Authorities in Hard Core Cartel Investigations (2005). The Council Recommendations on hard core cartels and on mergers also address international co-operation. The Russian Federation has stated in its Initial Memorandum that it accepts these Recommendations. The topics of these instruments include notification, co-ordination, exchange of information, consultation-conciliation-comity, confidentiality and privilege protection, effects on leniency applicants and informants and notification to information providers.

The Competition Law specifically authorizes FAS to cooperate with international bodies conducting work in the area of competition and with the competition authorities of foreign countries and to participate in the development of international instruments and treaties related to competition. In addition to a number of other bilateral agreements, FAS has signed a new type of bilateral agreement aimed at facilitating cooperation on particular transborder cases with five competition authorities. These agreements provide for the exchange only of non-confidential information.

⁵³ <http://acts.oecd.org/Instruments/ShowInstrumentView.aspx?InstrumentID=192&InstrumentPID=188&Lang=en&Book=False>

The competition law as well as general principles of Russian law prohibit the competition authority from disclosing confidential information without a waiver from the owner of the confidential information. However, certain Russian authorities, *e.g.*, procurators, may compel FAS to share confidential information. The exception, according to FAS, would be if there were an international treaty or agreement that prohibited such sharing and the information had been provided to FAS with specific restrictions on its use. The adequacy of protection of confidential information may prohibit sharing by those competition authorities that are bound by more specific rules concerning means of protection or that are required to assure themselves of the adequacy of protection of confidential information in order to share it. FAS is drafting an Instruction on Handling Information with Public Bodies of Foreign Countries in investigation of cases of violations of antimonopoly law, which is expected to contain a special procedure in processing documents containing confidential information. (Agreement among members of the Eurasian Economic Community allows for the possibility of exchange of confidential information between competition authorities.)

FAS sees waivers as the most acceptable means of addressing concerns related to exchange of confidential information in the context of specific cases of competition law violations and merger review. Firms are, however, unlikely to voluntarily sign waivers where the information exchanged proves or contributes to the proving of a violation.

The presidential decree requiring strategic Russian companies to *inter alia* get prior permission from a federal body of executive power before providing information to foreign authorities raises concerns about the extent of commitment to international cooperation in competition matters. The additional time lag and the risk that requested information will not be forthcoming can hamper competition investigations. Thus it is recommended that adequate safeguards be put in place to ensure that the ability of Russian companies to cooperate with and to contribute to investigations of competition authorities from third countries in a timely manner is not undermined by the legal requirements imposed by the decree.

3.5. Competition and international trade and investment

The Russian Federation has accepted the Recommendation of the Council concerning cooperation in areas of potential conflict between competition and

trade policies⁵⁴ and agreed to abide by it. As a general policy, FAS supports the maintenance of open markets for international trade as an important means to limit anticompetitive behaviour. FAS has in some cases sought changes in state regulation of international trade in connection with cases of abuse of dominance, including a FAS proposal to the Government in 2007 on repeal of import duties on raw aluminium and on cement. In some cases, it has proposed measures that would limit export or dampen the effects of swings in international market prices on commodity markets in the Russian Federation, such as in the case of oil exports. A deputy head of FAS is a member of the Government Sub-Commission on Customs - Tariff and Non-tariff Regulation, Protective Measures in International Trade, which is responsible for preparing proposals concerning regulation of international trade for consideration of the Government. Through this participation, FAS submits conclusions concerning the effect of proposed measures on competition. Where the domestic production of specific goods is highly concentrated or the share of imports in the market is significant, a conclusion of FAS is obligatory in relation to proposals for the introduction of protective trade measures, including antidumping and countervailing duties. FAS may also provide review of drafts of legal acts in the area of international trade regulation.

FAS plays a role in enforcing legal procedures related to investment by foreign firms and individuals in enterprises and activities that are considered to be strategically sensitive.⁵⁵ Foreign investors may undertake transactions that would provide them a blocking share, majority control or other rights that allow them to otherwise exercise direct or indirect control⁵⁶ of companies operating in strategic areas only with prior permission. Transactions for the acquisition of additional shares do not require prior consent if the acquirer already has majority control of the relevant company. In order to obtain consent, the acquirer must submit a petition through a procedure that is similar in form to the procedure for pre-merger and pre-transaction notification under the concentration control rules. (Because a wide variety of forms of control are recognized under the law about foreign investment, the variety of types of

⁵⁴ <http://acts.oecd.org/Instruments/ShowInstrumentView.aspx?InstrumentID=190&InstrumentPID=186&Lang=en&Book=>

⁵⁵ On the Procedure for the Accomplishment of Foreign Investment in Economic Entities Having Strategic Significance for the Defence of the Country and the Security of the State. Federal Law No. 57-FZ of 29 April 2008.

⁵⁶ Indications that a company is under control and who is considered to be in control are defined in Article 5 of the law.

transactions that are covered is considerably broader.) FAS serves as the authorized body that receives the petitions. FAS registers them, determines whether they have all of the legally required information and appendices, notifies parties of missing information and upon receipt of all necessary information determines whether control over the strategic enterprise will be established by the transaction. FAS also verifies such matters as whether the applicant possesses the appropriate license and permissions related to the strategic activity or is for some other reason not eligible to undertake the transaction. Decisions on whether a specific company will be allowed to obtain control (when the transaction leads to such acquisition) are not taken by FAS, but rather by a Government Commission to which FAS transfers the petition for review. If a decision is taken to deny an acquisition, the identity of the decision-making body and the law under which the decision was taken will be specified in the decision. Over the five years this law has been in effect, 291 petitions have been received. Of these, 159 petitions were considered by the Government Commission on Control over Foreign Investment. 151 were approved and 8 were rejected. The balance was either returned because the transaction needed no prior approval (99) or withdrawn when the parties abandoned the planned transaction (33).

3.6. Competition body resources and caseload

Table 7 shows recent trends in the resources available to FAS. Although resources have increased substantially over the past years, tasks have also changed. A notable example is the additional budget and staff intended to go towards activities in the supervision of state purchasing. FAS does not maintain records on resources devoted specifically to its competition duties. In 2009, over one-sixth of the total staff worked at the central office and the remainder in territorial offices. The numbers are professional and support staff, but not security and maintenance personnel.

Table 7. Trends in FAS resources

Year	Total Authorized Staff	Budget (millions of roubles)	Budget (millions of roubles, CPI-adjusted, 2005=100)
2011	3 079	2 277	1 290
2010	3 269	1 788	1 098
2009	3 130	1 511	992
2008	3 277	1 429	1 048
2007	2 277	965	807
2006	1 827	554	505
2005	1 827	482	482
2004	1 827	358	403

Source: FAS (CPI from OECD.statextracts)

The next table shows trends in the broad categories of competition law enforcement actions. An earlier table shows the number of merger pre-transaction petitions and post-transaction notifications.

Table 8. Trends in competition enforcement actions

	Agreements, Concerted Actions	Abuse of Dominance	Unfair Competition	State Actions and Agreements
2012:				
Petitions reviewed	1165	16 200	2 485	4 436
Formal cases opened (own initiative)	292 (91)	2 582 (308)	1132 (94)	3 848 (2 344)
Violations found	187	1907	891	3 381
Orders issued	321	1 379	660	2 591
Sanctions imposed*	2 898 655	8 421 038	60 311	9 641**(z)
2011:				
Petitions reviewed	1 661	16 225	2 070	4 239
Formal cases opened (own initiative)	482 (214)	3 197 (306)	1 065 (130)	4 032 (2 645)
Violations found	315	2310	828	3 519
Orders issued	547	1 684	653	2 680
Sanctions imposed*	2 363 202	9 980 511	67 440	15 051**
2010:				
Petitions reviewed	1 283	13 848	1 695	3 701
Formal cases opened (own initiative)	607 (313)	2736 (317)	927 (112)	4 001 (2 866)
Violations found	376	1 593	630	3 053
Orders issued	754	1 453	537	3 030

	Agreements, Concerted Actions	Abuse of Dominance	Unfair Competition	State Actions and Agreements
Sanctions imposed*	903 457	4 432 808	99 941	8 101 **
2009:				
Petitions reviewed	897	10 046	1 172	2 915
Formal cases opened	488	2411	687	3 075
(own initiative)	(284)	(350)	(186)	(2 183)
Violations found	293	1438	476	2 278
Orders issued	393	1251	365	2224
Sanctions imposed*	1 400 924	31 299 620	52 326	230**
2008:				
Petitions reviewed	341	6 156	906	2 361
Formal cases opened	355	1 639	488	2 160
(own initiative)	(257)	(158)	(78)	(1 502)
Violations found	181	862	292	1 457
Orders issued	171	748	241	1 398
Total sanctions*	1 657 888	11 864 324	69 052	N/A
2007:				
Petitions reviewed	195	5 290	840	2 557
Formal cases opened	232	1 331	448	1 407
(own initiative)	(163)	(113)	(86)	(823)
Violations found	94	676	315	816
Orders issued	78	614	245	771

	Agreements, Concerted Actions	Abuse of Dominance	Unfair Competition	State Actions and Agreements
Sanctions imposed*	4 260	302 402	3 435	N/A
2006:				
Petitions reviewed	98	3 862	650	2 321
Formal cases opened	66	1 161	303	1 553
(own initiative)	(36)	(135)	(40)	(968)
Violations found	22	643	199	849
Orders issued	22	613	169	774
Sanctions imposed*	N/A	N/A	N/A	N/A
2005:				
Petitions reviewed	75	3 587	592	2 432
Formal cases opened	64	1 026	299	1 097
(own initiative)	(35)		(52)	(560)
Violations found	32	608	189	718
Orders issued	42	590	152	665
Sanctions imposed*	N/A	N/A	N/A	N/A

*Source: FAS statistical reports, Forms 1, 5 and 9. Sanctions reported are in thousands of roubles. Sanctions for abuse of dominance and agreements, as well as for unfair competition, came into force during 2007. 2008 is the first full year in which the provisions were applicable.

** Data under Article 14.9 of the Code of Administrative Offences of the Russian Federation "Restriction of Competition by Government Bodies and Local Government Authorities"

(z) For 1H2012.

The vigour of competition law enforcement depends in part on the characteristics of the competition authority. FAS is geographically dispersed and has a broad remit, encompassing mainstream competition rules, unfair competition, non-pricing conduct of natural monopolies, actions by public officials and public bodies as well as roles under the advertising, public procurement and other laws. The competition authority's long list of

responsibilities is a long-standing concern. It can also be difficult for more isolated territorial offices to stay updated with developments in the law and underlying economic thinking.

4. Limits of Competition Policy: Exemptions and Special Regulatory Regimes

4.1. Economy-wide exemptions and special treatment

The competition law contains no general exclusions for specific spheres of the economy or particular kinds of enterprises. A few articles do contain limitations in application to intellectual property or innovation, and a number of articles allow exceptions to be created by laws or other legal acts.

Intellectual property and the results of innovation are provided a certain degree of exemption in Articles 10, 11 and 13. The removal of the Articles 10 and 11 exemptions is under discussion. Article 10 provisions on abuse of dominance contain an explicit exception for activities related to the exercise of exclusive rights in intellectual property or of rights in trademarks and other legally protected means of firm or product identification. Article 11 provisions on agreements explicitly except agreements about providing and (or) alienating the right of using the results of intellectual activity or trademarks or other means of firm or product identification. Neither of these provisions has been applied since they came into force in 2006, according to FAS. The competition authority states that it interprets the abuse exemption as applicable only to the “exercise of the intellectual property right,” defined as the use of the intellectual property by the right holder in its own activities or the sale or licensing of the right to others. Exercise does not, however, include activities putting products in which the intellectual property is used into circulation, such as their sale. This understanding of the exemption narrows it significantly in relation to abuse of dominance. Indeed, it would appear to apply only to possible abuses by means of the imposition of inappropriate or burdensome conditions in contracts for the licensing or sale of the right to use the intellectual property. A right holder that chooses to use the intellectual property in its own manufacturing processes and to sell the resulting good will, if found dominant, be subject to all of the law’s restrictions on abuse of dominance in relation to those sales.⁵⁷ The Government

⁵⁷ In a 17 May 2013 speech, the head of FAS suggested that an abuse of dominance could be found if parallel imports were sold in Russia at a price greatly exceeding the price at which the same products were sold in the country from which they were exported. “Antitrust watchdog proposes legalizing parallel imports,” RAPS Russian Legal Information Agency, 17

Action Plan (Roadmap) would remove the Articles 10 and 11 exemptions. The general exemption under Article 13 is available if, in addition to meeting other criteria, the conduct results or can result in perfection of product or sale of a good, or stimulation of technical or economic progress or increased competitive capacity of Russian goods in the world market.

The Law's prohibitions against acts, actions, and agreements of state bodies and officials that restrict competition (Articles 15 and 16) apply on the federal level only to executive bodies. They do not apply to federal laws. A federal law that seriously restricted competition, and in particular a law that created barriers to the movement of goods and services within Russia, might conceivably be found to violate constitutional guarantees. This would require a decision of the Constitutional Court to determine whether the limitation was for constitutionally acceptable purposes, such as protection of life and health, and was proportional to the purpose served.

The combination of the functions of state bodies and those of an "economic subject" is in general prohibited, but Part 3 of Article 15 contains a broader exemption in instances where this is provided for by federal law, presidential edict or decree of the Government of the Russian Federation. By contrast, delegation of any functions the exercise of which does or may restrict competition to any of the bodies of state power of the constituent parts of the Federation or to bodies of local self government is permissible only by federal law. Delegation of the functions of state bodies to an economic subject is only allowable in relation to Rosatom, the state corporation responsible for atomic energy.

The term "economic subject" is used throughout the law to refer to participants in economic activities whose rights and obligations are defined by the law or whose interests are being protected. Article 4 of the law defines "economic subjects" as individual entrepreneurs, other physical persons involved in a professional income-generating activity, commercial organizations and non-commercial organizations carrying out activity that brings them income. Individual persons who are neither entrepreneurs nor involved in a professional income-generating activity are within the general coverage of the Law under Article 3, but would not be covered by references to "economic subjects" unless they form a part of a group of related persons as defined by the law. Although there is no specific exception in the law for labour, the use of the

May 2013, <http://rapsinews.com/news/20130517/267421022.html> accessed 21 May 2013.

term “economic subject” in the articles of the law that might otherwise apply would exclude the application of the law in that area.

There are no exemptions or special treatments under the law for small enterprises, nor is there a *de minimis* rule applicable to most of the law’s prohibitions. Vertical agreements are exempted under Article 12 if they involve only economic subjects with a share of less than 20% on any market. Concerted actions are exempted under Article 11 part 1 if the market shares of the involved economic subjects are below 20% (combined) and below 8% (individual). Support of small and medium enterprises is an acceptable purpose for the provision of state or municipal preference under Article 19, with the prior approval of the competition authority.

4.2. Regulation and reform of natural monopolies

Natural monopolies’ conduct is regulated under the competition and natural monopoly laws, as well as sector-specific laws. The federal law on natural monopolies narrowly defines them, and direct legal regulation is narrow and focused almost exclusively on tariffs. The competition law is applied on a case-by-case basis to other natural monopoly conduct, and certain provisions apply specifically to natural monopolies. The structure of natural monopoly sectors has been subject to various degrees of reform, with ownership separation in the electricity sector and other sectors generally separated into vertically related joint stock companies.

The competition law enforcement has given unsatisfactory overall results. This follows from the inability to prescribe generally applicable limits and requirements for natural monopoly behaviour outside of tariff rates, and the limited deterrence effect of the low sanctions available until the 2009 amendments. In addition, some structural changes have made it more difficult to achieve efficient outcomes: Privatization without taking account of the inherited infrastructure has produced “small” natural monopolies that control other parties’ access to basic services, for example, an industrial plant controlling electricity facilities that also serve other industrial plants in the estate, and contracting practices, related primarily to municipal utilities, have multiplied the number of firms that are monopoly providers.

The structure and regulation of the energy and communications sectors will change, according to Government decrees. The Energy strategy of Russia

for the period to 2030⁵⁸ has implications for competition and regulation in the petroleum, natural gas, coal, electricity and heat sectors. This Strategy replaces one for the period to 2020. The 2030 Strategy notes that, despite its high priority in the earlier Strategy, the aim of highly competitive energy markets with fair trading principles was not achieved. Exchange trade in oil and oil products was established, the electricity sector was restructured and the coal industry was restructured and liberalized, according to the Strategy, but the 2030 document also points to remaining regional and technological monopolies, unfair competition, disparate domestic energy prices, and insufficiently transparent access to energy infrastructure. Strategy 2030 will inter alia improve control over concentrations in the energy markets, improve regulation of natural monopolies in the energy sector, establish exchange trade for all types of fuel and energy resources, enhance access to energy infrastructure (trunk pipelines, electricity and heat networks), and establish an effective and stable pricing system on energy markets. The latter is to be achieved by greater use of energy derivatives and long-term energy supply contracts. The regulation of retail prices for energy (gas, heat, electricity and oil products) is to ensure reliable and affordable energy to households. Demonopolization of the gas market is a strategic goal, along with creation of a competitive environment and non-discriminatory access to gas industry infrastructure.

Changes in the regulation of the communications sector will result from the Russian Government's Action Plan (Roadmap) for "Promotion of Competition and Improvement of Antimonopoly Policy" of 28.12.2012. It describes measures to be undertaken in 2013-2015 in a handful of individual sectors, of which communications is one. The radio frequency allocation plan will be revised and a report will be drafted on how to prevent distortion of competition and discrimination among technologies. Two planned Government Resolutions will, respectively, reduce fees on local fixed line services and impose non-discriminatory access to communication infrastructure owned by natural monopoly entities. Research will be performed to determine whether tariff regulation of fixed line services should be ended.

⁵⁸ The Strategy's aim is to maximize the effective use of natural energy resources and the potential of the energy sector to sustain economic growth, improve the quality of life of the population and promote strengthening of foreign economic positions of the country. It was approved by Decision of the Government of the Russian Federation No. 1715-r dated November 13, 2009 accessed at http://www.energystrategy.ru/projects/docs/ES-2030_%28Eng%29.pdf.

The next section describes the general scheme for the regulation of natural monopolies, and following sections describe the reforms and regulations of specific natural monopoly sectors.

4.3. General Scheme

The competition law, the law on natural monopolies, and sector-specific laws govern the regulation of natural monopolies. The natural monopolies that are identified in the Federal Law on Natural Monopolies are explicitly subject to tariff regulation by bodies created or assigned by the Government. A tariff fixed by a natural monopoly in accordance with legislation cannot be found to be monopoly high or monopoly low under the competition law. Other, *i.e.*, non-pricing, conduct by economic subjects is subject to the competition law. To increase the effectiveness of the competition law in its application to natural monopolies, it was amended to enable the Government to adopt non-discriminatory access rules for natural monopolies. Also, a new law on procurement by specified types of economic entities, among them natural monopolies, imposes rules designed to strictly limit the conduct in which they may engage to extend their scope.

The Federal Law on Natural Monopolies requires that the prices and tariffs charged by such monopolies be regulated by the bodies created or assigned for this purpose by the Government. The law contains an exhaustive list of the types of activities that are to be considered natural monopolies, and includes:

- transport of oil and petroleum products through main pipelines;
- transport of gas through pipelines;
- rail transport;
- services of transport terminals, airports and ports;
- basic local telephone services and basic postal services;
- transmission of electric energy;
- transmission of heat energy;
- operative-dispatcher service controlling transmission in the market for electric energy;
- services related to the use of the infrastructure of internal waterways, and
- disposal of radioactive waste.

The general tariff regulator is the Federal Service for Tariffs (FST), an executive body subordinate to the Government of the Russian Federation. FST regulates prices and tariffs of natural monopolies and also in other circumstances where prices are regulated by the state.⁵⁹ Decisions related to natural monopolies are taken by a board within FST that includes five representatives of FST, one representative each from FAS, the Ministry for Regional Development and the Ministries of Communications, Transportation and Energy and two from the Ministry of Economic Development.

Price regulation takes the form either of specifically set prices or price caps, along with a designation of customers that must be served by the natural monopoly on a mandatory basis and definition of the required volume of service to various customers if there is insufficient capacity to supply all of the relevant demand. A limited involvement in investment decisions is also allowed. However, direct regulation of contract forms or contract terms (other than prices and tariffs) by the regulatory body is not allowed. Consequently, these disputes are often brought by the customer to FAS as an abuse by the regulated monopoly of its dominant position.

Monopoly suppliers that are not covered by the list in the Law on Natural Monopolies may nevertheless be subject to regulation of price and terms of contract by other legal acts. Enforcement of the rules, however, generally requires individual customers either to file suit in court or file a complaint with FAS concerning abuse of a dominant position. Court procedures are more formal and time-consuming than those used by FAS, and courts will not undertake an investigation in the way that FAS is obligated to do.

Structural change in the past two decades has sometimes multiplied monopolies. There are two ways this occurs. In some instances, firms have obtained rights to operate parts of state- or municipally-owned infrastructure, a process that can lead to better or innovative services but also to successive monopolist structures. In other instances, ownership of network infrastructure providing distribution of electricity, gas or other services has been broken into smaller, complementary pieces. For example, an industrial complex or large factory may be broken up during privatization or later sale or lease of space. As a result, one of the enterprises in the complex may end up with the ability to control the flow of power or fuel or other services to other users, due to the location on its premises of the main transformer and circuit breakers, main

⁵⁹ This latter category includes products related to atomic energy, some defence related products and a variety of others.

transmission cable or other equipment necessary to measure and control fuel, power or other services. This enterprise becomes a small “natural monopoly” in the sense that it controls, *e.g.*, the transmission of energy to the other entities in the complex. Such enterprises are not “utilities” in the usual sense. Even where the other users have direct contracts with the supplier of the fuel or energy, the controlling entity may demand payment from its neighbours for its services in transmitting the fuel or energy through infrastructure that is considered its property, or it may refuse to allow the contracted amount to be used or take extra power or fuel for its own needs. Disputes may arrive at FAS in the form of complaints about abuse of dominance.

Conflict between the competition law and acts regulating natural monopolies is avoided by exceptions in the competition law. A tariff fixed by a natural monopoly in accordance with legislation cannot be found to be monopoly high or monopoly low under the competition law. Prohibitions of burdensome conditions of contract and price discrimination contain exceptions for instances in which the terms are required by federal law (or specified other legal acts). Other conduct, such as tying and all kinds of burdensome terms or price discrimination that are not positively required by law, would be covered by the competition law.

The competition law contains a number of provisions establishing additional rules and requirements for natural monopolies, many of which were added in the 2009 and 2012 amendments:

- require the Government to create rules for non-discriminatory access for all goods and services sold by regulated natural monopolies as well as markets controlled by them as a consequence of the need for their cooperation or services (Article 10, Part 3);
- require that transactions which transfer the rights to use the basic assets of natural monopolies that are in state or municipal ownership are to be conducted on the basis of open competitive bid or auction (Article 17 part 1); and
- establishes standards for disclosure of information. (Article 8 part 1.)⁶⁰

⁶⁰ The article provides for (1) Description of standards, prescribes that they be publicly available, prescribes transparency of activities of natural monopolies, as well as their regulation, conditions of sale (price, quality, etc), unlimited access of consumers to regulated product, investment programmes

- provide for the competition authority to issue warnings for abuses of dominance (Article 25 part 7), which enables firms to be signalled to change their conduct without the burden of opening a formal case.

Non-discriminatory access rules apply to a number of sectors.

- Rules on access to major oil pipelines and terminals in sea ports for export have existed for some time, and were expanded to cover all major oil pipelines. The new rules require disclosure of available capacity and aim at maximal use of the capacity.
- Access rules for major gas pipelines, which provide that access to free capacity be proportional to output volumes so as to increase independent organizations' share, are contained in a draft Resolution submitted by FAS to the Government.
- Various parts of the electric power sector are subject to non-discriminatory access rules, including transmission, operations and dispatch, and the wholesale market trading system, as well as non-discriminatory technical rules for connecting, respectively, energy-taking and energy-producing devices.
- Certain airport services, *e.g.*, supply of aviation fuel, have been subject to non-discriminatory access rules since 2009, but a draft Resolution would specify non-discriminatory access to infrastructure for self-servicing consumers, make access obligatory for ground handling services at large airports, and specify a minimum number of operators that must be admitted to the provision of certain services at large airports.
- Rail infrastructure of general use is also subject to non-discriminatory access rules.
- Certain natural monopolies must disclose certain information, again aimed at non-discriminatory access.

are to be public. (2) The standards must be approved by Government of the Russian Federation, and it may empower executive body to establish specific rules. (3) Observance is exercised by executive body designated by the Government.

- Non-discriminatory access rules for other sectors have been drafted but not adopted (telecommunications, postal services, harbour services, inland waterways infrastructure and transport terminals, and natural gas)⁶¹

Natural monopolies, as well as other specified types of legal entities, must purchase goods, works and services according to specified rules. These are included in Federal law No. 223 “Concerning purchasing of goods, works, services by some types of legal entities,” which fully entered into force on 1 January 2013. All information about purchasing must be placed on a specified website by all state-linked companies and affiliates/associated companies of state companies as well as natural monopoly entities.

The Russian Government’s Action Plan (Roadmap) for “Promotion of Competition and Improvement of Antimonopoly Policy” of 28 December 2012 describes measures to be undertaken in 2013-2015 in a handful of individual sectors. These sectors are the drug market, medical services, air transport services, communication services, preschool education services, market of petroleum products. In the drug market, the notion of “interchangeable drugs” will be introduced, and prescriptions will be required to use international non-proprietary names. In the communications market, the radio frequency allocation plan would be revised and there would be a report on the interaction of operators aimed at preventing distortion of competition and discrimination among technologies. An April 2013 Government Resolution would reduce fees on local fixed line services, and research would be performed aimed at determining whether tariff regulation of fixed line services should be ended. A June 2013 Government Resolution would impose non-discriminatory access to communication infrastructure owned by natural monopoly entities.

The next few sections describe the regulation and reform of specific sectors.

4.4. Electricity

Reform and regulation is significantly more advanced in the electricity sector than in other natural monopoly areas. The sector is regulated by eight federal laws and 33 Government decrees as well as by orders of the Ministry of

⁶¹ [http://search.oecd.org/officialdocuments/displaydocumentpdf/?cote=DAF/COMP/AR\(2012\)14&docLanguage=En](http://search.oecd.org/officialdocuments/displaydocumentpdf/?cote=DAF/COMP/AR(2012)14&docLanguage=En) (Rail) para. 49 and FAS; (information) para. 50.

Energy, the Federal Tariff Service (FTS) and the FAS. Among the most important are the sectoral law, “On the electric power industry,”⁶² (the “electricity law”) and rules governing the wholesale and retail markets, non-discriminatory access to infrastructure and the basic principles for price formation.

Part of the reform process involved the separation of generation and sale of electricity from transmission and dispatch, with the latter being regulated as natural monopolies and the former moving gradually out of strict forms of regulation. A wholesale spot market for electric power was established covering large parts of Russia under the oversight of an administrator. Rules for operation of the wholesale market and the terms of contracts between participants were defined in detail by a Government decree. As of August 2012, 68 major power producers had been sold to private investors through public stock offerings and were operating independently on the wholesale market. The electricity law defines the lower bound of dominance in an electricity market as 20% of the generating capacity (or consumption) within the geographic bounds of a market in which electricity circulates freely. Price manipulation on the wholesale or retail electricity market is a violation of the competition law that may result in behavioural restrictions, including on price bids or regulation. Repeated violations can result in involuntary demerger. FAS attaches great importance to opportunities created by these regulations for the control over the behaviour of the majority of large players in electricity markets and the prevention of price surges. From mid-2006, no legal entity or entrepreneur could be active both in generation-sale and transmission-distribution. By January 2008, FAS had made 145 decisions on the mandatory reorganization of economic entities or their activity to eliminate such combinations, but no others through mid-2012. In making these decisions, FAS must confront the complications of inherited infrastructure and piecemeal privatization.

Non-discriminatory access rules and rules for connection to the electricity grid are enforced by FAS. Despite the existence of relatively detailed rules, violations are a concern, including refusals to contract, refusals to connect specific customers to the grid and various forms of overcharging or imposition of additional requirements for contracts, especially in relation to connection. These kinds of difficulties particularly affect small and medium enterprises, and several decisions and Government decrees aim to expedite contracting with such enterprises and limit the price and additional conditions for connection.

⁶² Federal Law of the Russian Federation No. 35-FZ “On the Electric Power Industry” of 26 March 2003.

FAS aims to inform small businesses of their rights and to collect information on the behaviour of network companies, and incentivize territorial bodies to discover violations in this sphere.

Although the reform in the electricity sector is considered an example for others, *e.g.*, the gas sector, in which there has not yet been significant progress, the reform is incomplete. A recent IEA study pointed out that over 60% of total generation assets are owned or controlled by government-owned enterprises, and that congestion shrinks the geographic extent of markets in such a way as to result in concentration and significant market power.⁶³ Other changes could result in more competition and more efficiency, such as giving Guaranteeing Suppliers greater incentives for cost-effectiveness, promoting competition in fuel supply markets (gas-fired generators represent about 40% of domestic electricity generation), and more market-based procurement of ancillary services and other improvements to system operation.

4.5. Natural gas

Some steps towards regulatory reform in the gas sector had been taken years ago, but the sector remains dominated by vertically integrated Gazprom. Gazprom was restructured as an open joint stock company and the different types of business activities (production, transportation, distribution and sales) were separated into different legal entities with separate accounting within the Gazprom group of companies. Gazprom is majority owned (50.002%) by the Russian Federation. An initial set of rules for non-discriminatory access to the gas transport and gas distribution networks, a decree of the Government of the Russian Federation, was adopted some years ago.

Gazprom is the legal monopolist for the export of natural gas.⁶⁴ Despite access regulation, cases considered by FAS indicate that access to the main pipelines as well as to local and regional distribution networks continues to be a problem. The decree regulating access to the gas transport network is being amended, according to FAS. Demonopolization of the gas sector is a strategic goal according to the Government's Energy Strategy to 2030.

⁶³ Cooke, D. A. Antonyuk and I. Murray (2012) "Toward a More Efficient and Innovative electricity Sector in Russia, IEA Consultation Paper p. 3.

⁶⁴ 2006 Federal Law No. 117-FZ on Gas Export. See Gazprom (2012), <http://www.gazprom.com>.

4.6. Petroleum products and pipelines

The oil pipeline network has been separated from the rest of the oil sector for some time. Transneft is an independent joint stock company wholly owned by the Russian Federation. It owns almost all of the trunk oil and oil products pipelines in Russia.

Refusal to contract with new entrants for use of the pipeline is a common problem. Rules for non-discriminatory access to the natural monopoly services of transport via pipeline of crude oil and refined products were established in 2011, but are scheduled to be amended to promote more efficient use of the main pipelines.⁶⁵ Pricing for pipeline transport is regulated under the law on natural monopolies. Less than 35% of oil is transported by pipeline, according to FAS

Trade in petroleum products has been a particular focus of the competition authority. The problem is seen as one of illiquid markets with a large share of related party transactions. The Russian Government's Action Plan (Roadmap) for "Promotion of Competition and Improvement of Antimonopoly Policy" of 28.12.2012 plans for 2013-2015 that at least 10% of the various petroleum products will be sold at exchanges. Pricing indicators based on off-exchange and exchange transactions, as well as prices in foreign markets, are to be formed in 2013. A 2012 amendment to the competition law states that prices generated in exchanges meeting certain conditions, which will be established by regulation, cannot be found to be monopolistically high (Article 6, part 5). The conditions primarily relate to liquidity but also FAS may disqualify prices as a benchmark if it finds the market to be manipulated by dominant firms. Market manipulation is not defined in the law.

⁶⁵ Government resolution No. 218 dated 29.03.2011 established the rules (Annual Report on Competition Policy Developments in the Russian Federation 2011, [http://search.oecd.org/officialdocuments/displaydocumentpdf/?cote=DAF/COMP/AR\(2012\)14&docLanguage=En](http://search.oecd.org/officialdocuments/displaydocumentpdf/?cote=DAF/COMP/AR(2012)14&docLanguage=En))
The amendments are due by March 2013, according to the Russian Government's Action Plan (Roadmap) for "Promotion of Competition and Improvement of Antimonopoly Policy" of 28.12.2012.

4.7. Rail transport

136. The rail sector has been undergoing reform for more than a decade.⁶⁶ Starting from a monolithic Soviet ministry, the sector has been transformed into several open joint stock companies, with the different business activities placed into separate legal entities and state supervision transferred to other bodies by 2004.⁶⁷ Russian Railways (RZhD OJSC) remains state-owned and retains ownership over rail infrastructure and all traction, as well as being the main provider of freight transport. Long-distance passenger transport is provided by a RZhD affiliate and regional passenger services are provided by RZhD with constituent parts of the Federation. However, as late as 2007 an ECMT review judged the internal accounting as not sufficient to consider the various activities as being separated in an accounting sense. That review also found the Government's competition objectives in the sector as well as the authority of the tariff regulator to be unclear.

137. Despite these difficulties, there has been substantial entry into markets for rolling stock: By 2006, the share of the total freight wagon fleet belonging to independent carriers, operating companies or other private owners had reached 32%. In passenger transport, more flexible tariff regulation was instituted for higher quality services, resulting in the corresponding investment in equipment improvements and a steady increase in the availability of multiple classes of service on various rail lines.

138. However, reform has stagnated in the infrastructure and traction parts of the sector, according to FAS. This restricts the effectiveness of reform overall since independent operators must contract with RZhD for transport of customers' freight. RZhD has repeatedly been found to discriminate in favour of its own subsidiaries. Although rules for non-discriminatory access to the "railway transport infrastructure of general use" have been enforced by FAS

⁶⁶ The reform is being conducted on the basis of the Program for the Structural Reform of Rail Transport, confirmed by Decree No. 384 of the Government of the Russian Federation of 18 May 2001. It extends to 2015. Among the programme's main goals are: separation of government regulation functions from economic activity, separation of core activities from other types of activity, transition away from monopolization of the sector and toward competition and retention of state regulation of the monopoly sector (infrastructure).

⁶⁷ ECMT (2007) Regulatory Reform of Railways in Russia: 2007 Update. <http://www.internationaltransportforum.org/Pub/pdf/07RussRail.pdf>.

since 2003⁶⁸ access remains difficult.⁶⁹ As of 2009, RZhD continued to have high percentages of some lucrative freight markets (for example, about 60% of the market for liquid petroleum products). According to FAS, further reform should increase private capital investment in the infrastructure, develop a competitive market for traction, and regulate tariffs in the long term.

4.8. Air transport

Air transport was substantially restructured and, in stages, liberalized over the past decades. However, competition is underdeveloped. The introduction of competition in airport services has been slower.

When the initial privatization and restructuring of air transportation was accomplished, division of the single national air transportation entity Aeroflot took place along local and regional lines, often producing new companies with control not only of local or regional air transport, but also the corresponding airports. FAS's analysis in the late 2000s indicated that about two-thirds of all domestic routes were served by one airline, but the remaining third were served by two to six. It found significant competition only on a limited number of particularly profitable routes, primarily those connecting Moscow with the administrative centres of some regions. More recent analysis found that competition remained particularly weak on regional and local routes, with about 90% of domestic routes, accounting for 23% of total passengers, being served by only one or two carriers. The entry of an additional carrier can reduce prices by up to 30%, FAS analysis found.⁷⁰ In 2007, quotas for air transport and a licensing system for routes which limited entry into the domestic market were

⁶⁸ Annual Report on Competition Policy Developments in the Russian Federation 2011, [http://search.oecd.org/officialdocuments/displaydocumentpdf/?cote=DAF/COMP/AR\(2012\)14&docLanguage=En](http://search.oecd.org/officialdocuments/displaydocumentpdf/?cote=DAF/COMP/AR(2012)14&docLanguage=En)

⁶⁹ For example, FAS issued a warning to Russian Railways OJSC in October 2012 to withdraw new rules it had imposed on consignors that would have prevented them from shipping at short notice. Fuel may be shipped as a result of exchange trading rather than according to monthly planning, and small consignors have shipping schedules no more than two weeks ahead. Russian Railways complied. FAS, 22 January 2013 press release, "Russian Railways OJSC executed a FAS warning," at http://en.fas.gov.ru/news/news_32689.html.

⁷⁰ FAS, 6 September 2010 press release: "FAS Russia: checking whether the tariffs for air passenger transportation are justified," at http://en.fas.gov.ru/news/news_30789.html.

eliminated. Now, airlines can form their own route networks. Entry into particular routes remains limited by the need to obtain takeoff and landing slots at the airport in question and to confirm a schedule of flights. FAS is of the opinion that costs of service in small and medium airports, where they exceed double the service cost in large airports, should be reduced.

International air transport is governed by intergovernmental agreements that restrict the number of carriers, volumes of transport, frequencies, points of destination and require mutual approval of tariffs. FAS has developed regulations of the draft agreement on air transportation within the activity of the Interstate council on the antimonopoly policy which are directed toward the elimination of such restrictions and the development of competition in international air transport.

Airport services are subject to regulation under the law on natural monopolies. Tariffs are set by the FST on the basis of a decree of the Government setting out the procedure and principles to be followed. FAS reports that the main types of antitrust offences have been cancellation of airport slots, related to ground handling services, cancellation of agreements to store jet fuel owned by airlines or others, and tying other services to the provision of jet fuel. In total, FAS handled more than 70 cases in the air transport sector during 2009-2011. Rules on the provision of access to services for natural monopoly entities in airports (approved by the decree of the Government of the Russian Federation No. 599 dated 22.07.2009 and valid since October 1, 2009) concerned ground-handling services. According to FAS, these rules have resulted in significant improvements in ground handling operations including the provision of jet fuel.⁷¹ A revision of the access rules is in process. In 2009, only about a quarter of all airports were served by a fuel company that was independent of the airport and only two airports had alternative companies from which to choose. In 2012, the latter number was 19, of which 11 were airports of federal significance.

⁷¹ For example, 12 airports now have at least two providers services on the aviation-engineering support for aeronautical equipment and maintenance of aircraft, 3 airports have competing providers of cleaning and equipment, 6 airports for flight catering, 8 airports for commercial services of passengers, 7 airports for the handling of baggage, cargo, and mail; 11 airports for the handling of business flights. In addition, there has been a shift towards separating ownership of the fuel from provision of the fueling service.

The Russian Government's Action Plan (Roadmap) for "Promotion of Competition and Improvement of Antimonopoly Policy" of 28.12.2012 plans for 2013-2015 aim to increase the number of airports with at least two suppliers of ground services, impose tariffs on fuel storage and fueling services, make airline entry requirements more transparent, improve subsidy programmes for routes from specified geographic areas (roughly, not European Russia), and ease certification for small airports.

4.9. General observations about natural monopoly regulation

4.9.1. Trends over 5-10 years

From the perspective of two decades, the transformation of natural monopoly sectors from monolithic Soviet ministries to open joint stock companies is remarkable. State functions are now distributed among the Federal Tariff Service (tariff regulation), sectoral ministries and the Government (overall sectoral policies), and FAS (competition law enforcement including policing abuses of dominance). There are variations among the different sectors: The electricity sector has been reformed to the greatest degree. Other sectors, *e.g.*, natural gas, have been reformed to a lesser degree: Different activities are in different joint stock companies, there are rules on non-discriminatory access to natural monopoly segments, and state functions have been transferred to other bodies. But, on the other hand, the joint stock companies are contained within a single group and access remains problematic. The degree of reform in other sectors lies between these two. For example, there has been entry into some potentially competitive segments in some sectors, *e.g.*, there are competing airlines on many city-pairs and there are competing rolling stock providers in some segments. The adoption and enforcement of non-discriminatory access rules should incrementally improve the conditions for competition in certain markets.

Competition law amendments in 2009 and 2012 aim to increase the law's regulatory efficiency. The narrow scope of regulation under the 1995 law on natural monopolies left questions of appropriate contract terms, access issues, universal service requirements, quality of service and other aspects of monopoly behaviour outside the regulator's authority, resulting in very large caseloads for the competition authority related to abuse of specific contracting partners by natural monopolies. Yet a lack of sanctions made such cases ineffective as a deterrence mechanism. The 2009 amendments increased the available sanctions and required that rules for non-discriminatory access be adopted for all areas of natural monopoly. The 2012 amendments required that competitive bid or auction be used in transactions which transfer the rights to use the basic assets

of natural monopolies that are in state or municipal ownership, and also provided that the competition authority could issue warnings for abuses of dominance, which is a less resource-intensive process than opening a formal case. Complementing these amendments is the Federal Law No. 223, entered into force at the beginning of 2013, which requires *inter alia* natural monopolies to procure according to specified competitive procedures.

The staged transition in the electricity sector is the farthest along the path of reform among the more complex utilities, and it is serving as a test case and model for other sectors. It has involved a large legislative and regulatory effort over nearly a decade. Although it has made substantial progress, it is not yet complete. Behavioural regulation continues to be used to restrict possibilities for price manipulation and other disruption. The lower market share threshold for dominance to 20% in wholesale electricity markets extends the application of the corresponding limits to firm behaviour. While other sectors may benefit by use of the example of the electricity reform, each involves its own technical, economic and political considerations. The experience with electricity reform may suggest the time frames that will be required for other complex structural reform efforts. The work by the competition authority on structural separation and problems at the retail and local levels in electricity, involving a high volume of individual cases related to specific infrastructure and access denial problems complicated by lack of capacity, is indicative of the type and number of such issues that will arise as other industries undergo further reform.

4.9.2. Conformity with 2001 Council Recommendation Concerning Structural Separation in Regulated Industries⁷²

The Roadmap calls on the Russian Federation to commit to consider carefully the costs and benefits of structural and behavioural measures in facing situations that combine non-competitive and competitive activities in regulated industries, particularly when undertaking privatisation, liberalisation and regulatory reform, following the Council Recommendation Concerning Structural Separation in Regulated Industries. This Recommendation addresses cost-benefit assessment of behavioural and structural measures, including consideration of transition costs and public benefits of vertical integration. Such balancing should involve sector regulators and competition authorities. Russia accepts the Recommendation.

⁷² <http://www.oecd.org/daf/competition/50119298.pdf>

The stated policy of the Russian Federation has been to support the structural separation of competitive or potentially competitive activities from regulated monopoly functions in most or all of the relevant sectors. The applicable law on natural monopolies directly prohibits retention of monopoly status in spheres where there is economic basis for transition to a competitive market. The federal law on procurement requires natural monopolies, among others, to procure by competitive mechanisms. In recent years, FAS reports, accounting separation rules have developed that require natural monopoly subjects to disclose information for each individual sphere of their activity.

The reforms in various natural monopoly sectors—electricity, natural gas, oil and oil products pipelines, rail, and passenger air transport—show that the vertical relationship between non-competitive and potentially competitive activities are addressed by structural and behavioural means. Often different activities are placed in different joint stock companies, and in a few instances there is ownership separation. The principle of non-discriminatory access to natural monopolies or their infrastructure facilities has been adopted into law. The competition law specifies that the Government can establish rules for non-discriminatory access to the goods market or the goods produced by natural monopolies, or the infrastructure facilities used by natural monopolies to provide services. These rules are in place or at various stages of adoption for specific infrastructure. Certain natural monopolies are subject to information-disclosure rules, also aimed at non-discriminatory access.

4.10. Other sector-specific rules and exceptions

4.10.1. Financial services markets

Banking and financial services markets are subject to the general competition law. The law contains exceptions and special provisions for these sectors. Principal differences include requirements for the involvement of other regulatory bodies in setting thresholds for dominance and for concentration control functions and considering cases on violations. Until 2006, there had been a separate competition law for the financial sector, but the transition to the general competition law was eased by the exceptions and special provisions.

Financial organizations are defined by the law as any economic subject providing financial services, including credit organizations, microfinance organizations and consumer credit cooperatives, insurance companies and brokers, stock exchanges, management companies for pension and investment funds, leasing companies, depositaries and others.

FAS has made agreements between providers of credit and insurance companies a priority. The conclusion of agreements or contracts on cooperation has been a common practice, sometimes including terms regulating the prices of insurance to be offered to clients of the credit institution, requiring tying of insurance to credit products and restricting the use of insurance provided by competitors. Among the consequences cited by FAS have been excessive costs paid by consumers and retarded development of insurance markets. In an effort to provide clarity regarding acceptable agreements between insurers and credit organizations, FAS developed the Decree of the Russian Federation No. 386 dated 30 April 2009 “Concerning cases for admissibility of agreements between credit and insurance organizations.” Amendment by decree No. 968 of 3 December 2010 updated and extended the list of inadmissible conditions in agreements between credit and insurance organizations.

Financial organizations are subject to selection only by open bid or auction in a number of circumstances (Article 18). The open bid requirements apply to specific financial services purchased by a federal or regional executive body, any body of local self government or a natural monopoly. The requirements apply to provision of deposit and settlement accounts, a variety of insurance services, services on the securities market, provision of credit, and non-state pension provision. Failure to abide by the open bid requirement is grounds for the transaction to be voided.

Competition rules for the creation of insurance pools were established in 2010.⁷³ Although insurance pools are an efficient way to handle risk, FAS practice found that the agreements to form such pools may also raise entry barriers into insurance markets and make use of protectionism of public authorities and local government bodies.

4.10.2. State Corporations

In 2007 and 2008, a number of special-purpose entities were created by federal laws. They include the Bank for Development and International Economic Activity (Vnesheconombank), the Russian Corporation for Nanotechnology (Rosnano), the Fund to Facilitate Reform of the Residential and Communal Services Sector (Communal Services Fund), the State Corporation for Construction of Olympic Facilities and Development of the

⁷³ Decree of the Government of the Russian Federation No. 504 of 5 July 2010 “Concerning cases for admissibility of agreements between insurers working in the same goods market, concerning the realization of joint insurance or reinsurance activity.”

City of Sochi (Olympstroi), the State Corporation for Atomic Energy (Rosatom), the State Corporation to Facilitate the Development, Production and Export of High Technology Products (Rostech) and the Fund to Facilitate Development of Housing (Housing Fund).⁷⁴ Each of the entities was formed by a special federal law defining its purpose and structure. These special-purpose entities were initially described as vehicles through which the state can carry out specific large-scale investment projects and as a means to protect state interests in matters related to defence, to promote an innovation-based economy and to assist Russia and Russian companies to compete in desirable sectors of the global economy.⁷⁵ Discussion of their use has rapidly expanded, however, and the creation of additional state corporations in a wide variety of fields was suggested, including the production of alcohol, construction materials, road construction, fishing and others, with justification on the basis of the social and economic importance of the corresponding activity. More recently, the primary sphere in which the creation of a new state corporation is under discussion is the development of the Far East.

Most of the entities were formed as state corporations with a non-commercial purpose. They are therefore governed by both the legal rules related to state corporations and those applying to non-commercial organizations, as well as by the special provisions and exceptions contained in their founding laws. The combination of the relevant legal rules has led to a number of concerns.

- State corporations, unlike some other types of state-funded legal entities, receive ownership rights in the property transferred to them as the investments of their founders, and the profits of state corporations are not subject to distribution requirements, leading to fears of asset stripping or privatization of assets and income streams if the corporations are not properly governed.

⁷⁴ See Federal Laws No. 82-FZ of May 17, 2007 (Vnesheconombank), No. 139-FZ of July 19, 2007 (Rosnano), No. 185-FZ of 21 July 2007 (Communal Services Fund), No. 238-FZ of 30 October 2007 (Olympstroi), No. 270-FZ of 23 November 2007 (Rostech), No. 317-FZ of 1 December 2007 (Rosatom), and No. 161-FZ of 24 July 2008 (Housing Fund).

⁷⁵ These purposes were named by President Putin in discussing the state corporations in his message to the Federal Assembly of the Russian Federation on 26 April 2007. (http://www.kremlin.ru/appears/2007/04/26/1156_type63372type63374type82634_125339.shtml).

- State corporations are subject to liquidation or restructuring through general bankruptcy proceedings only if that is envisioned by the federal law by which they were created, and non-commercial organizations may be supported by the state and municipal bodies through a variety of special means, including tax breaks and release from payment for use of property. Bankruptcy is not provided for by the laws creating Rostech, Rosnano or Rosatom, leading to concerns about long-term state support of these entities, including through non-transparent privileges, even in the face of their failure to perform or their waste of the assets entrusted to them.⁷⁶
- General legal rules for state corporations that simplify reporting and governance requirements, together with special exceptions from some of the reporting requirements for non-commercial organizations that are made in the laws creating them, have caused serious concern about the ability of anyone outside the entities to adequately supervise their behaviour or to trace the use of assets and funds.

Because the state corporations are created by federal laws, aspects of their formation that would otherwise violate the provisions of the competition law would not be covered by it. For example, state functions have been delegated to Rosatom. And the transfer of assets to the state corporations generally does not require the pre-transaction approval of FAS, as the transaction is one required by a presidential edict and therefore not subject to the will of the organizations involved in the transaction. Nevertheless, the activities of state corporations in the markets in which they participate are not exempted from the coverage of the competition law and would in theory be subject to all of its restrictions and requirements, provided they bring the state corporation income (as for all non-commercial organizations). While no case of this kind has yet occurred, it is certain that difficult questions will arise concerning the application of the law to entities designed to shape economic behaviour in entire sectors of the economy.

FAS expressed serious concern about the effect of state corporations on competition, predicting that their advantages will make it impossible for other entities to compete with them and that guaranteed state support will eliminate

⁷⁶ It should be noted that the exclusion from the general rules concerning bankruptcy does not prevent the founders of such a state corporation from liquidating it for a variety of reasons, including poor performance. It does, however, prevent others, including the corporation's creditors, from forcing them to do so.

rather than sharpen any incentives for increase in efficiency, reduction of costs or innovation in the relevant sectors. FAS opposed the creation of additional state corporations, particularly those that would horizontally or vertically integrate entire industries or sectors in the domestic economy or deliberately create a structure able to control such industries through market dominance or the ability to distribute state support and determine state policies.

The activities of state corporations were reviewed in 2009 by Commissions organised under the General Procurator of the Russian Federation. The commissions, on which FAS staff participated, reported back to the Procurator on apparent violations of the competition law and other laws, as well as on other evidence of inefficiency and questionable economic behaviour. For example, in its report on “Rostekhnologii,” FAS pointed out the company’s failure to conduct any of its purchasing at all through open tender as required by the competition law or to file any of the required notifications on its acquisitions of companies. Expensive acquisitions from individuals of small businesses with functions duplicating those of existing corporate divisions and delays in the expenditure of funds allocated for the support of particular economic sectors were also highlighted. In its report on VneshEconombank, FAS reported the absence of any internal corporate mechanisms that would allow the bank to observe its obligation not to compete with commercial financial institutions. FAS’s observations and proposals to conduct fuller investigations were forwarded to the Procuracy for further action. But little seems to have been taken.

Some responses are leading toward privatization in the future and others toward better oversight and management. A government decree⁷⁷ established clear time schedules for taking inventories of Federal State Unitary Enterprises and for either liquidating them or putting them on a privatization plan. President Vladimir Putin has issued instructions that by 2016 the state shall have divested itself of its interest in companies that are not from the natural resources sector, do not have natural monopolies, and that are not defence sector organisations. To carry out the instructions, in May 2012 federal executive government bodies were instructed to submit a list of federal unitary enterprises and the blocks of shares in business entities held by the federal government, in order to supplement the forecast plan (programme) for the privatization of federal property. This work is ongoing, according to FAS. Better management is imposed *inter alia* by a federal law that requires certain types of legal entities,

⁷⁷ Decision No. 1188 of the Russian Government of 31 December 2009.

including state corporations, to buy via competitive mechanisms⁷⁸ Rusnano, a state corporation for nanotechnology development, for example, was transformed into a joint stock company and made subject to the federal bankruptcy law. Decree 1188 also established a list of the powers of government bodies with respect to unitary enterprises under their jurisdiction and granted broader powers for the Russian Agency for the Management of State Property (Rosimushchestvo) to manage and oversee the use of state property. Further, Article 17¹ of the competition law, which entered into force in 2008, established general requirements for the procedure to transfer the right to hold or use state or municipal property.

FAS supports the transformation of state corporations into joint stock companies and, where economically efficient, division into separate corporate structures. Potentially competitive spheres should be demonopolized.

4.10.3. Agricultural products

Agricultural products, in particular basic food products, are not subject to any formal exception or exemption of the competition law. But price increases, particularly of basic foodstuffs, are often of concern. In parts of 2007 and 2008, many regional and local bodies responded to a sharp increase in prices of food products by concluding agreements with both producing firms and trading enterprises concerning price freezes or limitations on increases or mark-ups for food products. Agreements of this kind are a clear violation of Article 16 of the competition law prohibiting agreements between bodies of executive power and economic subjects that result or might result in restriction of competition. Such agreements are permitted, however, if they are envisioned by federal laws or by legal acts issued by the president or Government of Russian Federation. With input from FAS, the Government of the Russian Federation adopted a decree specifically permitting the executive bodies of the constituent parts of the Federation (but not local bodies) to conclude agreements on price freezes, price reductions or the limitation of trade mark-ups.⁷⁹ A price freeze on six basic foodstuffs was agreed in October 2007 at the federal level with some of the largest producers and retailers. This decree expired in April 2008.

⁷⁸ Federal law No. 223-FZ "On the procurement of goods, works and services by certain types of legal entities."

⁷⁹ Decree No. 769 of 11 November 2007 "On Agreements Between Executive Bodies of State Power of the Subjects of the Russian Federation and Economic Subjects Concerning Reduction and Freeze of Prices for Specific Types of Socially Important Basic Food Products."

Food prices spiked again in 2010, and the Government adopted a decree that allows the Government to set maximum consumer prices of a limited list of socially important foodstuffs for a limited period of time.⁸⁰ However, the Government did not make use of its powers under the decree.

Input prices into agricultural production are also restricted by various Government decrees. In 2010, the Government issued a decree⁸¹ to restrict the price at which lubricants necessary to agricultural production are sold to agricultural goods producers at 90% of the wholesale price. It was extended in 2011 and 2012, in the latter year with the price reduced to 80% of wholesale price. In summer 2012, the Ministries of Energy and Agriculture issued an order, “Recommended volumes of gasoline and diesel fuel to be delivered by oil companies to agricultural goods producers for carrying out agricultural mechanized works in field conditions in July – November, 2012.” FAS drafted a decree to implement this order which was aimed at efficient use of budgetary funds, including greater transparency and targeting.

The access of agricultural producers to trade networks, which was highlighted during the food price spike, continued to be a topic of discussion and has fed into the special competition rules for retail trade. And price control rules are contained in the law on trade described below.

4.10.4. Retail trade

A federal law on trade entered into force in 2010.⁸² FAS has primary enforcement responsibility. The law is aimed at the supply of consumer goods

⁸⁰ Decree of the Government of the Russian Federation No. 530 “Concerning the adaptation of regulations for determination of maximum allowable consumer prices for some types of socially important essential food products” dated 15.07.2010. The Government may determine maximum consumer prices in the territory of a constituent entity of the Russian Federation if during thirty calendar days the increase of consumer prices in the territory of such entity exceeds thirty percent. The freeze cannot exceed ninety calendar days.

⁸¹ Decree No. 129 “Concerning agreements between executive bodies, local authorities and economic entities on reduction or support of prices for some types of lubes realized by agricultural goods producers” dated 5 March 2010, amended by Decree of the Government of the Russian Federation No. 678 dated 30 June 2012.

⁸² Federal Law No. 381-FZ “On the Fundamental Principles of State Regulation of Trading Activity in the Russian Federation,” dated 28.12.2009.

particularly food for resale. It specifically excludes retail markets (sales to consumers) and international trade, industrial and technical goods, electric power and heat, among others. Price spikes of socially important basic food items in 2007 and later, as well as complaints from domestic food producers/suppliers about difficulties in getting larger retail chains to carry their products and their inability to make profits at the prices and conditions offered, gave impetus to the law.

The trade law reserves to economic entities the rights to determine for themselves their forms of trade, range of goods offered, the technology used for inventory, prices, conditions in contracts for buying-and-selling goods and of paid-service contracts, and much else, except as provided by other laws and, for socially important food products certain provisions in the trade law.

The relationship between food product suppliers and retail chains is subject to particular control in the law. A retail chain is defined as two or more stores under common management or trading under a common name. The law requires the criteria for selection of suppliers and of retail chains to be publicly available. The law restricts the terms of supply contracts between food product suppliers and retail chains. For example, a supplier may offer no more than a 10% quantity discount and the discount shall not be factored into the retail price, and no discount can be offered for socially important food products. The retail chain may not include remuneration for executing contract conditions in the price it pays for the supply of the food product. The supply contract cannot include conditions that require the retailer to engage in advertising, marketing or similar services aimed at promoting food products. Payment must be made within a given number of days.

In addition, the trade law imposes conduct restrictions on food product suppliers and retail chains that are akin to those imposed on firms in a dominant position. They may not, for example,

- discriminate including preventing entry or exit from a market
- impose exclusivity of supply or of terms of contract;
- require better terms of contract than offered to others;
- require information on contracts signed with others;
- impose payment for “shelf space” in existing or new stores or for changes in the mix of products carried;
- impose price reduction to meet minimums charged by competitors;

- impose compensation for lost or spoiled goods after ownership has transferred, unless caused by the fault of the supplier;
- require compensation for any expense not directly connected to the supply and sale of a specific lot of product;
- impose return of and credit for unsold goods, unless provided for by law;
- impose any other condition containing the essential elements of the above.

However, parties may present evidence that their actions qualify for the general exemption for agreements afforded by Article. 13, part 1 of the Competition Law. The use of commission agreements to circumvent the law's requirements is also prohibited.

The trade law also intervenes in the retail market. It prohibits any retail chain with a market share in food product sales exceeding 25% of a municipal region, city district, or larger area from obtaining any additional trading space by any means. It requires regional bodies to develop norms for minimum per capita trading space and to use them in development and economic planning, including land-use planning. These norms are to be the primary criteria for the evaluation of the accessibility of food and nonfood products to the population and of the satisfaction of demand for those products.

The law on trade contains a “circuit breaker” provision that allows the government to impose temporary price controls to stabilise prices in the case of a sudden spike. If the price of a “socially important food product of first necessity” increases by 30% or more within a period of 30 calendar days on the territory of one or more regional subjects of the Federation, the government may establish a maximum retail sale price for that product in the region(s) for a period of not more than 90 days. The list of such food products must be confirmed by government decree, and in July 2010 the government confirmed the list⁸³ and the rules for the establishment of maximum prices. The rules are short and place responsibility for submitting proposals on imposition of temporary price controls on the Ministry of Economic Development, which is to make them on the basis of statistical information on prices and an analysis of

⁸³ The list includes beef, pork, lamb, and chicken, frozen fish, butter, sunflower oil, milk, eggs, sugar, salt, tea, wheat flour, wheat and rye breads and rolls, rice, wheat and buckwheat kasha (groats), pasta, potatoes, cabbage, onions, carrots and apples.

the reasons for the price spike. “Panics” in the markets for buckwheat groats and flour (both on the list) occurred after the list and rules had been confirmed, but the government declined to use the provisions to dampen price increases, citing the lack of experience in their application.

The enforcement of the law on trade had a pattern of enforcement, as of the 2011 Update, of “prohibited terms of contract” being by far the most active area. The vast majority of the complaints received by that time did not appear to state a valid complaint under the law. Enforcement took place primarily on the basis of verifications of the contracts concluded by retail chains that are conducted by FAS staff. Most of the violations that were discovered were eliminated by the parties involved without the need for FAS to open a formal case.

FAS has proposed amendment to the law on trade and to the Code of Administrative Violations to, among other things, raise the maximum penalty for violation from the current level of RUB 5 million and impose turnover fines, broaden the prohibition of transactions that result in a market share in food retailing exceeding 25%, and prohibit promotional services voluntarily ordered by the retailer in order to promote the product on the shelves.

Box 15. Competition violation in retail trade

In 2011, the Orenburg Association of Alcohol Market Operators (“OAAMO”) and the state unitary enterprise Orenburgsnabsbyt introduced in the Orenburg Region a requirement for additional quality inspection of alcohol products and labelling of the products with “Orenburg Region Voluntary [Quality] Control.” Orenburgsnabsbyt would charge organizations involved in the sale of alcohol and spirits. The Government of the Orenburg Region had taken a decision in 2006 to recommend to organizations involved in the production and trade of alcohol products in the Orenburg Region to carry out a quality and safety inspection of alcohol products intended for sale in the region. FAS inspection revealed that the voluntary scheme was, in practice, necessary for gaining access to retailers in the region. FAS also concluded that federal legislation did not provide for additional quality control of alcohol products beyond that of the Federal Service for the Regulation of the Alcohol Market. FAS found the imposition by the Orenburg Region’s government of the obligation to participate in additional quality and safety inspection of alcohol products to violate the Law on Trade Article 15, paragraph 1. A decision was issued and the violation was remedied voluntarily.

Table 9. Enforcement of Law on Trade in 1H2012

Type of violation	Complaints considered	Cases opened		Decision finding violation	Order issued
		Complaint based	Own initiative		
Article 9. Rights and responsibilities of business entities with respect to entering into and performing contracts for the supply of foodstuffs	5		28	24	19
Article 13. Violation of anti-monopoly regulations on trading and supplying foodstuffs	11	3	33		39
Article 14. Restriction on the purchase or lease of additional retail floor space by business entities engaged in the retail sale of foodstuffs through the organisation of a retail network	26			22	
Article 15. Violation of anti-monopoly regulations for government bodies with respect to the regulation of trade	6	6	35	36	31
Total	48	9	96	82	89

Source: FAS

4.11. Conformity with Guiding Principles for Regulatory Quality and Performance and Recommendation of the Council on Competition Assessment

This Roadmap principle calls for the Russian Federation to commit to supporting effective competition policy and ensuring that regulatory restrictions on competition are proportionate to the public interests they serve, in accordance with the OECD's Guiding Principles for Regulatory Quality and

Performance (2005). Particularly relevant here are the elimination of sectoral gaps in the coverage of competition law, co-ordination of regulatory oversight and competition law enforcement, proportionality in design of economic regulation, periodic review of cost-benefit balance, efficiency in reform to introduce competition, consumer choice, state ownership, universal service, consideration of competition in regulatory impact analysis, competition agency authority to advocate reform and linkages to other objectives. In particular, the Roadmap notes the importance of effective competition policy and enforcement, including both vigorous enforcement of competition law and design of economic regulations in all sectors, including energy, to stimulate competition. The 2009 Recommendation of the Council on Competition Assessment⁸⁴ calls for governments to identify existing or proposed public policies that unduly restrict competition and to revise them by adopting more pro-competitive alternatives. The Recommendation further calls for governments to establish institutional mechanisms for undertaking such reviews. The Russian Federation accepts the Recommendation.

There are no, and have not been, significant sectoral gaps in the coverage of the competition law. However, regulations imposed or specifically authorized by federal law are not subject to challenge under the competition law and there is no systematic requirement for their periodic review for their effect on competition. It is recommended that regulations under federal law be reviewed periodically for their effects on competition and the resulting observations be sent to the Government. The competition authority has the statutory authority and opportunity to engage in advocacy for reform.

The competition authority has a key role in regulating behaviour, with sector regulators responsible for a limited range of pricing issues. Coordination is secured by the presence of competition authority representation on the board of the regulator, as well as by expert councils uniting staff of the competition authority, sectoral regulators and sectoral policy makers and representatives of the regulated industry. A price fixed by a natural monopoly in conformity with legislation cannot be an abuse of dominance under the competition law.

The energy sector is specifically mentioned in the Roadmap in reference to effective competition policy and enforcement and design of economic regulations. FAS has brought many cases against vertically integrated oil companies for monopolistically high prices, as well as other cases in the sector.

⁸⁴ <http://acts.oecd.org/Instruments/ShowInstrumentView.aspx?InstrumentID=219&InstrumentPID=215&Lang=en&Book=False>

It has introduced non-discriminatory access rules for major oil pipelines and seaport terminals, and access rules for major gas pipelines are being revised. Although the electricity sector is subject to rules prescribing vertical separation, there are concerns regarding state ownership at different vertical levels. The takeover by state majority-owned Rosneft of TNK-BP, combining Russia's largest and third-largest oil companies raises questions including the role of state ownership in the energy sector.

Regulation is sometimes introduced to counter the effects of liberalization. The 2010 Law on Trade regulates the relationships between wholesalers and retailers of food products as well as market power in food retailing. The requirement to trade through commodity exchanges for oil, petroleum products and coal is made in the belief that, despite no change in underlying market structure, the exchanges will generate presumably competitive prices which provide a yardstick against which to compare suspect prices and a belief that they are a means of forcing subsidiaries of vertically integrated oil companies to trade at arms length. It is recommended that the costs and benefits of requiring the use of commodity exchanges be assessed. In particular, the benefit of requiring a particular form of trade without expanding the choice of independent suppliers may be very small indeed. More generally, it is recommended to avoid the static use of benchmarking such as establishing a given market index as a reference for pricing conduct, in competition law enforcement.

“State corporations” designed to shape economic behaviour in entire sectors of the economy, and with the potential to dominate markets and distort competition as a consequence of opaque forms of support, were created in the 2000s. The creation of dominant positions for commercial activities harms competition. Thus, it is recommended to refrain from putting assets into state corporations where there is a potential to create dominant positions in commercial activities or distort competition. Also, the state retains a significant share in undertakings with market power in a variety of sectors (*e.g.* the Central Bank is a majority owner of the largest commercial bank, Sberbank).

As a part of the Government, FAS has the ability to remain informed about and comment on policy developments even at early stages. FAS is regularly assigned by the Government to participate in the development of draft legislation or other measures or to review specific proposals for their effect on competition. If a proposed legal act affects FAS's sphere of competence, co-ordination of the draft with FAS is mandatory. FAS must produce an annual report on the state of competition in the Russian Federation, in which it analyses the state of competition on a number of markets and identifies barriers to the

development of competition that should be addressed, including those caused by state policies. The competition law empowers FAS to review and challenge laws, regulations and other normative legal acts, as well as individual decisions of state bodies and officials that restrict competition, but not federal laws. FAS annually reviews hundreds of thousands of normative legal acts and individual decisions, and annually issues thousands of decisions on the basis of those reviews requiring corrections of competition restricting acts or decisions, in effect conducting a competition assessment on the acts and the policies in practice.

The competition authority, FAS, is geographically dispersed and has a broad remit. There is a long-standing concern that the wide range of responsibility risks confusion or misunderstanding of the purpose of the regime and the function of the agency. Thus, it is recommended that the resources available be commensurate with the tasks assigned, so as to enable effective enforcement of competition law and promotion of competition-related policies. Re-assignment of tasks that are less directly related to competition would help.

The Ministry for Economic Development carries out regulatory impact assessments of *inter alia* generally applicable legal acts of federal executive government bodies, but does not specifically focus on competition. The Government Commission for competition and development of small and medium entrepreneurship also reviews competition restrictions.

In the view of FAS, competition in the Russian Federation has not yet substantially improved despite the Government Programme's creation of measures to develop competition for specific branches of industry as well as regional plans. Rather, much of what it suggested in 2007-2011 to ensure structural change in the economy was not realized, and a more active attitude of the key ministries would increase the effectiveness of competition law enforcement. This points to the need for a more integrated approach to the related economic, institutional and administrative problems. The Government Action Plan (Roadmap) appears to move in this direction. Thus, it is recommended that Government renew its pro-competition efforts with a more integrated approach.

5. Competition Issues in Regulatory and Legislative Processes

5.1. Competition advocacy in legislative and regulatory process

Due to its position within the composition of the Government of the Russian Federation, FAS is represented at all sessions of the Government and

has the opportunity to comment on any draft law or draft decree of the Government or general policy change that is discussed. In addition, as a part of the Government FAS takes an active part in the formation of the plans that are drafted each year concerning the work to be undertaken by the Government in the coming period, including the Plan of Measures of the Government of the Russian Federation for the Medium Term and the Plan for Legislative Drafting Activities of the Government of the Russian Federation. These plans define the priorities of the Government concerning the drafting of legislation, policy documents and other matters and assign primary and cooperative responsibilities for their completion to the ministries and other bodies within the Government. One of the most important ways in which FAS can engage in competition advocacy is its work to include important pro-competition legislative and policy changes in these plans.⁸⁵

FAS is required to present a report on the state of competition in the Russian Federation every year. The reports discuss in detail the current levels of competition in various markets, barriers to competition and policies that affect competition in positive and negative ways. In addition, they often focus on a specific policy topic of current relevance to competition policy and competition development. The content of the reports is often widely discussed in the press and government bodies and may become the basis for policy initiatives in the areas highlighted.

With respect to competition law and related areas of legislation, FAS is not only an advocate for needed changes but is generally in charge of the drafting and passage process. Indeed, since its formation, FAS has engaged in a sustained advocacy effort concerning the need for new competition legislation

⁸⁵ An important example of this kind of advocacy is FAS's pressure for the inclusion of a number of provisions related to competition in the National Anti-Corruption Program confirmed by the President of the Russian Federation on 31 July 2008. Among the provisions promoted by FAS were those requiring the general establishment of administrative liability for legal entities involved in corruption violations as well as for state and municipal servants who commit corruption-related offences, including disqualification. FAS was also responsible for the inclusion of requirements that measures be adopted to regulate the use of state and municipal property and state and municipal resources, to further improve norms regulating state purchasing, to require the use of auction or exchange trading for the sale of state and municipal property, to create rules to eliminate discrimination in access to infrastructure of natural monopolies and to increase liability for cartel agreements.

that meets international standards. Having successfully convinced the Government of this need, it has effectively served as the legislative and regulatory drafting engine for a nearly complete replacement of the existing legal regulation of competition and related issues.⁸⁶

While the rapid pace of new laws and amendment may be cause for concern in terms of the stability of legal rules and the development of appropriately nuanced legal analyses, it is certainly evidence of FAS's advocacy skills and the degree of political support it currently enjoys.

For very broad or complex issues, those on which the interests and opinions of different parts of the Government may be at odds, and where an inter-departmental approach is needed on an ongoing basis, government commissions or other advisory bodies may be created in which FAS may participate and which provide additional opportunities for advocacy of pro-competition policies. The Government Commission on Administrative Reform, headed by the deputy prime minister and on which the head of FAS is serving, is an example. This commission aims *inter alia* to reduce government interference in economic activities. Other examples of FAS's participation in such commissions is its senior officials' memberships in the Government Commissions on, respectively, Draft Law Activity, Control over Foreign Investments, Economic Development and Integration, Monitoring and Efficient Response to the Changing Conditions of Food Markets, and Sub-Commission on Customs-Tariff and Non-tariff Regulation, Protective Measures in international trade.

The procedure for the work of the Government also gives FAS opportunities to comment upon and, where required, object to the drafts and proposals submitted by others, even where FAS was not included among the bodies assigned to develop the draft. As a rule, such drafts are circulated to all

⁸⁶ This has included the drafting of several entirely new laws, including the law on state purchasing (which is soon replaced), the 2006 advertising law and the 2006 competition law, and also substantial sets of amendments to other laws, including innovative (and controversial) changes in the Code of Administrative Violations and other legislation in relation to sanctions and leniency. FAS has also drafted (in some cases together with the Ministry of Economic Development or other appropriate bodies) a very large amount of supporting legislation in the form of decrees of the Government of the Russian Federation and other types of legal acts (block exemptions, threshold definitions for concentration control, rules for non-discriminatory access to infrastructure and a wide variety of others).

of the bodies that make up the Government for comment prior to their passage, and substantial efforts are made to eliminate objections before the document is approved. This includes draft laws and other documents that are not submitted by Government but rather by legislators, by regional bodies, by courts or by others possessing the authority to submit legislation directly to the legislature. The procedure followed by the State Duma concerning such drafts requires that they be submitted to the Government for the receipt of a formal conclusion, which involves the same opportunity for commentary by the members of the Government.

Although the cooperative structure for the work of the Government gives FAS many opportunities for competition advocacy in the form of comment on legal and policy proposals, it may sometimes have negative as well as positive aspects. For example, while the fact that efforts are made to resolve objections and achieve consensus approval mean that FAS's own objections will be seriously considered, it also means that objections of other ministries to FAS's drafts and proposals will be equally seriously considered and may weaken pro-competitive positions. In both instances, pressure to move forward with a large burden of work may require compromises, after which FAS may not be in a position to reopen the question and press for the compromise to be rejected.

5.2. Government Action Plan (Roadmap) for the "Promotion of Competition and Improvement of Antimonopoly Policy"

FAS and the Ministry for Economic Development elaborated and the Government confirmed the Government Programme for the Development of Competition in the Russian Federation for 2009-2012, since amended and extended to 2015. It aimed *inter alia* to reduce barriers to market entry and foreign trade, simplify access to the infrastructure of natural monopolies, adopt an accelerated procedure for considering violations of rules for non-discriminatory access to services of natural monopolies, and adopt a more transparent and more accessible system of public procurement. Specific sectors were targeted: petroleum products, natural gas, electricity, mineral fertilizers, agricultural and food markets, cement, coal, and rail services. Regional competition development programmes were also developed.

Despite the action plan to implement the Government Programme having essentially been implemented, there have not been substantial improvements in competition itself, in FAS's assessment. FAS is of the opinion that competition development requires a comprehensive approach, solving related economic, institutional and administrative problems. Improvements in individual market influences, as is done under the Programme, are not likely to result in any

substantial changes in the development of competition. Key ministries, too, must play their part.

The planned next stages in the development of competition are set out in the Russian Government's Action Plan (Roadmap) for "Promotion of Competition and Improvement of Antimonopoly Policy" of 28.12.2012.⁸⁷ It replaces the earlier Government Programme and covers the period 2013-2015. Under the Action Plan:

- Constituent parts, *e.g.*, republics and major cities, who efficiently implement competition promotion standards will be rewarded.
- Proposals will be drafted for the withdrawal of federal state unitary enterprises from competitive markets, except for those that provide state defense and security, and strategic enterprises.
- Governmental and municipal authorities who wish to establish new legal entities-business units must coordinate with FAS, unless the new legal entities-business units are provided for by federal law or Presidential or Government decision.
- For infrastructure sectors, action plans for competition promotion will be endorsed by the FAS, the Federal Tariff Service, and the corresponding ministry. For electric power, rail transport and petroleum products, these plans include the establishment of market boards with equal representation of buyers and sellers, and organized (exchange) trade. A federal law would involve FAS, the Federal Tariff Service, and the relevant ministries in overseeing natural monopolies' investment plans and costs, and impose technological audits.
- Specific sectors are targeted: Medicines, medical services, air transport, communication services, pre-school education and petroleum products.
- Consumer rights would be better protected through a new federal law to protect the interests of groups of individuals in court, allow the assessment of multiples of damages from antimonopoly violations, and distribute compensation levied on antimonopoly law violators

⁸⁷ Government of the Russian Federation Directive of 28 December 2012 No. 2579-r (unofficial translation).

among harmed parties. Natural monopolies' service standards would be established in law.

Antimonopoly regulation modifications will, according to the Action Plan (Roadmap):

- establish the legal force of FAS's interpretation of the competition law, and interpret the following:
 - Proof of prohibited agreements including cartels, coordinated actions and collusive bids
 - Evaluation of permissibility of business methods of entities in a dominant position on the market
 - Establishment of monopoly high and low prices
 - Application of antimonopoly laws to private corporate trading
 - Proof and calculation of losses incurred from violations of antimonopoly laws
 - Agreements in innovative and high-tech industries
 - Vertical agreements, including dealer agreements.
- end post-transaction notifications for economic concentrations as well as certain pre-transaction notifications (intra-group transactions of natural monopoly entities)
- end simultaneous levying of an administrative fine and disgorgement of illegally received income
- guarantee that individuals assisting in antimonopoly enquiries are included in the leniency granted under the leniency programme
- remove the Articles 10 (dominance abuse) and 11 (agreements) exemptions for intellectual property rights
- broaden the use of warnings to address minor violations of competition law (abuse of dominance in the form of unjustified refusal

to contract and of discrimination, unfair competition except related to acquisition or use of differentiating exclusive rights, actions of federal executive authorities that restrict competition) establish a norm to limit the opening of a criminal case under Article 178 of the Criminal Code, the article related to competition, to materials submitted by the antimonopoly authority

- restrict the use of the Register of entities with market share exceeding 35% to only stating the dominant position.

5.3. Expert councils and other public involvement

FAS has formed a public-consultation council on which representatives of a variety of non-commercial organizations serve. It includes a total of eleven members from research institutions, business organizations and consumer groups. Members are appointed by the head of FAS on the basis of proposals by non-commercial organizations. The Council is a permanent consultative body that meets at least once each quarter. Its primary purposes are to develop proposals on improvements in competition legislation and its enforcement, to involve non-commercial organizations in monitoring violations of competition legislation, to inform entrepreneurs, non-commercial organizations and citizens about the purposes, tasks and authority of the competition bodies and to prepare papers on the level of observance of competition legislation and the protection of competition. Analogous councils are to be formed in the territorial offices of FAS.

FAS has also formed a number⁸⁸ of expert councils to provide advice and discussion and to serve as a platform for the exchange of ideas and the maintenance of open dialog between FAS and representatives of businesses and of interested groups. The expert councils may focus on competition issues in a specific sector (electricity, rail), in a broader sector (agro industrial complex, education and science) or in a specific area of enforcement (advertising, unfair competition). In addition to members of FAS staff, they include representatives of businesses operating in the relevant sphere and of other interested state bodies, and also academic experts.

The “Promotion of Competition Development” non-commercial partnership provides a platform for joint work and dialogue by FAS Russia and the legal community. For example, the second and third antimonopoly

⁸⁸ Twenty six as of mid-2012.

packages—amendments of the competition law—were drafted with participation of the partnership. Founded in 2007, it comprises more than 50 members, including business people, lawyers and economists specializing in antimonopoly law.

5.4. Competition advocacy and public information

FAS has undertaken major efforts to improve public education on competition issues, to improve public access to information about FAS and its activities and to involve representatives of affected businesses and of the public in FAS's work. These efforts have moved FAS to a much greater level of public openness and involvement in its work and made it among the most open of all Russian government bodies. Public education is a complement to competition advocacy among a population where the general understanding of the goals and benefits of competition are weak.

FAS maintains a large and detailed website where users can find legislation and regulations related to all of FAS's functions, reports on FAS's activities, market analyses, a selection of administrative decisions and of court decisions related to each area of practice, press releases and press articles related to FAS and a great deal of other information. FAS's territorial offices have their own websites containing both general information on FAS and specific information on the territorial office, its staff members, schedule for consideration of cases and other aspects of its work. In February of 2008, FAS adopted a formal information policy defining the types of information that are considered to be public, what kind of information must be kept confidential and the procedure for placing information on the websites.⁸⁹

However, often only results of merger decisions are published on the FAS website, and very few of other kinds of decision. The merger decisions contain the names of the parties and their activities. The summaries of other cases may be longer, but few are published and they often do not enable a reader to understand the factual basis nor the reasoning that led to the outcome. For economic subjects to build up an understanding of the law and for the Russian legal community to be able to participate in the development of the law, enforcement practice must be easily available to the public.

⁸⁹ Statute on the Information Policy of FAS Russia, confirmed by Order No. 54 of FAS Russia of 21 February 2008. Available at <http://www.fas.gov.ru/law/17421.shtml>.

Box 16. Typical examples of published merger decisions

The information below is typical of what is provided in merger decisions published on the FAS website.

1. Decision on the Petition of Open Joint Stock Society “Lukoil”

Date of adoption of the decision - 18 April 2013

Date of publication on the site - 18 April 2013

DECISION On the Result of Consideration of the Petition

In accordance with Articles 28 and 33 of Federal Law No. 135-FZ of July 26, 2006 “On the Protection of Competition,” the Federal Antimonopoly Service has considered the petition of the open joint stock society “Lukoil” [address omitted]; the primary activities of which are – exploration for oil, gas and other deposits, geological study of subsoil areas, digging of wells, production, transport and processing of oil and gas, production of oil products, petrochemical products and other products (including products for mass consumption and the provision of services); sale of oil, oil products and other products of the processing of hydrocarbons and other raw materials (including sale to the public and supply for export) – about the acquisition of 100% of the voting stock of the closed joint stock society “Samara-Nafta” [address omitted]; the primary activities of which are – production of raw petroleum and petroleum (well) gas; storage, processing and sale of raw petroleum, petroleum products and products of the petrochemicals industry, production and sale of petroleum products, purchase and sale of oil, gas condensates and other raw materials for the petrochemicals industry – and has taken a decision to approve the petition.

2. Decision on the Petition of Open Joint Stock Society “Gasprom Oil-Novosibirsk”

Date of adoption of decision -- 18 April 2013

Date of publication on the site -- 18 April 2013

DECISION On the Results of Consideration of the Petition

In accordance with Articles 28 and 33 of Federal Law No. 135-FZ of July 26 of 2006 “On Protection of Competition,” the Federal Antimonopoly Service has considered the petition of the open joint stock society “Gazprom Oil-Novosibirsk” [address omitted]-- the primary activities of which are – wholesale and retail sale of oil products and petrochemical products, storage of oil and exploitation of oil storage facilities and filling stations – concerning the lease of the basic production assets of the open joint stock society “Gasprom Oil-Omsk” [address omitted]; the primary activities of which are – wholesale and retail sale of oil products and petrochemical products – which would constitute 55 percent of the balance-sheet value of basic production assets and nonmaterial assets of “Gasprom Oil-Omsk” and has decided to approve the

petition.

3. Decision on the Petition of “Irkutsk Oil Company”

Date of adoption of the decision - 18 April 2013

Date of publication on the site - 18 April 2013

DECISION On the Results of Consideration of the Petition

In accordance with Articles 28 and 33 of Federal Law No. 135-FZ of July 26 of 2006 “On Protection of Competition,” the Federal Antimonopoly Service has considered the petition of the limited liability society “Irkutsk Oil Company” [address omitted]; the primary activities of which are – production of raw petroleum and natural gas; processing of raw hydrocarbons; and wholesale trade in oil, gas and the products of their processing – concerning its absorption of the limited liability society “SNGK” [address omitted]; the primary activities of which are – geological studies and geophysical and geochemical work in the area of the study of subsoil regions; prospecting for and production of oil, gas and condensates; and the processing of oil and gas – and has decided to approve the petition.

In order to improve its work, FAS has established a new training centre in Kazan and has, for several years, subjected itself to independent examination. The Kazan, Tartarstan, training centre opened in 2012 and will host educational events, conferences, and international meetings. Since the mid-2000s, FAS has taken the somewhat unusual step of organizing annual studies by independent organizations of public comprehension of competition issues, of public and business opinion about levels of competition in the economy and the possibilities for honest competitive work and of public perceptions of its own work, including views on the level of corruption of its staff, problems in its work and other issues. The results of the studies were made available on FAS’s website and were used in developing strategies for improvement of FAS’s work. FAS Russia has also been assessed against the ISO 9001:2008 standard and found to comply in 2011 and 2012.

6. Assessment and conclusions

This report has examined the Russian Federations competition law and policy in light of the accession roadmap to assist the Competition Committee in its assessment of Russia’s willingness and ability to assume the obligations of membership in the OECD concerning competition policy. The Committee has prescribed three themes for its assessment: (1) the current situation of competition policy and enforcement, (2) the magnitude and direction of change

in competition policy over the last 5-10 years and (3) the extent of conformity with the particular recommendations in the competition policy instruments that are referenced in the roadmap. The next section summarizes findings regarding both current condition of competition trends, enforcement and policy over the past 5-10 years.

6.1. Current conditions and trends over 5-10 years

The development of economic competition is a pervasive and fundamental part of the transformation of the Russian Federation over the past two decades. The 1993 Constitution and the laws (other than the competition law) embodied strong support for competition. But competition was not a high priority during much of the 1990s and later. The need to increase competition is regularly reiterated at the highest political levels, and measures to achieve this are treated as high priorities in the Government and the legislature. The importance of competition is recognised across a range of government policies, for example in the institution of competitive forms for all state and municipal purchasing and of competitive bid or auction requirements for award of use rights in important natural resources and for the sale or use of most forms of state and municipal property. Pro-competition measures are included in anti-corruption measures.

Despite calls for FAS to respond to competition problems, the government also hinders competition. A number of state corporations were created in the 2000s; these entities have received large transfers of resources and property that may allow control over entire sectors, and in particular allow dominance of markets or distortion of competition. The state retains a significant share in undertakings with market power in a variety of sectors, particularly sectors that provide inputs into major parts of the economy such as energy and banking, and there have been recent moves in the direction of further consolidation, both under state control, *e.g.*, oil, and in private hands, *e.g.*, potash. The pace of reform in sectors with natural monopolies has been slow. Despite the 2009-2012 Government Programme for the Development of Competition, competition itself has not substantially improved. Perhaps the new Government Action Plan (Roadmap) will address the related economic, institutional and administrative obstacles to competition identified by FAS.

The competition authority has broad responsibility, enforcing the competition law and, being well-positioned within government, playing a central role in the Government's response to price spikes in socially important goods, its on-going reform of natural monopolies and promotion of fair public procurement. The competition authority is directly subordinate to the head of the Government and has its own funding and staff.

FAS's law enforcement responsibilities include not only the competition law but also the laws on public procurement, advertising, trade and others. The breadth of FAS's authority can aid policy coherence, but also runs the risks of task overload, dilution of attention and delay in development of economic analysis skills and investigation practices – problems that have interfered with the work of the Russian competition authority in the past.

The pace of change in competition law and related legislation has been rapid. A new competition law in 2006 was followed by significant amendments in 2009 and 2012. Further changes are planned. The changes made and those planned are, on the whole, important and necessary ones, but a continual process of change undermines continuity and limits development of analysis skills and enforcement practices.

The competition law deals with restrictive agreements, abuse of dominance, mergers, unfair competition, competition restrictions by public authorities and state or municipal preferences (state aid), without sectoral exceptions. In outline, the content is roughly similar to the laws of many OECD countries, with the exception of the relatively unusual coverage of public authorities. However, details in the law may sow the seeds for the development of a very distinctive law. The definitions of “signs of restricting competition” and of monopolistically high and monopolistically low prices have led in some instances to a rigid understanding of lawful market conduct.

In competition enforcement, key accomplishments in the past six years include stronger sanctions in the form of turnover-based fines, the ability to undertake more serious investigation activity, the institution of a leniency program, the separation of cartels from other sorts of restrictive agreements, and higher merger filing thresholds. In addition, the use of warnings and the adoption of non-discriminatory access rules for natural monopolies and their infrastructure may reduce the cost of enforcing competition rules on the conduct of dominant firms.

Natural monopolies have been regulated according to a relatively stable system since 2004. According to this system, the tariff regulator is responsible for tariffs, sectoral ministries and the Government are responsible for overall sector policy and FAS is responsible for competition issues and policing abuses of dominance. But the narrow scope of regulation under the law governing natural monopolies leaves FAS with very large caseloads in applying the competition law to non-pricing conduct natural monopolies. Structural reform has often been limited to the separation of state functions from commercial functions, and the latter separated into distinct legal entities within a single

group of companies. The major exception is the electricity sector, where there has been ownership separation. Non-discriminatory access rules to natural monopolies and their infrastructure are in place in many important sectors. But there remains significant scope for reform in natural monopoly sectors.

FAS has expanded its cooperation with the competition authorities of other jurisdictions, both bilaterally and at multilateral and international organizations. It has signed five new-type bilateral agreements with foreign competition authorities aimed at coordination and consideration of mutual interests in specific investigations. However, FAS most intense cooperation is through the CIS and Eurasian Economic Community. Against this general trend, the potential for additional delays and risks to cooperation due to the legal restriction on the participation of Russian strategic companies in foreign competition investigations forms a stark contrast.

There remain major challenges both for competition law enforcement and for competition policies. Management and reduction of FAS's extremely large caseload is still necessary, in order to allow the development of high quality economic analysis in its enforcement work, which in turn would allow the competition law to be comprehensive and effective. Greater internal coherence in the understanding of law and analysis would increase predictability. In general, pressure for competition law to be used as a means for the control of inflation or the adjustment and continuing control of specific price levels must be resisted.

6.2. Implementation of the Six Roadmap Principles

6.2.1. Cartels and bid-rigging in public procurement

The Russian Federation has committed to ensuring that competition laws, sanctions and enforcement procedures and institutions effectively halt, deter and remedy hard core cartels. The Recommendation of the Council Concerning Effective Action against Hard Core Cartels focuses on prohibiting cartels, addressing effective control, deterrence and remedy, enforcement processes and powers, sanctions against firms and individuals, exemptions and exclusions, and enforcement co-operation and comity (the issue of co-operation is discussed separately below.) The Russian Federation has accepted the Recommendation and has amended its legislation to increase sanctions and improve investigative authority. The Recommendation of the Council on Fighting Bid Rigging in Public Procurement encourages designing public procurement tenders to promote more effective competition and to reduce the risk of bid rigging while

ensuring overall value for money. The Russian Federation accepts the Recommendation.

Since 2012, cartels have become more clearly defined in the law and distinct from other sorts of agreements. Sanctions against cartels, as well as other competition law violations, have increased substantially although sanctions against individuals remain rather small by the standards of other large jurisdictions. Changes in FAS's enforcement powers have given more detail and clarity to the procedures to be followed and made clear its ability to enter business and state premises without notice in cases related to agreements. Close cooperation with the procurator's office and the bodies of internal affairs will be required to make the improvements in legislation effective in practice. There is stronger political support for such cooperation and it has begun to occur on individual cases. However, there remain legal hindrances to systematic cooperation. Leniency applications have fallen precipitously, a development which may be cause for concern if it continues.

The competition law distinguishes cartels from all other types of agreements. Five types of agreements among competitors—those involving price-fixing, bid-rigging, market division, reduction of output, or group boycott of specific parties—are prohibited *per se* and, according to Article 11, “are to be recognized as cartels.”

Competition crime is addressed in Article 178 of the Criminal Code. The article also refers to cartels, and criminal liability is limited to cartels and repeated abuse of dominance in particular forms, *i.e.*, monopolistically high or low prices, groundless refusal to contract or restriction of access to the market. The narrowing of the definition of “cartel” in Russian usage from meaning any sort of agreement towards international usage, as well as the narrowing of criminal liability for restrictive agreements to cartels, is welcome. The fact that the abuses of dominance are defined in an open-ended way makes them unsuitable for classification as crimes. It is recommended to remove criminal liability for repeated abuse of dominance.

Maximum sanctions for competition law violations by firms have risen substantially since 2007. For legal entities, for example, they have risen from less than USD 20 000 to 1% to 15% of income from sales to the market affected. However, the maximum sanction for single-product firms is low, and the maximum administrative law sanction on individuals is quite small. Thus, it is recommended that these sanctions effectively deter competition law violations by all market participants.

FAS has a specialist cartel prosecuting unit and uses broader investigative powers since 2009. It has conducted some unannounced dawn raid searches, used material obtained through police surveillance techniques, used written statements of employees and others as evidence, and used electronic communication and other forms of electronic evidence. FAS has thus obtained evidence of intent in a number of agreements cases. However, cooperation with the law enforcement agencies is not yet systematized and remains at the discretion of the criminal investigator. Thus it is recommended to improve cooperation between the competition authority and the criminal law investigatory authorities.

The number of cartel cases under the competition law is unclear for earlier years because they were not categorized separately. In 2012, 114 cases were opened, of which 76 violations were found, under the cartel provision, Article 11, Part 1. In 2011 and in 2012, respectively two and four criminal cases were opened that correspond to the competition law's Article 11 prohibition of competition-restricting agreements, a category broader than cartels.

The leniency programme, first introduced in 2007, was substantially amended in 2009 to *inter alia* limit the possibility of full leniency to the first applicant and tightened cooperation requirements. The number of applications fell precipitously to less than twenty annually. General principles allow criminal punishment to be moderated or eliminated on the basis of active cooperation of a defendant. But this type of leniency under the Criminal Code is not available on the same grounds as under the administrative law and it remains at the ultimate discretion of the judge. It is recommended to amend the Criminal Code to reinforce the incentives of the leniency programme under administrative law.

The public procurement law, Federal law 94-FZ "Concerning placing of orders..." of 2005, promotes broad participation in public procurement through transparency and aims to prevent conspiracies between customer (the organizer of the auction) and bidder. According to FAS, this is the most frequent type of conspiracy at auctions in the Russian Federation. FAS addresses conspiracies between bidders as well as between bidders and customers through the bid-rigging prohibition and Article 15, prohibiting competition restrictions by public bodies, in the competition law. According to FAS, some points in the Council Recommendation on Fighting Bid Rigging in Public Procurement contradict current Russian legislation on public procurement. For example, Russian legislation requires the customer to contract with the successful bidder whereas the Manual recommends granting customers discretion not to contract if they suspect a conspiracy. Russian legislation requires a high degree of transparency, *e.g.*, requiring that the record of assessment and comparison of the

applications to participate in a tender and identities of the winner and runner-up be published. A replacement law was signed in April 2013, but its substance will be shaped by future implementing regulations. The principal innovations of the law are reported to be that it expands available procurement procedures, gives greater freedom for procuring entities and places greater emphasis on efficiency.

As now drafted, Article 13, Parts 1 and 1¹ appear to impose fewer conditions on competitor agreements than on other conduct for which an exemption may be sought. It is recommended that the exemption available under Article 13, Part 1 to cartels be no broader than the exemption available under Article 13, Part 1 to other agreements, transactions, and dominant firm conduct.

6.2.2. *Merger Review*

The Russian Federation has committed to ensuring that review of mergers is effective, efficient and timely, following the standards of the 2005 Council Recommendation concerning Merger Review. This Recommendation provides best-practice guidance about merger control. It deals with effectiveness, efficiency (in terms of jurisdiction, notification, and information gathering), timeliness, transparency, procedural fairness, consultation, third-party access, non-discrimination, protection of confidentiality, resources and powers and enforcement co-operation (the issue of co-operation is addressed separately below.) Russian Federation has accepted this Recommendation.

The Russian law provides for a two-tier concentration control system, with prior notification and approval for the largest transactions and post-transaction notification for a second tier of the same kinds of transactions. Basic thresholds to identify which concentrations must be notified are calculated on the basis of the most recent balance-sheet value of the assets of the firms involved, *i.e.*, the acquirer and its group of persons and the target and its group of persons, and their annual turnover. (Unless they retain some control, the figures for the previous parent of the acquired entity do not contribute towards the sum.) Transactions must be reported if either of the thresholds is met. Transactions that should have been reported but were not may be invalidated.

The reach of the merger control provisions has been considerably refined through several substantial increases in thresholds and limitation on filings within related groups. Notification requirements and consideration procedures have been clarified and opportunity for consultation with parties and for third party comment provided in instances where a refusal appears possible.

Outcomes for transactions with foreign party involvement do not differ from others. Parties may designate information as confidential, with the exceptions provided by law. Some decisions are published and available on the competition authority website. Usually, no summary of the factual basis or the reasoning is published, but only the fact of the acceptance or denial of the transaction. It is recommended that FAS accompany its publication of its enforcement decision with a summary of the factual basis and reasoning behind the decisions concerned, while respecting confidentiality requirements.

The nexus threshold, introduced in 2013, may not exclude transactions without significant and direct effects on competition in Russia. The annual sales threshold of about USD 33.3 million is low and the threshold can be breached if only one party to the transaction has assets or sales in Russia. Moreover, there does not appear to be a threshold for the value of intangible assets, for example trademarks and other intellectual property rights “located in Russia,” or of the value of assets owned but not controlled by Russian financial institutions and not used to produce goods or services sold into Russia. Therefore, it is recommended that the nexus requirement be monitored to determine whether it successfully excludes from merger control procedure transactions having no direct or significant effect on competition in Russia.

The number of post-transaction notifications has fallen, but given the low incidence of refusal or conditional approval of these transactions, it would seem reasonable to eliminate post-transaction notification altogether, as would occur under a bill under consideration in the Duma in 2013. This proposal is supported, provided that the possibility is created to intervene in those rare instances where a low-value merger can substantially restrict competition in a small market.

Some of the behavioural conditions imposed by FAS for approval of mergers may not be useful, or indeed harm competition. The obligation to notify price changes before they become effective reduces market flexibility since there is usually a delay between notice and change, and the benefit of a post-notification is unclear. The incremental benefit of a firm agreeing not to violate the competition law, which it is obliged to do anyway, is unclear. And the obligation to publish a firm’s commercial practices, including pricing practices, might perversely facilitate coordination or cartelization with rivals. FAS might wish to study the effects of the various behavioural conditions imposed, identify the combinations of market characteristics and behavioural conditions where the conditions promote or preserve competition, and modify its practices accordingly.

6.2.3. *International Cooperation and information exchange*

The Russian Federation has committed to co-operating in investigations and proceedings applying competition laws, through notification and co-ordination pursuant to the 1995 Council Recommendation concerning Co-operation between Member Countries on Anticompetitive Practices affecting International Trade, and through implementing the Competition Committee's Statement of Best Practices for the Formal Exchange of Information between Competition Authorities in Hard Core Cartel Investigations (2005). The Council Recommendations on hard core cartels and on mergers also address international co-operation. The Russian Federation has accepted these Recommendations. The topics of these instruments include notification, co-ordination, exchange of information, consultation-conciliation-comity, confidentiality and privilege protection, effects on leniency applicants and informants and notification to information providers.

The Competition Law specifically authorizes FAS to cooperate with international bodies conducting work in the area of competition and with the competition authorities of foreign countries and to participate in the development of international instruments and treaties related to competition. In addition to a number of other bilateral agreements, FAS has signed a new type of bilateral agreement aimed at facilitating cooperation on particular transborder cases with five competition authorities. These agreements provide for the exchange only of non-confidential information.

The competition law as well as general principles of Russian law prohibit the competition authority from disclosing confidential information without a waiver from the owner of the confidential information. However, certain Russian authorities, *e.g.*, procurators, may compel FAS to share confidential information. The exception, according to FAS, would be if there were an international treaty or agreement that prohibited such sharing and the information had been provided to FAS with specific restrictions on its use. The adequacy of protection of confidential information may prohibit sharing by those competition authorities that are bound by more specific rules concerning means of protection or that are required to assure themselves of the adequacy of protection of confidential information in order to share it. FAS is drafting an Instruction on Handling Information with Public Bodies of Foreign Countries in investigation of cases of violations of antimonopoly law, which is expected to contain a special procedure in processing documents containing confidential information. (Agreement among members of the Eurasian Economic Community allows for the possibility of exchange of confidential information between competition authorities.)

FAS sees waivers as the most acceptable means of addressing concerns related to exchange of confidential information in the context of specific cases of competition law violations and merger review. Firms are, however, unlikely to voluntarily sign waivers where the information exchanged proves or contributes to the proving of a violation.

The September 2012 presidential decree that requires strategic Russian companies to *inter alia* get prior permission from a federal body of executive power before providing information to foreign authorities raises concerns about the extent of commitment to international cooperation in competition matters. The additional time lag and the risk that requested information will not be forthcoming can hamper competition investigations. Thus it is recommended that adequate safeguards be put in place to ensure that the ability of Russian companies to cooperate with and to contribute to investigations of competition authorities from third countries in a timely manner is not undermined by the legal requirements imposed by the decree.

6.2.4. Structural Separation in regulated industries

The Russian Federation has committed to consider carefully the costs and benefits of structural and behavioural measures in facing situations that combine non-competitive and competitive activities in regulated industries, particularly when undertaking privatisation, liberalisation and regulatory reform, following the Council Recommendation Concerning Structural Separation in Regulated Industries. This Recommendation addresses cost-benefit assessment of behavioural and structural measures, including consideration of transition costs and public benefits of vertical integration. Such balancing should involve sector regulators and competition authorities. The Russian Federation has accepted the Recommendation.

The stated policy of the Russian Federation has been to support the structural separation of competitive or potentially competitive activities from regulated monopoly functions in most or all of the relevant sectors. The applicable law on natural monopolies directly prohibits retention of monopoly status in spheres where there is economic basis for transition to a competitive market. The federal law on procurement requires state corporations and natural monopolies, among others, to procure goods, works and services by competitive mechanisms. In recent years, FAS reports, accounting separation rules have developed that require natural monopoly subjects to disclose information for each individual sphere of their activity.

The reforms in various natural monopoly sectors—electricity, natural gas, oil and oil products pipelines, rail and passenger air transport—show that vertical relationships between non-competitive and potentially competitive activities are addressed by structural and behavioural means. Often, different activities are placed in different joint stock companies, and in a few instances there is ownership separation. The electricity sector has been subjected to vertical separation between generation and sale, on the one hand, and transmission and distribution, on the other hand, and a wholesale spot market operates for large parts of Russia. The rail sector has been vertically separated into different legal entities, but infrastructure, traction and much of freight transport remains in the same group of companies and the deadline for structural reform in rail transport has been extended to 2015. The oil pipeline network has been separated from the remainder of the oil sector for some time. The gas sector has been vertically separated into distinct legal entities but these remain within a single integrated group.

The principle of non-discriminatory access to natural monopolies or their infrastructure facilities has been adopted into law. The competition law specifies that the Government can establish rules for non-discriminatory access to the goods market or the goods produced by natural monopolies, or the infrastructure facilities used by natural monopolies to provide services. These rules are in place or at various stages of adoption for specific infrastructure. Certain natural monopolies are subject to information-disclosure rules, also aimed at non-discriminatory access.

6.2.5. Market regulation

The Russian Federation has committed to supporting effective competition policy and ensuring that regulatory restrictions on competition are proportionate to the public interests they serve, in accordance with the OECD's Guiding Principles for Regulatory Quality and Performance (2005). Particularly relevant here are the elimination of sectoral gaps in the coverage of competition law, co-ordination of regulatory oversight and competition law enforcement, proportionality in design of economic regulation, periodic review of cost-benefit balance, efficiency in reform to introduce competition, consumer choice, state ownership, universal service, consideration of competition in regulatory impact analysis, competition agency authority to advocate reform and linkages to other objectives. In particular, the Roadmap notes the importance of effective competition policy and enforcement, including both vigorous enforcement of competition law and design of economic regulations in all sectors, including energy, to stimulate competition. The Recommendation of the Council on Competition Assessment calls for governments to identify existing or proposed

public policies that unduly restrict competition and to revise them by adopting more pro-competitive alternatives. The Recommendation further calls for governments to establish institutional mechanisms for undertaking such reviews. The Russian Federation has accepted the Recommendation.

There are no, and have not been, significant sectoral gaps in the coverage of the competition law. However, regulations imposed or specifically authorized by federal law are not subject to challenge under the competition law and there is no systematic requirement for their periodic review for their effect on competition. It is recommended that regulations under federal law be reviewed periodically for their effects on competition and the resulting observations be sent to the Government. The competition authority has the statutory authority and opportunity to engage in advocacy for reform.

The competition authority has a key role in regulating behaviour, with sector regulators responsible for a limited range of pricing issues. Coordination is secured by a variety of staffing arrangements. A price fixed by a natural monopoly in conformity with legislation cannot be an abuse of dominance under the competition law.

The energy sector is specifically mentioned in the Roadmap in reference to effective competition policy and enforcement and design of economic regulations. FAS has brought many cases against vertically integrated oil companies for monopolistically high prices, as well as other cases in the sector. It has introduced non-discriminatory access rules for major oil pipelines and seaport terminals, and access rules for major gas pipelines are being revised. Although the electricity sector is subject to rules prescribing vertical separation, there are concerns regarding state ownership at the different vertical levels. The takeover by state majority-owned Rosneft of TNK-BP, combining Russia's largest and third-largest oil companies, raises questions including the role of state ownership in the energy sector.

Regulation is sometimes introduced to counter the effects of liberalization. The 2010 Law on Trade regulates the relationships between wholesalers and retailers of food products as well as market power in food retailing. The requirement to trade through commodity exchanges for oil, petroleum products and coal is made in the belief that, despite no change in underlying market structure, the exchanges will generate presumably competitive prices which provide a yardstick against which to compare suspect prices and a belief that they are a means of forcing subsidiaries of vertically integrated oil companies to trade at arms length. It is recommended that the costs and benefits of requiring the use of commodity exchanges be assessed. In particular, the benefit of

requiring a particular form of trade without expanding the choice of independent suppliers may be very small indeed. More generally, it is recommended to avoid the static use of benchmarking such as establishing a given market index as a reference for pricing conduct, in competition law enforcement.

“State corporations” designed to shape economic behaviour in entire sectors of the economy, and with the potential to dominate markets and distort competition as a consequence of opaque forms of support, were created in the 2000s. The creation of dominant positions for commercial activities harms competition. Thus, it is recommended to refrain from putting assets into state corporations where there is a potential to create dominant positions in commercial activities or distort competition. Also, the state retains a significant share in undertakings with market power in a variety of sectors (*e.g.* the Central Bank is a majority owner of the largest commercial bank, Sberbank).

As a part of the Government, FAS has the ability to remain informed about and comment on policy developments even at early stages. The competition law empowers FAS to review and challenge laws, regulations and other normative legal acts, as well as individual decisions of state bodies and officials that restrict competition, but not federal laws. FAS annually reviews hundreds of thousands of normative legal acts and individual decisions, and annually issues thousands of decisions on the basis of those reviews requiring corrections of competition restricting acts or decisions, in effect conducting a competition assessment on the acts and the policies in practice.

The competition authority, FAS, is geographically dispersed and has a broad remit. There is a long-standing concern that the wide range of responsibility risks confusion or misunderstanding of the purpose of the regime and the function of the agency. It can also be difficult to stay updated with continual developments in the various laws and underlying economic thinking. Thus, it is recommended that the resources available be commensurate with the tasks assigned, so as to enable effective enforcement of competition law and promotion of competition-related policies. Re-assignment of tasks that are less directly related to competition would help.

The Ministry for Economic Development carries out regulatory impact assessments of *inter alia* generally applicable legal acts of federal executive government bodies, but does not specifically focus on competition. The Government Commission for competition and development of small and medium entrepreneurship also reviews competition restrictions.

In the view of FAS, competition in the Russian Federation has not yet substantially improved despite the Government Programme's measures and plans. Rather, much of what it suggested in 2007-2011 to ensure structural change in the economy was not realized, and a more active attitude of key ministries would increase the effectiveness of competition law enforcement. This points to the need for a more integrated approach to the related economic, institutional and administrative problems. The Government Action Plan (Roadmap) appears to move in this direction. Thus, it is recommended that Government renew its pro-competition efforts with a more integrated approach.

6.2.6. Intellectual property rights

The Russian Federation has committed to effective enforcement of intellectual property rights. The Russian Federation has accepted Recommendation.

The competition law exempts the exercise of intellectual property rights from the abuse of dominance and agreements provisions. The exempted actions are the exercise of exclusive rights in the results of intellectual activity and in the means of individualisation of a legal person or of goods, work or services that are [legally] equated to such rights. But the competition authority's interpretation substantially constrains the exemption. Few cases have been brought that could have raised the issue of an exemption under these provisions since they came into force in 2006 (2012 for the agreements exemption), and FAS has proposed their elimination.

The competition authority states that it interprets the abuse exemption as applicable only to the "exercise of the intellectual property right"—defined as the use of the intellectual property by the right holder in its own activities or the sale or licensing of the right to others. Exercise does not, however, include activities putting products in which the intellectual property is used into circulation, such as their sale. This understanding of the exemption narrows it significantly in relation to abuse of dominance. Indeed, it would appear to apply only to possible abuses by means of the imposition of inappropriate or burdensome conditions in contracts for the licensing or sale of the right to use the intellectual property. A right holder that chooses to use the intellectual property in its own manufacturing processes and to sell the resulting good will, if found dominant, be subject to all of the law's restrictions on abuse of dominance in relation to those sales.

There is a risk that the existence of intellectual property rights influences FAS to draw markets too narrowly, thus incorrectly labelling firms as dominant

and subjecting them to special constraints. In particular, FAS's principles of market definition in pharmaceuticals presume markets to be defined by international non proprietary name, formulation and dosage, although therapeutic substitutability can overturn the presumption. These principles would suggest a similar role for intellectual property rights in establishing presumptions in other cases. It is recommended that the ownership of intellectual property rights not prejudice findings of dominance.

Russia applies the principle of national exhaustion of intellectual property rights. The block exemption on agreements, adopted in 2009 for five years, contains an exemption for joint research, and requires that the rights of the parties in the results of the research be specified in such agreements.

REFERENCES

OECD (2004), *Competition Law and Policy in Russia: An OECD Peer Review*. Paris.

Reynolds, S.J. (2012), “New Directions in Russian Competition Law,” *Antitrust* 26:2 (Spring), 78-84.