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Foreword

Antitrust in BRICS: Agenda and achievements in comparative perspective

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1. Introduction

In the XXI century antimonopoly policy with its extensive laws and intensive enforcement is not the sole "privilege" of developed countries. There are three points addressed in this article which opens the special issue of *Russian Journal of Economics* (RuJE) devoted to antitrust in the BRICS countries:

- Why are BRICS and antitrust a topic for RuJE?
- What is the focus of attention in the special issue?
- What is important but not discussed in the special issue, and what further analysis is it aiming to incentivize?

As an invited editor I'd like to express my sincerest gratitude to all the authors of the special issue who shared their ideas about various aspects of antimonopoly policy in the BRICS countries with the journal's audience. I'd also like to thank all the referees who read manuscripts and gave recommendations on their development. RuJE is a hospitable platform for the publication of original research on competition issues and antitrust policy. Throughout the almost six years of the journal's existence, this topic has constantly recurred. I hope that this special issue will arouse additional interest among readers and potential authors and trigger a discussion on competition policy issues in the journal.

2. Why are BRICS and antitrust a topic for RuJE?

Recent developments regarding antitrust in the BRICS countries — they represent more than 40% of the world's population and about 25% of the world's economy — demonstrate a qualitative transformation, which expresses itself in multiple aspects. Firstly, there has been a dramatic growth of fines imposed on

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antitrust law violators — both in absolute terms and compared with two leading jurisdictions (the EU and the US). Secondly, there are persistent attempts by the BRICS countries to coordinate their activities in the world arena more in line with the OECD countries. Overall, the characteristics and conduct of the BRICS countries demonstrate that BRICS is more than a simple acronym. There are definitely common features in their national economies as well as corresponding issues of antimonopoly policy at the national level. There are also grounds for a common agenda in the field of international relations on competition issues. For more details, see, for example, Avdasheva et al. (2020).

Yet attempts to understand national antitrust in the BRICS countries in international discourse, as well as the discourse in the countries concerned, reveals a dichotomy. Economists tend to discuss antitrust in general without paying much attention to historical context and institutional details, or the actual implementation of competition rules. This special issue aims to help fill this gap and create better understanding of competition protection policies in Brazil, China, India, and Russia.[1]

Last but not least, 2020 is the year of Russia's chairmanship in BRICS. Competition protection and development are among a wide range of issues to be discussed in events planned for this year.

3. What is the focus of attention in the special issue?

The special issue contains six papers devoted to different issues of competition protection. These papers demonstrate not only the wide diversity of topics, which is an important specificity of competition policy as compared to other economic policies, but also some achievements (and in some cases — problems) which might, and should be, analyzed by economists. At the same time there are points that reflect certain similarities not only for the BRICS countries, but also for other jurisdictions, regarding particular issues of competition protection. Below, we describe the content of the special issue and discuss some important aspects of competition policy in a comparative way in order to reflect the spirit of contemporary antitrust in the BRICS countries.

In the article on *China's Anti-Monopoly Law and the role of economics in its enforcement*, Heng Ju and Peng Lin present a panoramic view of Chinese antitrust law and enforcement, highlighting the most notable events and antitrust cases that provide insight into Chinese antitrust. China has the youngest competition law among the BRICS countries. Just like in Russian legislation, and along with the hard core of antitrust (deterrence against individual and collective monopolistic activity of market participants,[2] merger control), China's antitrust law contains prohibitions on so-called administrative monopolies related to the actions of authorities.

The authors believe that the economic analysis in relation to cartels is relatively straightforward. However, the separation of cartel practices from commercial

[1] We hope issues of antitrust in South Africa will also be considered in further discussions on the pages of RuJE.

[2] Here we take into account the differences on competition protection issues related to abuse of dominance, for example, in the EU tradition, and monopolization of markets by the firm, in the US tradition of enactment and enforcement of laws.

practices that are aimed at improving welfare may be of particular interest. For Russia, there is a well-known antitrust case concerning large-diameter pipes for infrastructure projects of Gazprom (Shastitko and Golovanova, 2013; Shastitko et al., 2014). Avoiding errors in the assessment of particular conduct as an anti-competitive agreement in contrast to welfare-improving business practice is also of special importance for the effectiveness of leniency programs as a particular enforcement tool (Pavlova and Shastitko, 2014). Also, the authors note a very interesting configuration of antitrust regime related to the practice of Resale Price Maintenance with de-jure *per se* prohibition but de-facto (according to court cases) — rule of reason approach.

In the special issue, two articles are devoted to the discussion of the hard core of antitrust in Russia. This has become possible due to the rich experience of law enforcement of antitrust in Russia over the past 30 years, as well as significant changes in legislation over the past 15 years. The article *Coordinated practice of law enforcement in Russia: How judicial review determines evidence standards and the number of objects of law enforcement*, by Svetlana Avdasheva and Svetlana Golovanova, discusses the issue of standards for the application of norms prohibiting concerted actions. The authors show that the judicial review of Russian antimonopoly authority's decisions on infringement significantly affects the level of evidence in enforcing competition requirements, as well as the structure of cases that the antimonopoly authority accepts for processing. Using statistics regarding enforcement, they show that in Russia the ability of the higher court to influence the criteria of first instance courts is limited when compared with the ability of the first instance court to influence the strategy of enforcement by the competition authority. Moreover, the increase in the burden of proof motivates the competition authority to refrain from an investigation of concerted practice, in accordance with the prediction of the model of the selection of enforcement target by reputation-maximizing authority. Thus, this article contributes to the discussion on how enforcement cost in combination with the probability of enforcement success might shape results of competition law implementation. The article contributes to the explanation of uneven application of economic analysis under competition enforcement in Russia (Shastitko, 2018): it depends among others on the definitions of illegal conduct. Changes and amendments of the Russian law "On protection of competition" regarding the definition of concerted practice limit the scope of enforcement against tacit collusion and decrease demand for economics.

The second article on the hard core of Russian antitrust is devoted to issues of abuse of dominance in the digital economy. The article *The calling card of Russian digital antitrust* by Natalia Pavlova, Andrey Shastitko and Alexander Kurdin uses three recent cases from Russian antitrust policy in the digital sphere to illustrate typical patterns of platform conduct that lead not only to a restriction of competition that needs to be remedied by antitrust measures, but also to noteworthy distribution effects. The cases also illustrate the approach taken by the Russian competition authority to some typical problems that arise in digital markets, e.g., market definition, conduct interpretation, behavioral effects, and remedies. In this article we find explicitly a very important policy issue for all the BRICS countries: balancing of antitrust and industrial policy. The recent Bayer–Monsanto merger case, which has led to the creation of the "Technology

Transfer Center" to select recipients interested in the technology transfer and to monitor the execution of the remedy, is one of the most important examples of attempts to find such a balance.

The problems of digital antitrust in India are discussed in the article *Convergence of competition policy, competition law and public interest in India* by Geeta Gouri. Based on a historical retrospect of antitrust in India, the author addresses fundamental questions of the goals of antitrust and the criteria for their achievement. The idea that competition benefits consumers is undisputed and almost axiomatic. However, according to the author, monopolistic market structures can also lead to enhancing total welfare. Moreover, contemporary trends towards monopolistic markets provide grounds for rethinking competition policy and law and their convergence for public interest. To illustrate these points a description of three antitrust cases is used: MCX-Stock Exchange vs. National Stock Exchange & Ors, the Print India case and the Google case. All of these cases are related to issues of monopolistic unilateral conduct and also might be considered as cases in digital markets.

The Brazilian experience of merger control is presented by Eduardo Ribeiro with the article *Tropical medicine: The economics and the evolving practice of antitrust remedies in Brazil*. The author shows there has been a shift towards agreements instead of unilaterally imposed remedies, with extensive use of trustees. The argument is built on the basic principles of transaction cost economics and agency theory. The article shows that the practice of remedies based on the contract approach also reflects the goal of enhancing the Authority's bargaining position by closing opportunistic behavior loopholes in incomplete contracts. The extensive use of trustees is explained on the basis of managing negative consequences due to information asymmetry between the Authority and merging parties in favor of the latter. The issue raised by the article is especially important in the context of the development of new business models by digital platforms (see Pavlova et al. in this issue, mentioned above).

Competition protection embraces a wide range of issues and spheres of relations between economic agents, including international trade. One implication of the concept of the first sale is different regimes of regulation of parallel trade analyzed by Yannis Katsoulakos and Kalliopi Benetatou in *An economic approach to parallel imports effects and competition policy,* providing insight into modification of *per se* restrictions on parallel imports in Russia as compared with the other extreme in the EU: complete exhaustion of initial producers' rights just after the first sale. The authors raise a set of questions on the choice of a parallel import restrictions regime with an effects-based approach, recommending rule-of-reason investigations of the specific economic facts of each case and what these imply for welfare (and, specifically, consumer welfare).

4. What is important but not discussed in the special issue, and what further analysis is it aiming to incentivize?

The special issue does not purport to cover all significant competition policy issues in each BRICS country or for BRICS as a whole. Moreover, this format does not allow a discussion of particular characteristics of national antitrust regimes, which, on the one hand, form the backbone of policy, but, on the other

hand, are not included in the agenda for broad discussion by experts. There is a set of examples, based on Russian experience.

Firstly, *collective dominance issues*. Unlike the US practice where this concept is simply absent, and the EU, where this concept is implemented almost exclusively for merger control, Russian practice demonstrates a unique particularity: implementing it for abuse of dominance cases (article 10 of the Federal law "On protection of competition"). In our opinion, this is an expression of regulatory bias of Russian antitrust which might be explained as a consequence of imbalance of competition and industrial policies, protective and active tools of competition policy (Shastitko, 2012). It is these imbalances that create cases where we find antitrust in form but economic regulation in terms of content.

Secondly, *antimonopoly exemptions for intellectual property rights (IPR) protection*. We know that there are no exemptions for actions and agreements containing competition restrictions either in the EU or the US jurisdictions. Moreover, the experience of other BRICS countries demonstrates a similar picture (see as an example the Qualcomm case in Ju and Lin in this issue). At the same time there are some regulations and other documents explaining the specific regime of antimonopoly law enforcement as far as IPR issues are concerned. However, articles 10 and 11 of the law "On protection of competition" contain exemptions both for individual behavior of dominant economic entities and for agreements between undertakings. Despite the obvious deviation from international antitrust standards in relation to intellectual property rights, in a discussion ongoing for almost 10 years, there is nevertheless still strong opposition to the lifting of IPR-related exemptions.

Thirdly, *antitrust under bilateral monopolies*. Russian antitrust enforcement practice demonstrates a wide diversity of methods to manage problems with competition restrictions in situations of bilateral monopoly, in spite of the pessimism of economists on the prospects for the application of antitrust laws in the context of high bilateral switching costs due to high risks of enforcement errors (first of all, type I errors). However, to avoid regulatory intervention in an economy that still has a structure inherited from the Soviet times with territorial-production complexes and non-alternative technological chains controlled by independent owners after the privatization of the 1990s — the antimonopoly agency implemented, for example, an instrument of compulsory mediation (Shastitko et al., 2018).

Fourthly, *merger control in concentrated markets*. At the beginning of the XXI century, the Russian economy experienced a set of large-scale mergers with CR1 (concentration index based on a market share of the biggest seller) close to 100%. Instead of blocking these deals, the Russian antimonopoly authority demonstrated loyalty to the proposed mergers, allowing them with mainly behavioral remedies to compensate the higher risks for internal consumers. The effects of this practice are studied, for example, in Avdasheva et al. (2018) not only from a nationwide perspective, but also from a worldwide one.

Overall, the articles in the issue show that questions of competition enforcement in BRICS are far from being settled. On the contrary, they require further analysis. Comparative analysis of the goals that competition authorities try to achieve (see Gouri in this issue), approaches to enforcement towards particular types of conduct (see Ju and Lin, and Avdasheva and Golovanova in this issue), and merger enforcement (see Ribeiro in this issue), or towards particular indust-

ries and business models (see Pavlova et al. in this issue) in different countries would help explain common regularities of competition enforcement in BRICS. The presented articles are sufficient to show that BRICS antitrust enforcement, first, is mature enough to be analyzed as a particular policy model, second, differs from the competition policies in the US and the EU; and third, the specific features of BRICS enforcement are not incidental. The specific approach to competition enforcement is an answer to particular challenges that the BRICS countries face.

Additional evidence on the effects of specific policies — including restrictions on parallel import (see Katsoulacos and Benetatou in this issue) — is even more important, in order to confirm or reject the prevailing presumptions on the impact of particular business conducts. In this way, the analysis made for the BRICS countries may provide substantial contributions to global competition law and economics.

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