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Competition Law, Policy and Regulation in the Digital Era

*Contribution of
The Russian Federation*

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The Russian Federation
Competition law, policy and regulation in the digital era
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Global digitalization is a challenge for competition authorities around the world. We should accept that the world is changing and it is crucial to proceed with improving legal and organizational measures to ensure, protect and develop competition in the digital age, as well as adapt antimonopoly legislation to digitalization.

Digital era puts plenty of questions to the regulators: protecting competition amidst rapid digitalization, global mergers of the largest companies with enormous innovative potential, countering international digital cartels and much more.

In a number of sectors, large digital companies continue to occupy dominant positions, having a significant impact on the economy, and the direct influence of transnational corporations on competition in national markets increases.

The influence of global players is significant also because they own the basic platforms (from software to payment systems, from social networks to patents for technology and equipment). In this regard, maintaining and ensuring a balance of interests of participants in digital markets, as well as protecting national market participants, require a timely response to the emergence of new features and mechanisms of activities of suppliers and buyers.

At the current stage of economic development, the competitive advantage is gained by the manufacturer that uses digital platforms, and not the one that continues to seek or increase sales using only traditional, non-digital methods of competing and attracting consumer attention, such as outdoor advertising and advertising on television.

The basis of the market power of companies has changed significantly with their ability to influence markets, monopolize entire industries, uniting them with a system of digital platforms' links. At the heart of modern market power is the ownership of information and its processing technologies, not the ownership of production facilities.

Moreover, significant changes in the structure of commodity markets in connection with the digitalization of the economy lead to the need to change the methods for determining the boundaries of commodity markets, assessing the influence of adjacent markets on each other.

Antimonopoly legislation has to take into account all these challenges and implement policies that not only effectively suppress the restriction of competition, but also ensure the development of innovations in the future.

In the Russian Federation, the Presidential Decree No. 203 of May 9, 2017 "Strategy for the Development of the Information Society in the Russian Federation for 2017-2030" stipulated the main directions of the policy development in this area¹.

In 2017, the Russian government approved the main policy document devoted to the development of digital economy – National Program "Digital Economy in the Russian Federation"². The Program consists of six projects, which are "Legal Regulation of Digital Environment", "Digital Infrastructure", "Personnel for Digital Economy", "Digital Security", "Digital Technologies" and "Digital Public Administration", and provides, inter alia, for amendments to the Federal Law "On Protection of Competition" and other regulatory legal acts regarding adaptation of antimonopoly legislation to digital economy³.

In addition, the President of the Russian Federation signed Decree No. 618 of December 21, 2017 "On the main directions of the state policy towards competition development" approving the National Competition Development Plan for 2018–2020⁴. The Decree and National Plan determine the principles of interaction between state and society, implying intolerance to incidents of unfair competition, cartels and abuse of monopolistic position. As a fundamental principle of state competition policy, the Decree defines the improvement of antimonopoly regulation in the digital economy.

The FAS also prepared and submitted to the Government of the Russian Federation the so-called "fifth antimonopoly package", aimed, among other purposes, at protecting competition in the Russian segment of the digital market.

The draft law defines new concepts, including "network effects", in the presence of which an economic entity can be recognized as dominant with a market share of more than 35% and revenue for the past calendar year exceeding 400 million rubles.

Such amendments would not prevent digital platforms from operating, but subject to their dominance would establish a prohibition on discrimination against customers, as well as on monopolistically high prices for the services provided. The

¹ <http://kremlin.ru/acts/bank/41919> (Russian version only)

² <http://government.ru/info/35568/> (Russian version only)

³ National program "Digital Economy of the Russian Federation" (approved by the Presidium of the Presidential Council for Strategic Development and National Projects of the Russian Federation, Report No. 16 of 24.12.2018).

⁴ <https://en.fas.gov.ru/documents/documentdetails.html?id=15342>

mechanisms will apply only to those companies that have a substantial turnover and can have an impact on the market.

In 2020, the FAS managed to cut out analog broadcasting in 84 regions of the Russian Federation. The monitoring of prices for user equipment and initiation of cases against chain stores made it possible to stabilize prices and increase the share of digital set-top boxes in the "low price segment". Our activities ensured the sustainability and transparency of the entire switch to digital broadcasting, and the tariffs set for public telecommunications services for digital broadcasting led to a 4.7 times reduction in the average consumer payment.

One of the greatest results the FAS achieved in accordance with the National Plan in relation to strengthening consumer protection and competition in the digital economy was elimination of unreasonable tariff difference for mobile communications services while traveling across Russia. In 2019, the FAS managed to complete the process of cancellation of intranetwork roaming – service that operator provides to its users when they travel across the country and automatically get connected to their operator's network. From the beginning, companies refused to comply with the FAS requirements and later set the cost of services in the region of residence equal to the ones in home region, but introduced a fee for incoming long-distance calls to compensate for the lost income. Finally, the FAS succeeded in establishing equal pricing conditions for communication services in the home region and for travelers across the territory of the Russian Federation in the network of its operator. On average, the cost of communication services for travelers across Russia reduced from 2 to 5 times when person was in the network of another operator.

Apart from that, the work was carried out on cancellation of roaming in the Republic of Belarus and the Russian Federation. The approved action plan on the abolition of roaming charges provided for the implementation of measures aimed at bringing subscriber tariffs to a fair level, in particular, mutual reduction by telecom operators of rates of inter-operator interaction to a level that allows setting comfortable subscriber tariffs, as well as simultaneous introduction of reduced subscriber tariffs. Joint work on the implementation of measures to abolish roaming on the territory of the two countries, as well as a plan of joint actions to identify and suppress fraud in the telecommunication networks of the two countries allowed to move to the final stage and reduce tariffs up to 20 times starting from November 1, 2020.

Within recent years, the FAS Russia closely monitored behavior of digital companies and has successful track record in a great number of case investigations. In Microsoft case⁵, fulfilling the FAS requirements created equal conditions for

⁵ <http://en.fas.gov.ru/documents/documentdetails.html?id=15352>

developers and antivirus products not only in Russia but also in all territories where Microsoft is present, ensuring efficient competition on the global IT market. Google case⁶ related to abuse of dominant position on the market of pre-installed application stores. In order to restore competition Google had to adjust its contracts with mobile devices vendors to exclude anticompetitive requirements that restrict installing applications and services of other vendors. Moreover, recently the FAS has completed consideration of the Booking.com case⁷ and established that the company abused its dominant position in the market for providing of information about hotels, hostels and other accommodation facilities by aggregators. Along with that the FAS has issued the ruling on the case against Apple Inc. on abuse of its dominant position, including remedies to eliminate the violation⁸, according to which Apple should remove from its documentation provisions that give it the right to reject third-party apps in the App Store for any reason, as well as to ensure that in-house apps do not take precedence over third-party apps, and that developers of parental control apps can distribute them without loss of the important functionality.

While considering cases against digital companies the FAS Russia identified several major challenges:

1) Features of determining the dominant position of the digital platform

Investigations made it clear that standard economic analysis mechanisms are insufficient in cases where the regulator deals with digital platforms, "zero-price" markets.

The FAS began to develop new approaches to assessing multilateral markets, determining market shares based on radically different indicators for calculating market share (number of applications, users and big data, ads, downloads, transactions through the platform, etc.), assessing the level of direct and indirect network effects and the platform gaining market power, including the degree of influence on dependent markets as a key digital infrastructure.

2) Features of assessing the practices of digital platforms in terms of the degree of influence on competition in related markets (downstream market effects)

It should be noted that one of the most common types of abuse of a dominant position in digital markets is abuse, expressed in the fact that the dominant entity, while being the owner of the platform and the owner of other goods circulating in adjacent

⁶ <http://en.fas.gov.ru/press-center/news/detail.html?id=50028>

⁷ <https://en.fas.gov.ru/press-center/news/detail.html?id=55116> (December 21, 2020)

<http://en.fas.gov.ru/documents/documentdetails.html?id=15364> (September 18, 2020)

⁸ <http://en.fas.gov.ru/documents/documentdetails.html?id=15363>

markets (related to the platform), uses its platform to preferential promotion of their own products and prevents the free promotion of competitors. Such benefits can be provided through linking (providing bundled offers) or in other ways (for example, through access to big data collected on the platform, through the use of special algorithms, etc.). Thus, often an element of abuse arises when the interests of the platform owner go beyond the development of the platform itself and spread to adjacent markets.

3) The analyzed actions of digital platforms are often or almost always associated with intellectual property and generate in each case the task of finding a balance between the public interests of protecting competition and the private interests of the rights holder

Often, within the framework of investigations in digital markets, the competition authority is faced with arguments from the defendants that the practices considered by the regulator are solely their exercise of intellectual property rights, to which antimonopoly legislation cannot be applied.

4) Determination of product and geographical boundaries of the market

Determination of geographic boundaries of ICT markets is carried out on the basis of the Law on Protection of Competition and the Procedure for analyzing the state of competition in the product market (hereinafter – the Procedure), approved by the FAS Order dated April 28, 2010 No. 220, which establishes a clear procedure, and is publicly available and includes next steps:

- preliminary determination of the geographical boundaries of the product market;
- identification of the conditions for the circulation of goods, limiting the economic possibilities of purchasing goods by the acquirer(s);
- determination of territories included in the geographical boundaries of the considered commodity market.

In addition to benefits, the digitalization of the economy also carries risks associated with the monopolization of commodity markets, the possibility of abuse of market power by "digital giants" to the detriment of the interests of consumers.

Taking account of the increasing need to protect and develop competition in the digital age, as well as adapt antimonopoly legislation to digitalization, the FAS has developed, implemented and successfully used a multiparameter system for identifying and proving bid rigging, which was later transformed into the big project

called "Big Digital Cat"⁹. This project is constantly being modernized and adapted to new realities: from detecting signs of bid rigging, it transferred to a complex approach of tracking all the connections of a legal entity.

In the future, the FAS plans to increasingly use "Big Digital Cat" to track all connections of a suspect, and finally come to the analysis of commodity markets, maintain an evidence base, and form decisions.

On a regular basis the FAS Russia issues methodological recommendations aimed at raising awareness among business, consumers and experts about the peculiarities of detecting and preventing violations of antimonopoly legislation in the digital era.

In 2020, the FAS prepared "Recommendations on the detection, prevention of cartels and other anticompetitive agreements in the digital economy"¹⁰, which expand the terminology by introducing the new term – digital evidence, defined as a "meaningful piece of information stored or transmitted in binary form", provide statistical data, as well as describe practices for identifying digital cartels in which offenders use various software products in order to implement the agreements.

The FAS pays special attention to digitalization when interacting with consumers and continues to strengthen its position as one of the most open Russian authorities.

New Information Policy Concept was developed to raise awareness among various groups of stakeholders (government, courts, business community, citizens, scientific community) about the functions and principles of the FAS. The main activities within this framework are the analysis of global and regulatory competitive systems, cooperation with specialized international journals and news services, participation in international research projects, activity in the Internet and foreign media space.

The FAS is actively developing its official accounts in social media (Instagram, Facebook¹¹, Twitter, etc.), where people can discuss activities of the authority and promptly look through the latest news.

The FAS has created a special website, located at www.anticartel.ru, devoted to providing information about the dangers of cartels and how to fight them. A person can find easy-to-read guidelines, ask questions, as well as observe anti-cartel enforcement practice and other relevant features of the Russian legislation. One of the main goals of this project is to bring together all Russian anti-cartel enforcement practices, to sum up foreign experience and to create a unified useful database.

⁹ <http://en.fas.gov.ru/press-center/news/detail.html?id=53478>

¹⁰ <https://fas.gov.ru/news/30139> (Russian version only)

¹¹ <https://www.facebook.com/rus.fas/>

In addition, citizens and economic entities can report information on the facts of over-pricing in retail and wholesale of food, agricultural products and raw materials through the hotline¹² on the FAS website. The obtained information is used by the FAS in preparation of a monthly report aimed at identifying and suppressing speculative price increases. Another tool designed to protect citizens is utility calculator¹³, which is also located on the website of the FAS. This tool allows to monitor if the limit index of payments for public utilities has been exceeded. Significantly, all these tools and areas of activity became of prime importance during the COVID-19.

To sum up, the FAS work on modernization of legislation, enforcement and advocacy in the context of digital economy is part of the work of competition authorities and international organizations around the world to address changes that emergence of digital markets entails for the economy and consumers.

¹² http://fas.gov.ru/pages/hot_line (Russian version only)

¹³ http://eias.fas.gov.ru/calc_ku/ (Russian version only)