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**Enforcing competition law in digital markets and ecosystems:
policy challenges and options**

Contribution

Federal Antimonopoly Service

The Russian Federation

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Introduction

Digital markets, namely the issues of understanding their nature, developing competition and improving law enforcement in this area, have always been in the center of attention of the world competition community. As repeatedly confirmed by Ms. Rebeca Grynspan, UNCTAD Secretary General, UNCTAD that turns 60 years in 2024, calls “for a more balanced approach to global data governance for the benefit of people and the planet”.

The question of proper and balanced regulation of digital markets is also a priority for the FAS Russia.

Starting from the 1990s, the Russian competition authority has already begun to discuss and address issues related to operator relations, mobile communication standards and radio frequency allocation rules, as well as tariff regulation in telecom sector.

In the 2010s, the FAS Russia began to work in digital markets in their current sense. In this vein, the first global case in which the FAS Russia was engaged in 2010 was the one against Microsoft for pre-installing Windows XP on computers sold in the Russian Federation¹. Since 2015, a number of digital disputes has begun to grow explosively.

Like competition regulators around the globe, the FAS Russia reviewed the cases against Google concerning the pre-installation of compulsory applications², Microsoft antivirus case³, Apple on parental control⁴, Google⁵ and

¹<https://www.concurrences.com/fr/bulletin/news-issues/june-2017/the-russian-competition-authority-issues-a-warning-letter-to-a-multinational>

² <https://www.reuters.com/article/idUSKBN0LOORJ/>

³ [https://one.oecd.org/document/DAF/COMP/AR\(2018\)26/en/pdf](https://one.oecd.org/document/DAF/COMP/AR(2018)26/en/pdf)

⁴<https://bricscompetition.org/ru/news/apple-complied-with-russias-fas-order-on-restrictions-in-app-store>

⁵ <https://www.bloomberg.com/news/articles/2017-04-17/google-settles-russian-antitrust-case-on-android-phones>

Apple⁶ in terms of their payment systems, Google on blocking YouTube accounts⁷, Booking.com on abuse of dominant position in the accommodation facilities market⁸ and others.

Among mergers, one shall note Bayer/Monsanto⁹ (2018) with a powerful component in the form of digital solutions and services for the agro-industrial complex. One of the conditions for Bayer/Monsanto merger approval in the Russian Federation was the creation of a system of technological transfer of some relevant R&D results, technologies and big data owned by transaction participants to Russian users.

Antimonopoly regulation in digital markets in the Russian Federation

Currently all over the world, we can see increasing number of cases related to the use of special programs and information technologies by participants in digital markets. Big data has become a huge factor in cases of abuse of dominance by tech giants and global mergers and acquisitions.

The FAS Russia strives to adapt to digital realities by both improving enforcement practices and modernizing antimonopoly legislation.

In September 2023, the fifth antimonopoly package (the so-called “digital” package) came into force, amending the Federal Law of July 26, 2006 No. 135-FZ “On Protection of Competition” (hereinafter “Law on Protection of Competition”) and the Code of Administrative Offences of the Russian Federation in order to adapt the application of antimonopoly rules to the realities of digitalization and globalization.

The amendments reflected in the “digital package” are aimed at improving antimonopoly regulation of digital markets, including in terms of suppressing abuse of dominant position, state control over economic concentration and prevention of anticompetitive agreements.

The concepts of “network effect” and “digital platform” have been introduced into the Law on Protection of Competition.

⁶ <https://www.bricscompetition.org/news/russias-fas-suspects-apple-of-violating-antitrust-rules>

⁷ <https://www.pymnts.com/cpi-posts/google-faces-fines-in-russia-for-violating-antitrust-rules-on-youtube/>

⁸ <https://www.bricscompetition.org/news/fas-fined-bookingcom-13-billion-rubles>

⁹ <https://tass.com/economy/1000874>

The Law on Protection of Competition was also supplemented with an article under which economic entities owning a digital platform are prohibited from actions qualified as abuse of a dominant position, if a number of conditions are present in the aggregate.

These conditions include:

- the network effect makes it possible to exert a decisive influence on the general conditions of circulation of goods in the commodity market or to eliminate other economic entities from this market or make it difficult for other economic entities to access it;
- the share of transactions between sellers and buyers through a digital platform exceeds thirty-five percent of the total volume of transactions on the relevant commodity market;
- the revenue of such business entity for the last calendar year exceeds two billion rubles (approx. 22 million USD).

In addition, the amendments introduced by the fifth antimonopoly package establish as an additional aggravating circumstance for committing the offense the use of a program that allows for automated decision-making without human intervention.

The amended Law introduces a new basis on which transactions with stocks (shares), property of commercial organizations, rights in relation to commercial organizations have to be made with the prior consent of the antimonopoly authority – if the transaction price exceeds seven billion rubles (approx. 77 million USD).

The new development will allow to take into account the real value of a target company operating in the digital market (for example, a startup), since traditional criteria based on the amount of annual revenue of participants of transactions and the value of their assets may not reflect the real impact on the economic terms of the transaction.

A novelty in Russian antimonopoly legislation is the expansion of the institution of an expert review, which implies the introduction of options for appointing and conducting an expert review during: an examination of applications for consent to the performance of a transaction (to another activity subject to state control); an examination of a case regarding a violation of antitrust legislation; supervision of

the performance of remedies (“trustee” functions). An expert review institute is of special relevance for cases and mergers that occur in digital markets.

Soft law toolkit

It is worth noting that in our work we strive to combine state control and active use of soft law mechanisms, including in digital markets.

In 2022, the FAS Russia and major IT companies signed the Principles of Interaction of Digital Market Participants¹⁰. The document is aimed at creating an institution of self-regulation. Market participants voluntarily undertook a commitment not to engage in unfair practices towards consumers or competitors.

These principles include reasonable openness of digital platforms and ensuring free access to information on how search results are ranked; neutrality of treatment of different sides of the market, including competitors; ensuring autonomy of platform users when interacting with the platform; avoiding expansive and ambiguous language in the rules of its operation; ensuring the rights of users, including by considering their appeals and providing them with comprehensive solutions. Moreover, this document includes general procedures for the dispute resolution in digital markets.

The provisions of the Principles of Interaction of Digital Market Participants were further developed in the form of the Standards of Interaction between Marketplaces and Suppliers, which specify the general provisions in relation to online commerce involving marketplaces.

In addition, representatives of marketplaces, rights holders and the FAS Russia have developed a set of good practices for the interaction of marketplaces with rights holders and sellers to prevent the sale of counterfeit goods. The application of such practices is intended to increase self-regulation of the industry and fight against counterfeiting. Since July 2023, more than 4.5 million cards of unoriginal goods have been blocked.

¹⁰ <https://www.bricscompetition.org/news/fas-and-major-it-companies-signed-principles-of-interaction-on-digital-markets>

Cautions¹¹ and warnings¹² are important soft law mechanisms in the Russian legal system. A caution is sent to an official of a business entity in case of detection of facts of dissemination by this person of information about its future behavior on the market in the form of public statements, if such behavior may lead to violation of antimonopoly legislation. A warning as a form of the mildest response of the competition authority to the behavior of business entities encourages them to refrain from unlawful actions and to correct its behavior. Warnings, on the one hand, are an element of law enforcement within the framework of consideration by the competition authority of specific cases on violation of antimonopoly legislation, but, on the other hand, they undoubtedly represent an instrument of soft law, as they provide the violator with a free choice – to voluntarily execute the warning and immediately cease the violation, or to continue anticompetitive practices and be subject to sanctions from the regulator with a high degree of probability.

The mechanism of warnings and cautions is actively implemented by the FAS Russia in the digital markets and has proven to be effective.

For example, the FAS Russia constantly monitors the tariffs of the largest Russian mobile operators and in September 2023, the Service issued a warning to Russia's largest cellular operators to stop charging for Internet distribution from subscribers' devices¹³. The warning is currently being enforced, there is no additional charge for Internet distribution.

Besides, these mechanisms are used with marketplaces. In order to suppress unfair practices and ensure equal and non-discriminatory conditions for all market participants, in April 2024 the FAS Russia issued warnings to two major Russian marketplaces Wildberries¹⁴ and Ozon¹⁵ for imposing unfavorable conditions for sellers and distributors.

¹¹ Article 25.7. of the Federal Law of July 26, 2006 No. 135-FZ “On Protection of Competition”

¹² Article 39.1. of the Federal Law of July 26, 2006 No. 135-FZ “On Protection of Competition”

¹³ <https://interfax.com/newsroom/top-stories/94655/>

¹⁴ <https://www.bricscompetition.org/news/russian-antitrust-body-issued-a-warning-to-wildberries>

¹⁵ <https://www.bricscompetition.org/news/russias-fas-issued-warning-to-ozon-for-alleged-signs-of-antimonopoly-law-violations>

International cooperation

The FAS Russia strives to promote its national best practices on the international arena. Since the formation of the Interstate Council for Antimonopoly Policy in CIS countries (hereinafter – ICAP) in 1993, the FAS Russia has been discussing the topic of digital regulation within the CIS and working together in the area of law enforcement.

Within the BRICS, the issues of antimonopoly regulation in digital sphere have been actively discussed since the first BRICS Competition Conference in 2009 in Kazan (Russian Federation). There is a BRICS Working Group for Research of Competition Issues in Digital Markets, co-chaired by the competition authorities of Brazil and Russia.

The idea of creating BRICS Working groups for Research of Competition Issues in Socially Important Markets (including the BRICS Working Group for Research of Competition Issues in Digital Markets) is reflected in Article 4.1. of the Memorandum of Understanding on cooperation in the field of competition law and policy of the BRICS countries signed in 2016 in St. Petersburg (Russian Federation).

The first report of the BRICS competition authorities on regulating competition in the digital economy was released in 2019 (hereinafter “first report”)¹⁶. This was primarily an overview document. It contained a general picture of theories and approaches in the study of digital markets, analysis of national legislations of the BRICS countries, description of landmark cases and decisions on economic concentration transactions. The result of its adoption was the prioritization of regulation of digital markets as one of the key areas of competition policy of the BRICS countries, understanding that such markets are global in nature and that it is necessary to deepen cooperation between BRICS competition authorities, including practical cooperation in case-handling.

In five years since the first report was adopted, enforcement has intensified and national legislation in all BRICS countries has evolved, with changes being discussed or already introduced to adapt competition law to the digital economy and globalized markets. The second report of the BRICS competition authorities

¹⁶https://cdn.cade.gov.br/Portal/Not%C3%ADcias/2019/Cade%20lan%C3%A7a%20relat%C3%B3rio%20sobre%20economia%20digital%20em%20reuni%C3%A3o%20do%20BRICS__brics_report.pdf

on regulating competition in the digital economy was issued in 2023 (hereinafter – “second report”)¹⁷. The second report pays special attention to economic concentration transactions and the approaches developed for them. The document also describes how market power is defined, metrics for measuring it that apply uniquely to individual markets, reflects algorithm practices, multilateralization of platforms, zero pricing, and defines the role of innovation.

Besides, on the basis of Principles of interaction between participants in digital markets, in Summer 2023, within the ICAP 30rd anniversary meeting in St. Petersburg (Russian Federation) the Model principles and standards of activity of digital market participants in the CIS member states¹⁸ were approved. Such principles and standards are now being discussed within the BRICS framework, including, for instance, 2023 BRICS Competition Conference in New Delhi.

Conclusion remarks

In order to tackle effectively challenges posed to competition authorities by digital economy, it seems reasonable that regulators combine improving legislation and developing practical tools at the national level with sharing experience and knowledge with international partners and analyzing contributions of international organizations.

The transnational and global nature of digital markets requires wider and deeper cooperation between competition authorities in different countries at all stages of law enforcement: from suspicion of infringement and collection of evidence to issuing decisions and monitoring their implementation.

It is important to promote cooperation between competition authorities in this area, including within the framework of international organizations such as the UN Conference on Trade and Development, in order to develop new global approaches to antitrust regulation of digital markets and, no less importantly, support developing countries, young and small competition authorities dealing with competition issues in global digital markets.

¹⁷<https://cdn.cade.gov.br/Portal/assuntos/noticias/2024/BRICS%20Digital%20Economy.pdf>

¹⁸ <https://en.fas.gov.ru/press-center/news/detail.html?id=55774>