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Strengthening Consumer Protection and Competition in the Digital Economy

Contribution of the Russian Federation

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The Russian Federation
Strengthening consumer protection and competition in the digital economy
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The Russian government pays special attention to the digitalization of the global economy and the growing influence of transnational corporations on competition in national markets. Several program documents exist in order to develop digital economy.

The Decree of the President of the Russian Federation 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.

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.

In addition, the "fifth package" introduces new approaches to controlling economic concentration. In particular, a new criterion for preliminary approval of transactions is being introduced – volume of the transaction should exceed 7 billion rubles.

The Russian President also 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

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>

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.

One of the greatest results the Federal Antimonopoly Service of the Russian Federation (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.

The FAS also won the competition advocacy contest of the World Bank and ICN in the category "Promoting competitive digital infrastructure, digital platforms and digital finance" with the project on abolishing intranetwork roaming⁵. Experience has shown that due to these initiative customer loyalty increased and reduction in tariffs led to a comparably sized increase in traffic. Abolition of roaming will contribute to the development of the telecommunications market, more active involvement of customers in the usage of telecommunications services, increase transparency in this area and make telecommunication tariffs more clear, which will benefit both users and telecom operators.

In 2019, the FAS managed to eliminate "banking roaming" – high commission for interregional transfers between accounts of the same bank. Dynamics of bank cards payments indicate growing interest of Russian citizens in non-cash segment. However, number of banks still charge commission that reaches 1.5% for interregional transfers to the accounts of relatives and friends opened in another territorial unit of one bank that undoubtedly indicates presence of geographical barriers to money transfer on the territory of the Russian Federation.

The FAS estimated that in 2018, costs of consumers faced with interregional discrimination amounted to 6 billion rubles. In order to eliminate this discrimination, legislative amendments were developed and adopted (Federal Law No. 434-FZ of

⁵ <https://www.worldbank.org/en/events/2018/12/06/2018-2019-competition-advocacy-contest#4>

December 16, 2019 "On Amendments to Article 29 of the Federal Law "On Banks and Banking Activities"⁶), which secured requirement of inadmissibility of establishing various commissions for interregional transfers between individual bank accounts opened within the same bank. By virtue of the introduced measures aimed at competition advocacy, the FAS managed to protect Russian citizens, ensure freedom of money movement and further development of non-cash payments, eliminate discriminatory practices, as well as increase motivation of banks to optimize business models and search for technological solutions to meet customer needs.

Within recent years, the FAS closely monitored behavior of digital companies and has successful track record in a great number of case investigations. In Microsoft case⁷, fulfilling the FAS requirements created equal conditions for 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 case⁸ 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 issued two warnings to Booking.com⁹ to stop actions that have signs of violation of the antimonopoly legislation, expressed in the imposition of wide and narrow price parity clauses on hotels, hostels and other accommodation facilities. 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 violation¹⁰, 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.

In its competition enforcement the FAS pays special attention to protection of consumer data rights. Data of consumers of digital services is not only an important resource for developing the economy and personalizing offers on the market, but also an integral characteristic of the individual user and his autonomy. Despite the fact that the data itself is non-rivalrous and in general, it is not difficult to obtain it, and companies can quickly collect large amounts of data, some categories of data –

⁶ <http://en.fas.gov.ru/press-center/news/detail.html?id=54657>
<http://publication.pravo.gov.ru/Document/View/0001201912160067?index=1&rangeSize=1>
(Russian version only)

⁷ <http://en.fas.gov.ru/documents/documentdetails.html?id=15352>

⁸ <http://en.fas.gov.ru/press-center/news/detail.html?id=50028>

⁹ <https://en.fas.gov.ru/press-center/news/detail.html?id=54555> (November 12, 2019)

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

¹⁰ <http://en.fas.gov.ru/documents/documentdetails.html?id=15363>

primarily personal user data – need special processing and use protection measures. The control over the processing and use of user data is realized by competent regulators. It should not be allowed that the data received by market participants is used unfairly as a competitive advantage and exclusive access to such data hinders the development of competition in the market. The FAS is fully aware of the need to control the non-rivalrous use of data in digital markets when considering cases involving the consumer data rights and is guided by Federal Law of July 27, 2006 No. 152-FZ "On Personal Data" in conjunction with Federal Law of July 26, 2006 No. 135-FZ "On Protection of Competition".

In 2019, the FAS was able to put into practice approaches to regulating markets based on the circulation of data when considering cases against online platforms for searching job and candidates for vacancies – companies "HeadHunter", "Superjob", "Rabota.ru".

The companies "HeadHunter", "Superjob", "Rabota.ru" own and manage the largest online platforms for searching job and candidates for vacancies in the Russian Federation – "hh.ru", "superjob.ru", "rabota.ru".

These sites represent the Russian market of services to ensure information interaction between applicants, employers and recruitment agencies in Internet.

The market of services for providing information interaction between applicants, employers and recruitment agencies in Internet is a multi-sided market with network effects, where such platforms as hh.ru, superjob.ru, rabota.ru (hereinafter – platforms) connect applicants and employers. Employers use various subsidiary software, such as automated recruitment software, to help them select candidates more efficiently and quickly when working with these platforms.

The automated recruitment software allows automatically selecting candidates' CVs from the platforms databases according to various parameters, inviting these candidates to an interview, and conducting an initial interview with candidates using a voice assistant. The activity of automated recruitment services directly depends on the ability to access the relevant databases of the platforms.

It should be noted that before posting their CVs and personal data on the platforms, users accept user agreements for the use of the platforms and give the platforms consent to the processing of their personal data. Platforms are required to obtain this consent in compliance with the Law on Personal Data. At the same time, the platforms are responsible for the proper processing of their users' personal data.

By posting their personal data and CVs on platforms, users fill in their databases. Thus, the platforms become attractive to potential employers, as they will be able to find suitable candidates for their vacancies there. This is how a multilateral platform emerges.

Further, the platforms use their accumulated database to provide paid services to various parties of the platform (access to the CV database, selection of relevant candidates, selection of relevant vacancies, assistance in preparing CVs, etc.).

The database becomes the main source of profit for platforms, they try to develop and fill it further (increase the capacity of data centers, train algorithms based on information from databases, use artificial intelligence, etc.), as well as protect it from third-party attacks.

The combination of these processes leads to the appearance of network effects for individual platforms in the product markets, which help the platforms to increase market share and even serve as a source of platform dominance in the markets.

The FAS found that the user agreements of the platforms hh.ru, superjob.ru, rabota.ru contain provisions that prohibit users of these platforms (including employers who paid for access to the platforms) from using third-party software when working with the platforms without confirming that such third-party software does not affect and disrupt the operation of the relevant platform.

In addition, it was found that the platform hh.ru blocked users (employers) for using third-party automated recruitment software and suggested users switch to their own software products, which have similar functionality.

Terms of user agreements of hh.ru, superjob.ru, rabota.ru, and actions of hh.ru blocking users for using third-party software contained signs of violation of the antimonopoly legislation, which resulted in creating obstacles to access to the market of services to ensure information interaction between applicants, employers and recruitment agencies in Internet for automated recruitment software. Based on the identified features, the FAS has initiated cases on signs of violation of the antimonopoly legislation in relation to these platforms.

During the case consideration, it was noted that the software for automated recruitment interacts with the databases of the platforms via the application-programming interface (API). Using the API is a good business practice and allows the parties to control the process of obtaining the necessary information from the platform databases, as well as to ensure the proper and secure functioning of databases. Interaction not via the API can lead to negative consequences for platforms and databases in the form of data parsing, violations in operation, unauthorized transfer and processing of personal data, etc.

After consideration of the case against the mentioned companies, the FAS concluded that in the user agreements of "SuperJob" LLC (superjob.ru) and "RDV-Soft" LLC (rabota.ru) there is a section dedicated to the interaction of third-party software with databases of the specified platforms via the API, as well as that such interaction actually occurs in the specified way. In addition, these platforms did not block their

users (employers) for using third-party software with databases. In such actions, according to the FAS, there are no violations of antimonopoly legislation.

However, with respect to the "Headhunter" LLC (hh.ru) the FAS found that the specified platform restricted third-party service interaction via the API, blocked users (employers) of this service for using it when working with the hh.ru and suggested switching to a service with similar functionality that was developed by the hh.ru.

These circumstances served as an obstacle to access to the commodity market of services to ensure information interaction between applicants, employers and recruitment agencies in Internet for the developer of third-party software for automated recruitment. As a result of the consideration of this case, the "Headhunter" LLC (hh.ru) was found to have violated Russian antimonopoly legislation by creating obstacles to access to the commodity market.

During the consideration of these cases, one of the main arguments of the platforms justifying restrictions in user agreements and actual restrictions of users (employers) was the argument that the use of third-party services by employers when working with databases could lead to compromising the personal data of platform users and thereby violate the Law on Personal Data.

The FAS has studied this argument and it has not been confirmed. If the interaction with the platform databases via the API is properly, violations of the Personal Data legislation should not occur.

Thus, the example of the above behavior of platforms in relation to third parties (in this case, suppliers of automated recruitment software used by employers) shows that the platforms try to restrict access to their databases for them.

This behavior is dictated by both the commercial interests of the platforms (locking consumers to services inside the platform – "walled garden"), and concerns for their technologies and personal data of consumers, since the platform does not control their processing by third parties.

In this situation, the issue of ensuring competition and the security of consumers' personal data becomes extremely important. According to the FAS, these goals can become achievable, including by allowing platforms to access their data via the API.

However, the issue of developing API standards in different areas, as well as the issue of access conditions to such APIs, remains open and should be discussed with all of the interested parties.

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"¹¹. 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

Along with that, the FAS issued a number of methodical recommendations aimed at raising awareness among business, consumers and experts about the peculiarities of detecting and preventing violations of antimonopoly legislation in the digital age.

In 2019, the FAS developed "Recommendations on practices in the use of information technologies in trade, including those related to the use of price algorithms"¹², which introduce and explain such terms as price algorithm, online platform, vendor, program product and distributor.

The Recommendations also describe accepted (legal) practices of vendors, distributors and resellers using information technologies, including price algorithm. Mainly the legality and acceptance of such practices depends on the objective, which shall not in any way violate the antimonopoly legislation of the Russian Federation.

In 2020, the FAS prepared "Recommendations on the detection, prevention of cartels and other anticompetitive agreements in the digital economy"¹³, which expand the terminology by introducing the new term – digital evidence, defined as a "meaningful piece of information stored or transmitted in binary form".

The Recommendations aimed at protecting national consumers were prepared based on the analysis of best international practices used worldwide and cover the table of recent cases investigated by the FAS.

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.

¹¹ <http://en.fas.gov.ru/press-center/news/detail.html?id=53478>

¹² <https://fas.gov.ru/documents/1-16fb9764-b5c1-48fe-8088-9f3f02144aea> (Russian version only)

¹³ <https://fas.gov.ru/news/30139> (Russian version only)

The FAS is actively developing its official accounts in social media (Instagram, Facebook¹⁴, 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.

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 hotline¹⁵ 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 calculator¹⁶, 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.

¹⁴ <https://www.facebook.com/rus.fas/>

¹⁵ http://fas.gov.ru/pages/hot_line (Russian version only)

¹⁶ http://eias.fas.gov.ru/calc_ku/ (Russian version only)