

Blocking Third-Party Software on Russian Job Platform: the Commercial Court of Moscow City Backs the Russian Antimonopoly Authority's Case Against HeadHunter

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On May 27, 2021, the Commercial Court of Moscow City backed the Federal Antimonopoly Services of Russia (FAS) in a case against HeadHunter, a platform that provides a job search service in Russia. HeadHunter had blocked clients from using the program Robot Vera from its competitor Stafori to automate recruitment services. Instead, HeadHunter offered its own service, Talantix, with similar functionality.

Facts of the case

According to clauses 4.2.7, 4.2.8, and 4.2.13 of the Terms of Use of the HeadHunter service, any user is prohibited from performing the following actions when using the HeadHunter's site (hereinafter referred to as the site): using or attempting to use any software to work with the site or to search on the site except traditional and public browsers (Microsoft Explorer, Netscape Navigator, Opera and others); use of software tools that simulate the user's work on the site; using parsing functions/parsing programs.

HeadHunter, referring to these points, began to block the accounts of individual customers who received access to the site on a paid basis and simultaneously use a competitor's application - Robot Vera.

Instead, to interact with the Site, HeadHunter has created and maintains an API (Application Programming Interface) Talantix, access to which is provided to everyone on non-discriminatory terms. The API allows the software to work with databases directly through dedicated channels. Programs registered in the API carry out automated data collection without any obstacles on the part of HeadHunter if there is no evidence of their use for unfair utilisation of data for purposes not related to the purpose of the HeadHunter databases.

Based on the systemic interpretation of paragraphs 4.2.7. and 7.1.2. Terms of Use, HeadHunter has created a legal environment that allows users (employers, recruitment agencies) to employ third-party software for automated recruitment through the API interface when working with the site and its databases.

A prerequisite for gaining access through the Site API is the registration of an account on the site, and the absence of such an account registration means that access to the functionality of the Site interface is prohibited. Due to repeated failures (which were caused by actions of HeadHunter) of Stafori's account registration on the site, there is no possibility for Stafori to provide services for the automated selection of personnel on the market of services for ensuring information interaction of applicants, employers and recruitment agencies on the Internet.

Dispute between FAS and HeadHunter

The FAS had found on December 24 2019, that the local entity HeadHunter violated competition law. According to the FAS, HeadHunter limited competition when it blocked the use of a third-party automated recruiting service on its site.

The FAS, when deciding to recognise HeadHunter as violating the antimonopoly legislation, pointed to a combination of criteria indicating that Headhunter had violated the provisions of the Law on the Protection of Competition, namely, the creation of obstacles to access to the product market or exit from the product market for other economic entities (Article 10 (1) part 9 Law on the Protection of Competition).

First, the FAS alleged that HeadHunter has a dominant position in the market. The FAS did not accept the alternative position which had been presented by HeadHunter. In particular, the FAS stated that for this type of market, the most accurate indicator would be the number of CVs since the number of CVs attracts employers, who are the main income-generating clients. Also, it is noteworthy to mention that the evidence of the dominant position of Headhunter was a brochure where it was proclaimed that «HeadHunter is the leading online recruitment platform in Russia and the Commonwealth of Independent States ("CIS") and focus on connecting job seekers with employers».

The second criterium was that Headhunter prevented the organisation of interaction of third-party services with its own database. During the consideration of the case on violation of the antimonopoly legislation, the FAS Russia established that the company's actions led to restricting the access of business entities. FAS categorically pointed out the fact that the case file contains all the necessary evidence that Headhunter deliberately blocks counterparties using the Robot Vera. For example, Headhunter sent from his official domain a contagious notification of the following nature: "Unfortunately, work on the site with the help of Vera's robot is prohibited by our rules and will increasingly be blocked. Soon the product will be officially launched - a virtual recruiter, which was created as an analogue of Vera's robot, so tracking such situations will be even more frequent."

Hence, the obstacles to access to market, in the view of FAS, were proven.

To overturn the FAS's decision, HeadHunter appealed with the Commercial Court of Moscow City.

The Commercial Court of Moscow City's decision

On May 27, 2021, the Commercial Court of Moscow City considered the case and agreed with the FAS.

The court found that the combination of these actions by HeadHunter led to the creation of obstacles for Stafori (Robot Vera) to access the services market to ensure information interaction of applicants, employers and recruiting agencies on the Internet. This, in turn, led to the restriction of competition in the market services to ensure information interaction of job seekers, employers and recruitment agencies on the Internet.

The court's key finding was that HeadHunter's violation was not that the company failed to provide for use or disposal of its own application, but the fact that the company performed the actions in relation to developers of competing applications that prevent such applications from being promoted.

Of course, the court had to assess the balance of interests between the owner of the intellectual property rights and the market competition itself. As an object of intellectual property, the free use of the application (software) is directly related to intellectual property rights. Article 10 (4) of the Competition Law (Prohibition of abuse by an economic entity of a dominant position) establishes an exception according to which the requirements of this article do not apply to actions to exercise exclusive rights to the results of intellectual activity and equated means of individualisation of a legal entity, or means of individualisation of products, works or services. However, as the court pointed out, this exception does not apply to actions that go beyond the implementation of exclusive rights.

It is important that the aspect pertaining to the interrelations between intellectual property rights and market competition, among other things, was the subject of consideration by the Constitutional Court of Russia. As indicated by the Constitutional Court of the Russian Federation, the provisions of the antimonopoly legislation cannot be interpreted and applied as completely removing the conflict of interests of the copyright holders of intellectual property objects from the action of the mechanisms to ensure the balance of constitutionally significant values. In particular, the protection of market competition is such value.

Not the first time

It is remarkable to note that this is not the first legal dispute between the two rivals. More than three years ago, in 2018, HeadHunter submitted a claim against Stafori to protect the exclusive rights of HeadHunter. HeadHunter is the owner of the exclusive rights related to the database, which represents a set of CVs of applicants posted on the websites of the claimant. According to Headhunter, Staffi illegally extracted part of HeadHunter's resume database and transferred it to third parties. HeadHunter's position was based on the fact that the copyright for the database belongs to the compiler and no one has the right to extract data from it without the permission of the copyright holder. The defendant in the case stated that Headhunter is just a tool for processing CVs and calling applicants. The court, evaluating the evidence in the case, took the position of the defendant, considering that the case did not prove a violation of the exclusive rights of the copyright holder of the database, namely, borrowing at least some part of the HeadHunter database.

Conclusion

Now in Russia and Europe, there is a tendency towards an increase in concentration and the formation of dominant players in a huge number of areas: taxi, search, maps, etc. Soon, all segments are at risk of being controlled by a limited number of corporations. But at the present moment, an important precedent has been set for market participants. Competitors in digital markets should have no technology constraints. The Federal Antimonopoly Service clearly indicated the direct prohibition of any technological restrictions on working with alternative applications.

Now, HeadHunter filed an appeal, and during the summer, we will find out whether the Appeal Court will agree with the lower court and the FAS.