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Antitrust Concerns Arising from Big Data and Pricing Software in Russia

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The trend to digitalization has captured the economies of almost all progressive and developing countries and influenced activities of companies doing business in Russia, as well. As the Federal Antimonopoly Service (“**FAS Russia**”) stressed, the markets are becoming more complicated and digital. It means that virtually every company that has a computer could be considered as active in digital markets, for example, if it (i) works, or stores, big data, client data bases; (ii) uses algorithms to study its competitive environment, or monitor activities of its distributors, to plan its business strategy in the market; (iii) develops and manufactures any products using big data and exploits innovative technologies.

Digitalization also led to the geographic boundaries of the markets vanishing. The regulator now tries to analyze impacts of transactions and activities of companies not only in Russia, but also on a global scale, to predict possible consequences of the above practices for the Russian economy in the future.

The legislation does not keep pace with the changes related to the digitalization of the economy. Therefore, FAS Russia is forced to develop and apply new mechanisms of antimonopoly regulation in its law enforcement practice to prevent violations in digital markets. A summary of the latest developments in the digital sphere are provided below.

1.1 New antitrust violations in digital era: collusion reached through auction robots and restraints resulting from pricing software

The first set of innovations relates to the transformation of anti-competitive agreements in the digital era. Companies have begun to use special software and online platforms allowing them to monitor the competitive environment and adapt their business strategies to market changes at – short notice.

On the one hand, monitoring the market situation, including prices and product portfolios of competitors and distributors, is essential for any company to conduct its business efficiently. On the other hand, transparency of information about prices (online stores, publicly available recommended prices, etc.) and digital tools for collecting and processing this data from open sources, creates the risks for anticompetitive collusion. For example, if two competitors, selling

products online, launch software monitoring each other's prices and adapting the level of prices to each other immediately, the economic effect could be the same as in case of cartel – setting and maintaining prices.

Already, in 2018, FAS Russia investigated the case on anticompetitive coordination of retail prices for smartphones by the producer – a Russian subsidiary of LG Electronics.[1] LG sales managers asked their distributors to inflate retail prices for LG smartphones up to the recommended level, based on the market reports prepared by a special software. That was the first case when FAS Russia analyzed the use of price monitoring software in the competitive environment. FAS Russia came to the conclusion that the use of that software facilitated anticompetitive coordination. However, the authority emphasized that the use of price monitoring software was not a violation in itself, as the effect of the use of such software on competition should be analyzed carefully.

Moreover, FAS Russia has recently begun to investigate cases on cartels in state procurements concluded with the use of special software – auction robots. An auction robot is a complex of settings of a personal account of a company, in an online procurement system aimed at automatic participation in biddings. This enables the companies to establish frequency, bids and other characteristics of auction strategy. When a number of competitors, participating in a bid, use auction robots adapted to each other, such practice may allow them to set and maintain maximum prices on procurements. FAS Russia tends to qualify such activities as cartels (*e.g. Valeria and Egamed case*) [2].

The Head of FAS Russia, Mr. Artemiev, commented that “cartels are now concluded by robots via special anticompetitive software: robots act independently in the Internet and enter into horizontal agreements that result in price increases” [3]. The Head of FAS Russia reported that the agency had already uncovered such violations twice during its investigations. He also confirmed that FAS Russia has technical tools allowing it to detect not only robots that collude, but also persons behind them, in order to bring them to justice. The most cartelized markets that FAS Russia controls with special scrutiny are life sciences, especially the pharmaceutical sector, as well as building and construction.

Thus, FAS Russia actively develops the enforcement practice related to investigations of antimonopoly violations committed with the use of pricing software. For instance, the Fifth Antimonopoly Package (which is being currently debated) contains, inter alia, a suggestion to consider the use of pricing software, while committing antimonopoly violations, as an aggravating circumstance, while determining the fines for violators. That means that companies should analyze the consequences of using pricing algorithms in their daily business more carefully, to avoid problems and possible concerns from the side of the regulator.

1.2 New approach of the regulator to the analysis of big data: shift in scope of interest from cartels to abuse of dominance cases

The shift in the regulator's scope of interest from investigating cartels to consideration of abuse of dominance cases can also be traced. Statistics shows that the number abuse of dominance cases increased from 453 in 2016, to 847 in 2017 compared to 357 and 420 cases on anticompetitive agreements in 2016 and 2017 subsequently[4].

Today, while analyzing the markets and evaluating the market power of a company, the

competition authority should rely not only on quantitative criteria (such as just the share of a company in the market) but also pay more specific attention to qualitative criteria. Hence, FAS Russia should assess network effects, shares of companies in the related markets, the amount of R&D investments and other factors that might create certain advantages to certain companies and affect the competition environment, in the relevant jurisdiction.

Moreover, FAS Russia currently analyzes not just the situation in the markets where the parties to the transaction have overlaps in business activities, but also considers possible effects from combinations of big data, know-how and technologies possessed by market participants. The major examples of the above trend are the *Bayer/ Monsanto case*[5] (where the merger was considered by the regulator to be a combination of big data and innovations rather than just a standard M&A deal with the Russian nexus), and the *Yandex/Uber case*[6] (where FAS Russia took into account network effects resulting from the joint activities in the markets).

The concepts applied in recent high-profile cases (digital platforms, network effects, reconsideration of influence of technologies) laid the basis for the huge set of amendments to the existing competition legislation prepared by FAS Russia, the so-called “Fifth Antimonopoly Package” [7]. The draft law establishes new approaches to dominance, when companies possess digital platforms and big data enabling them to influence market conditions, as well as a new merger control procedure taking into account the above globalization tendencies in the markets.

1.3 Concept on pre-installing applications

Another significant legislation novelty is the Concept on pre-installing applications[8], triggered by a wave of cases on abuse of dominant position in the apps markets.

For example, in the *Yandex/ Google case*[9], FAS Russia established that Google Inc. and Google Ireland Limited dominated the market for pre-installed application stores on Android operating systems. It judged their actions as restricting the rights of competitors, developing software in related markets, as abuse of dominant position by Google. In the *Yandex/ Google case*, the application pre-installation is an effective channel for attracting customers to software products. However, it is used by developers of global operating systems on a priority basis, which makes it very difficult for Russian developers to enter the existing market and compete with the owners of such global operating systems.

In the similar *Kaspersky/ Microsoft case*[10] initiated by Kaspersky Lab, FAS Russia issued a warning to Microsoft, which held a dominant position in the market for computer and laptop operating systems, on inadmissibility of creating discriminatory conditions, by blocking the possibility for users to use antivirus software offered by the other developers, due to already pre-installed Microsoft antivirus software on computers sold.

As the Head of the Department for Regulation of Telecommunications and Information Technology of FAS Russia, Ms. Zaeva, noted that global companies gained competitive advantages to promote their own applications and services, using the product-binding practice. As the official stressed, consumers’ inability to remove the pre-installed applications enhance these competitive advantages.[11] Thus, to mitigate the risks for competition, the regulator decided to prepare its own Concept on pre-installing applications.

According to FAS Russia, the Concept meets the objectives of the competition development, as well as consumer interests' protection. It also ensures national interests in developing information and knowledge society and competitiveness of the Russian information, as well as communication technologies at the global level.

The Concept establishes requirements to end connection equipment for the customers: (i) to have pre-installed alternative Russian software products of similar functionality, and (ii) to ensure the possibility of complete removability of pre-installed programs, except for service programs that ensure the functionality of the equipment.

Consequently, on the one hand, the Concept provides an opportunity for the Russian developers to proceed into the channel of pre-installation of software products and effectively compete with the products of global companies and, on the other hand, ensures the customers' ability to choose applications that they would like to see installed on their devices. At the same time, the Concept, to a certain extent, interferes with market relations, thus, the effects of its enforcement should be analyzed carefully. In particular, it should consult interests of not only the Russian producers and developers, but also those of other market players, such as global developers of IT applications, software, retailers, and also end customers, in order to avoid increases in prices and expansion of "grey" import practices.

The Concept is still under serious debates with other agencies and market players, thus, its contents and main provisions might change substantially.

1.4 Technology transfer as a new remedy in merger cases

In recent years, the regulatory authorities (for example: the Government Commission for Control over Foreign Investments and FAS Russia) began to analyze the influence of sanctions on the market conditions and future activities of the companies, while assessing the impacts of transactions on the Russian markets, in more detail. One should also note that there is a strong trend to support the Russian national producers and import substitution in Russia. Due to the above and, in connection with the digitalization, in particular, the importance of big data as a major factor for the companies' market power, Russian regulators began negotiation with foreign investors of possibilities to transfer certain technologies to Russian producers, as a condition for clearance.

The first case when FAS Russia implemented the concept of technology transfer was the *Bayer/Monsanto* case. The remedies imposed on Bayer included the transfer of certain digital farming and other technologies and know-how to Russian agricultural producers (including establishment of the Center for Technology Transfer, training of the Russian specialists, providing access to databases, etc.). Another recent example is the *Schlumberger/ EDC case*^[12], where FAS Russia asked Schlumberger to provide EDC with a number of innovative drilling technologies and to guarantee that EDC retains those technologies in case Schlumberger would have to leave the Russian market due to sanctions reasons.

After analysis of the existing practice, it seems that the Russian regulator will actively proceed with imposing such technology transfer remedies in future, to eliminate potential competition restrictions and to ensure evolution of the markets and growth of the Russian economy, in response to transformation of the markets in the digital era.

Currently, antimonopoly legislation in Russia is in the process of active development to respond to the challenges of the digital economy. The main directions of that development are the transformation of approaches to dominance in the markets, usage of pricing algorithms and enforcement of technology transfer as a new remedy in merger control and strategic investments cases. Adoption of the Fifth Antimonopoly package, expected in early 2020, shall incorporate all these novelties into the existing Russian competition legislation.

[1] FAS Russia, official website: Russian subsidiary of LG unlawfully coordinated prices for smartphones (March 02, 2018) <https://en.fas.gov.ru/press-center/news/detail.html?id=52813>

[2] FAS Russia, official website: Case against a cartel that used auction robots (November 03, 2017) <https://en.fas.gov.ru/press-center/news/detail.html?id=52369>

[3] Robots' collusion: FAS Russia detected new types of collusions (May 20, 2019) <https://rg.ru/2019/05/20/reg-cfo/fas-vyivavila-novye-formy-monopolizacii-rynka.html>

[4] FAS Russia reduced by 12.5% the number of cases initiated in 2017 (March 20, 2018) <https://fas.gov.ru/publications/14866>

[5] FAS Russia's decision on prolongation of consideration period of the Bayer/Monsanto transaction (November 15, 2017) – <https://br.fas.gov.ru/ca/upravlenie-kontrolya-agropromyshlennogo-kompleksa/-c084b115-a929-42e7-a5a9-a8362a96e6c4/>

[6] Remedies issued by FAS Russia as a result of consideration of the Yandex/Uber transaction – <https://br.fas.gov.ru/ca/upravlenie-regulirovaniya-svyazi-i-informatsionnyh-tehnologiy/ag-82030-17/>

[7] Draft Federal Law on Amendments to the Federal Law No. 135-FZ dated July 26, 2006 "On Protection of the Competition" and Other Legal Acts of the Russian Federation <https://regulation.gov.ru/projects/List/AdvancedSearch#departments=41&kinds=6&npa=79428>

[8] FAS Russia presented a Concept on pre-installing applications (January 28, 2019) – <http://en.fas.gov.ru/press-center/news/detail.html?id=53740>

[9] FAS Russia's decision and remedies issued to Google – <https://br.fas.gov.ru/ca/upravlenie-regulirovaniya-svyazi-i-informatsionnyh-tehnologiy/ad-54066-15/?query=%D0%B3%D1%83%D0%B3%D0%BB>

[10] Microsoft restored equal conditions for vendors of antivirus products (August 17, 2017) – <http://en.fas.gov.ru/press-center/news/detail.html?id=51365>

[11] FAS Russia presented the Concept on pre-installing of applications (January 25, 2019) <https://fas.gov.ru/news/26844>

[12] FAS Russia's press release on Schlumberger/EDC transaction (February 05, 2019) –

<https://fas.gov.ru/publications/17473>

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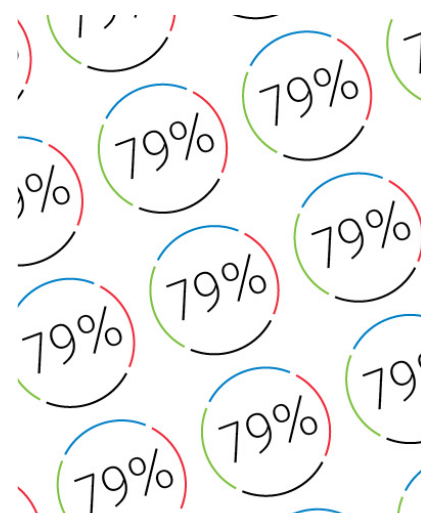
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