

Kluwer Competition Law Blog

Network Effects as a Ground for Anti-Competitive Conduct in Russia

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The digitalisation of the modern economy poses new diverse tasks for the legislator and dispute resolution bodies. It is expected that said digitalisation will affect various industries and segments of the economy. In this sense, relations pertaining to the protection of competition will also be affected by the mentioned process. Particular attention is drawn to digital platforms, which are understood as devices, software products and information services, through which interaction between consumers and suppliers of various goods and services is carried out. The property that makes digital platforms so interesting is referred to as the network effect.

The category of network effect is closely related to the idea that the utility of each of the consumers of a certain product is positively linked to the number of consumers of this product. Numerous examples of [antitrust investigations](#) into Google, Facebook and Microsoft show that digital platforms in the market can significantly restrict competition. Simultaneously, there are apparent difficulties in separating legal behaviour from illegal behaviour on the part of sellers who are participants in such markets.

Quite simply, the network effect is a situation where the value of a network connection for a user depends on the number of other users already connected. The more participants, the more expensive the network, as in the case of, for example, users of social networks.

Legislative incentives of the Federal Antimonopoly Services (FAS) of Russia

The legal category of network effect appears in the so-called [Fifth Package of amendments](#) to the antimonopoly legislation developed by the FAS. At the end of 2020, the Association of E-Commerce Companies of Russia was actively negotiating how to formulate this legal category correctly. The Fifth Package of amendments to the FAS's antimonopoly legislation since 2016 should extend the law "On Protection of Competition" to the digital sphere.

The document introduces the concept of "network effect", which implies that a market participant receives economic benefits due to many users and the data collected from them. The FAS regards this as a sign of a dominant position. The Fifth Package of amendments was submitted to the State Duma in September 2020 and is currently being finalised.

It should be noted that the FAS has adjusted the meaning of the term "network effect". In the new

version of the document, this term means the dependence of the consumer value of the product on the number of consumers. Network effects should be taken into account by the FAS when analysing competition in a particular market, where transactions between a seller and a buyer are made using software on the Internet.

The FAS suggests introducing restrictions for the owners of software if the network effect of its use makes it possible to have a decisive impact on the general conditions of circulation of goods, as well as if the owner of the software occupies more than 35% of the market for such services and 'owner's revenue from this activity exceeds 400 million rubles per year.

The development of case law: Avito vs Avto.ru

One of the first court cases concerning the problem of network effects was the case from the practice of the Arbitration Commercial Court of Moscow City on the application of Avito to the FAS of Russia to declare illegal the refusal to initiate proceedings on violations of antitrust legislation alleged in the actions of the company Auto.ru.

Auto.ru filed a complaint regarding the mass copying of ads for the sale of used cars, originally published on the Avito website. Such ads contained a description of the car being sold in free form, technical information, as well as the Avito logo in the photos. For the information from the Avito ads to comply with the terms of their publication on Auto.ru, the latter also made mass calls to Avito users who placed their ads to clarify the information hidden on Avito. The applicant qualified these actions as a violation of the law "On Protection of Competition".

In particular, stating the direction of actions, Auto.ru Avito referred to the fact that, due to the copied ads, a paid product "The history of placement on the website of Auto.ru", which brings the competitor income, and in addition, the increase in the number of seller ads, makes the platform more attractive to all interested parties due to the impact of "network effects".

The FAS dismissed this complaint, and subsequently, the court confirmed this position. In its reasoning, the court pointed out the results of a survey of 449 respondents, which showed that such a criterion for choosing a site by a consumer, namely the number of ads more than on other sites/applications, was in 7th place in importance and was important for 25% of respondents. Thus, as the court stated, the report does not show that the number of ads is a determining indicator for the consumer.

However, it is even more difficult to prove that the competitor's activity is aimed at obtaining advantages at this particular moment regarding the impact of network effects. This is a delayed-action effect, and its impacts can be significantly stretched over time. However, it is even more difficult and risky from a legal point of view to simply assume the impact of network effects on the markets of digital platforms.

In addition, the court did not consider the extent to which the analytical report of consumers refutes the position of network effects.

Obviously, the decisive role for the court in making the decision was the lack of evidence to show that, as a result of the actions of Auto.ru, Avito experienced an outflow of the audience with a simultaneous increase in its audience. Auto.ru, of course, does not take into account the specifics

of this market.

Furthermore, in this regard, the problem of network effects did not affect the dispute itself; the question of what fills the same network effect in the case under consideration, and what its effect is, remained without the court's attention. If in the traditional sense we are talking about the focus on obtaining advantages, then in conjunction with the fact that this is achieved through specific actions of the competitor as such, the corresponding behaviour should be characterised by the presence of intent.

As for network effects, due to their characteristics, it is quite difficult to apply the concept of intent to them. Perhaps, having established intent in certain actions of a person in the market of digital platforms, this is enough to state their focus on achieving competitive advantages, since the person probably understands the impact of network effects and counts on it.

Conclusion

The FAS initiatives correspond to the world practice to control digital companies and limit abuse by aggregators (taxis, bulletin boards, social networks). The criteria for assessing network effects and their impact on the company's ability to determine the general conditions for the circulation of goods on the market should be fixed in the FAS guidelines for assessing the state of competition.

However, there is not yet a single transparent metric for assessing the "network effect", so its application raises questions. Moreover, in the case of platforms that do not have payment functionality, the use of the network effect raises even more questions.

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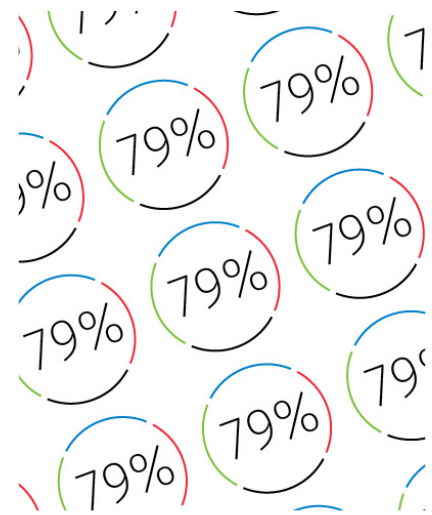
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