

# Kluwer Competition Law Blog

## Russia: Secrecy of Correspondence And Requests For Information

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Recently, the Commercial Court of Moscow backed a procedural decision of the Federal Antimonopoly Service (FAS). The FAS fined the Russian IT company Mail.Ru Group for failing to provide the supervisory authority with full information about clients' mailboxes on their servers. These mailboxes belonged to the Federal Penitentiary Service employees, who were suspected of being involved in the anticompetitive behaviour.

### Background of the case

At the end of 2019, the FAS suspected the Federal Penitentiary Service of violating competition legislation when purchasing from a single supplier within a state tender procedure. During the investigation, the FAS sent a request for information to Mail.Ru Group to transfer the event log for e-mails of several users who were suspected of being involved in the anticompetitive behaviour. This log was supposed to contain information about the recorded operations when using e-mail boxes, along with an attachment comprising explanations of the interpretation of variables used in the log. The e-mail-boxes, as argued by the FAS, were used by employees of the Federal Penitentiary Service.

From the point of view of Mail.Ru, part of the requested information fall under the protection of the secrecy of correspondence doctrine and could only be provided with the consent of individuals (users) or on the basis of a court decision. Due to this situation, the company did not provide said information.

### Overview of the proceedings at the FAS and the Commercial Court of Moscow

In the view of the FAS, their request for this kind of information does not in any way relate to the provisions of Article 23 of the [Constitution](#) of the Russian Federation, which guarantees each person the right to privacy of correspondence, telephone conversations, postage, telegraph and other messages. The FAS stated that the request to provide the event log did not in any way affect the content of the letters and does not oblige Mail.Ru to violate the privacy of correspondence. Thus, Mail.Ru was found guilty of an administrative offence for failure to submit the information provided by the competition rules. The FAS accordingly imposed an administrative penalty in the

form of a fine on Mail.Ru. Disagreeing with this decision, Mail.Ru appealed to the Presidium of the FAS, but in the end the decision was left unchanged, and the company's complaint was dismissed.

The company then appealed with the Commercial Court of Moscow. Two weeks ago, the court [agreed](#) with the antitrust authorities and upheld their fining decision. The court did not find grounds for cancelling the fine, fully agreeing with the position of the FAS. The judge noted that there was no request from the competition authority, which could in any way violate the requirements of the Constitution in terms of the right to privacy of correspondence. According to the court, the FAS was exercising an important state power to protect public interests and the right to request this kind of information.

## Analysis and comment

So why does this case deserve special attention?

First of all, an interpretation of the category “event log” by the FAS as well as the court follows a distinct legal argument. Indeed, the event log for e-mails is a table that displays all major changes in a mailbox (actions with letters, folders and “tags”, that is, sorting letters and filtering them). Opposite each of these actions is the computer's IP address which was used to carry it out. Any information, including the text of the e-mail and its subject, is not contained within the e-mail event log.

What is even more remarkable is that the court turned to the generally recognised explanatory dictionaries of the Russian language and cited several definitions of the category “log” instead of “event log”. Of course, the dictionaries which were published in 1939 and 1992 do not contain the definition of “event log”, but that is not a reason to substitute the categories.

Moreover, both state bodies ignored the concrete wording of the FAS request, stating that “providing an event log for e-mailboxes containing information about recorded transactions when using the specified electronic mailboxes, with the attachment of the necessary explanations for the interpretation of the variables, designations, and other coded information used in the event log”. Mail.Ru could consider the phrase “.....other coded information used in the event log” as the request to reveal the content of the correspondence due to various possibilities of [construal](#) of the word collocation “other coded information”. However, the court turned down this moment and adopted the position of the FAS.

Secondly, this is not an ordinary case because it demonstrates the sufficient authority of the FAS in the Russian jurisdiction. In Russia, it is not a widespread event that one state body gangs up on another, meaning the FAS and the Federal Penitentiary Service. Usually, [corporate solidarity is the cornerstone](#) of relations between state authorities.

It seems as though the FAS has the legislative base, and case law frames the ground for this. Back in 2019, the draft laws No. 848392-7, No. 848246-7 and No. 848369-7 on amendments to the Federal Law “On the Protection of Competition”, the Criminal Code and the Criminal Procedure Code in order to endow the FAS with unlimited powers regarding the seizure of documents and correspondence in the course of inspections were published. According to the draft laws, the FAS is, for example, empowered to withdraw documents and other correspondence from companies,

including files with commercial, banking and other secrets. According to the official website of the State Duma, the draft laws [passed](#) their first reading on 19 February 2020, but there were no more updates on its further consideration. Criticism arose that the expansion of the powers of the FAS could lead to a restriction of the constitutional rights of citizens to privacy of correspondence.

## Outlook

With the above said, however, this is not the first case of its kind. In April 2017, the FAS sent Mail.Ru a request to disclose the correspondence of a Russian citizen. The FAS requested the content of the correspondence in connection with the investigation of the competition protection case. The company refused to provide this information, for which the FAS issued a fine to them. Mail.Ru [challenged](#) the fine in three courts but to no avail.

Now, the company has one month to appeal, but apparently, the established case law does not bode well for Mail.Ru.

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