
Kluwer Competition Law Blog

Main Developments Competition Law and Policy 2021 – Russia

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Dissonant antimonopoly tendencies in 2021

In 2021, the tendencies in the antitrust area have emerged remarkably in Russia. On the one hand, there were highly awaited developments such as the [Plenum](#) of the Supreme Court. It is difficult to assess the importance of this document since it was extremely necessary for the regulation of antimonopoly relations in Russia. Among other things, the Plenum distributed the burden of proof between market participants and the Federal Antimonopoly Service (FAS) of Russia, banned the prosecution of entrepreneurs according to formal criteria, and made the punishment of cartels more difficult.

In contrast, less beamish tendencies can also be seen, demonstrated by the various FAS decisions. In 2021, we have witnessed how the FAS pressured the IT industry, especially foreign IT companies.

The record fine of almost a billion rubles, which the FAS imposed on Apple in Russia, is a sign of the global decline of the monopoly of Western IT giants, as well as a signal of the regulator's intention to defend the interests of Russian IT companies more decisively in the domestic market. This statement was proudly declared on the official website of the FAS in May 2021, with reference to the article, whose symbolic title read "The sunset of IT-monopolism".

It seems as though the FAS is presenting itself as the main zealot in the war with the international IT companies, but its actions appear to be unjustifiable and intimidating for international business. The FAS' attitudes towards the IT market's participants might contingently be divided into two areas: case law and legislative incentives. Let us start with the first.

Case law

In 2021, the FAS has considered a plethora of cases concerning global digital platforms. As indicated by the state authority, the main purpose of such cases is the need to protect consumers from abuse by digital monopolies. Let us take a look at some of the most landmark cases that will affect the IT market's regulation.

FAS vs Booking.com

Booking.com forbade hotels from setting prices on other sites and indicating higher prices than the aggregator established. The aggregator receives a commission from hotels for each booking, so it will not profit if the tourist simply looks at the prices on the platform and then makes a reservation on the hotel's website. The FAS **concluded** that such behaviour violated anti-competitive legislation and indicated that the Russian hotel business had become dependent on the aggregator. It demanded that the conditions on price parity be excluded from agreements with hotels, both in terms of prices for hotel services and in terms of the conditions under which these services are provided.

On the 24th of November, the Commercial Court of Moscow city **upheld** the 1.3 billion rubles fine that the FAS imposed on Booking.com for abusing its dominant position in the Russian market, while a little earlier the Ninth Commercial Appeal Court **reaffirmed** that Booking.com had violated the provisions of the Federal Law "On the protection of competition".

This decision could well be expected since similar cases against Booking.com had already been considered for a relatively long time in Europe. The comprehensive analysis of this case can be seen [here](#), but there is still quite a lot of dispute surrounding why both the commercial court and the FAS failed to take into account the arguments of Booking.com.

The IT company indicated that the imposition of the parity clause could not be considered an abuse of the dominant position since it is beneficial for accommodation facilities. Booking.com tried to refer to the position of the Supreme Court, which indicated that, when assessing the existence of abuse in the behaviour of the dominant entity, the court should pay attention to the legitimate interests of that entity. The key point is that such behaviour can be recognised as acceptable if it is economically beneficial for the counterparties.

Neither the court nor the FAS agreed with Booking.com's justification of the benefits of using price parity for hotels, and the platform has now been ordered to pay a fine in the amount of 1.3 billion rubles to the state treasury.

FAS vs Apple

As mentioned above, the FAS issued a warning to Apple and demanded that it eliminate the violation related to the inability to pay for goods by users in applications from the App Store catalogue using external links. Clause 3.1 of the App Store Review **Guidelines** prohibits developers of iOS applications from informing customers inside the application about the possibility of paying for purchases outside the App Store. Apple requires developers to remove links to their Internet resources and change the functionality of the application so that the registration form does not lead to external sites. Otherwise, the company will not allow applications in the App Store. The FAS concluded that, in doing this, Apple is abusing its dominant position in the distribution market for iOS applications.

Later on, the FAS announced that it had opened a case against Apple because the American company did not comply with the FAS requirement to stop abusing its dominant position in the distribution of iOS applications.

Apple then [filed](#) a lawsuit against the FAS and intends to challenge the order of the state body on the obligation to inform customers of the App Store about alternative payment methods. In fact, Apple has been faced with this matter in different countries across the world, and the FAS's position should not have been regarded as an unexpected blow.

Earlier, the United States District Court (Northern District of California) [ordered](#) Apple to stop restricting developers from calling for alternative payment acceptance in the *Epic Games* case. As a result, the company has updated the rules for using the marketplace in the United States and several other countries, but not in Russia. In other jurisdictions, such as South Korea, the special legislative act was [passed](#) to protect developers, which can now avoid paying commission to Apple and direct their users to pay through various platforms.

In 2021, this is not the first time the FAS has taken over the American IT giant. It is worth noting that the FAS [imposed](#) on Apple, little more than six months ago, a turnover fine of 906,299,392.16 rubles for violation of antimonopoly laws at the request of the Russian organisation Kaspersky Lab. It was found that Apple abused its dominant position in the distribution of mobile applications on the iOS operating system through a series of sequential actions, leading to a competitive advantage to its own products. Simultaneously, there were negative consequences due to the deterioration of the distribution conditions for competitors' products (such as the application of parental control, which is called Kaspersky Safe Kids).

FAS vs Yandex

It should be noted that the FAS deals not only with foreign IT companies but also with its Russian colleagues. Despite criticism of the cases against foreign companies, there are cases where the FAS keeps guard over public interests.

Without any doubt, the first dispute which garners special attention is the case of Yandex. In August 2020, an IT coalition of eight online services filed a complaint with the FAS about interactive Yandex widgets that appeared on the search results page – the so-called sorcerers. In recent years, Yandex has been actively promoting its companies in the search engine, making them more visible. Compared to organic search results, they are visually highlighted, leading users exclusively to Yandex online services.

Through its actions, Yandex created a threat to fair competition in the market for goods and services. By promoting its services due to a monopoly position in the search results, Yandex transfers the traffic to these services, depriving other companies of this, and as a result, the new services suffer. According to IT coalition members, Yandex drains away a significant part of competitors' traffic through its promotion methods. Thus, it is not the independent services that users like, but the services that are part of the Yandex ecosystem which are being developed. At the same time, sorcerers are not labelled as advertisements, thus misleading users, and this is something which the Federal Antimonopoly Service [agreed](#) with.

The FAS issued a warning to Yandex for creating discriminatory conditions in the search engine. Within a month, the company had to eliminate this violation. However, Yandex did not comply with the requirement. The [litigation](#) commenced, and the first court hearing, in this case, took place in September, after which time it became known that the FAS and Yandex were negotiating a settlement agreement. As a result, the process was postponed in order to give the parties the

opportunity to resolve the dispute out of court. The next hearing will be on the 20th of December.

It seems that in order to conclude an amicable agreement with the FAS, Yandex was simply forced to meet its competitors. The Russian IT giant began to integrate competitors' products, services and content into sorcerers. But unfortunately for Yandex, even if it is possible to conclude an amicable agreement with the FAS, the matter will not end there.

The Antitrust Regulation Department of the Eurasian Economic Commission (EEC) has completed an investigation into the practice of business discrimination by digital ecosystems. The regulator concluded that Yandex has a dominant position in the advertising services market in search results in Russia. Moreover, EEC experts identified signs of violations by the company of competition rules regarding the use of sorcerers.

The EEC could not initiate a case against Yandex because it found violations only in the territory of Russia. The commission transferred all materials to the FAS. If the fact of restriction of competition on the part of Yandex is established, the company will face a turnover fine.

Legislative incentives

The legislative incentives of the FAS also aim, to the greatest possible extent, to settle a control over the international IT companies.

The Law "On Setdown"

The story began with the Federal Law "On the Activities of Foreign Persons in the Information and Telecommunication Network of the Internet on the Territory of Russia" (the law "On Setdown"). It obliges foreign online sites with a traffic of 500,000 users from Russia to open official branches or representative offices in Russia from the 1st of January 2022. Obviously, this law applies to all major international IT companies.

A foreign IT company will have to register a personal account on the website of the Federal Service for Supervision of Communications, Information Technology and Mass Media (Roskomnadzor). Roskomnadzor is the federal executive body tasked with overseeing communications, information technology and the media, as well as overseeing the protection of personal data.

A personal account will be created for the purpose of posting an electronic form for feedback with Russian citizens or organisations. For those who refuse to comply with the requirements of the law, there are a number of sanctions – including a ban on advertising of their own resources and the placement of advertisements aimed at Russian citizens, as well as a ban on money transfers and full or partial blocking of violating resources.

Subsequently, the FAS prepared a draft resolution on the rules for consideration by itself of cases related to violations of the Federal Law "On Advertising". The draft clarifies the procedure for banning the placement of advertisements of foreign IT companies that violate the requirements of the law "On Setdown".

The FAS proposes to expeditiously consider the statements of Roskomnadzor regarding the ban on the placement of advertisements by foreign IT companies that have ignored the law “On Setdown”. The document was developed and published by the FAS. The draft clarifies the procedure for banning the placement of advertisements of foreign IT companies that violate the requirements of the law “On Setdown”.

Roskomnadzor will send a statement to the FAS about the decision to ban the distribution of advertising for a particular company. The FAS must consider the application within seven working days. At the same time, the FAS will be able to decide without the participation of the person whose actions contain signs of a violation and without issuing a ruling to initiate a case.

This procedure appears to be formal and does not imply any assessment of Roskomnadzor’s decision. The FAS orders can be challenged in court within three months, but their appeal does not suspend their effect. It seems that such regulatory prescription is something other than restricting the rights of foreign IT companies.

Note that, as of the date of this writing, the draft was *given* the status “Refusal to continue development”.

The Fifth Antimonopoly Package

It remains to be added that, in 2022, the FAS plans to adopt the Fifth Antimonopoly Package, which, among other things, will protect consumers from abuse by digital monopolies.

The draft of the Fifth Antimonopoly Package was presented at the beginning of 2018. Its appearance was the impossibility of effective application of standard categories of antitrust regulation in digital markets. The FAS proposed introducing additional criteria that would allow the owners of large infrastructure platforms and Internet platforms to be classified as dominant entities.

Overall, this law-in-draft has a very good purpose – to bring legal certainty to antitrust disputes involving digital platforms and IT market participants. At the moment, in fact, there are no clear criteria for how to determine whether digital platforms have a dominant position. The questions arise as to how to correctly assess cases of dominance with transactions of large IT companies and with digital assets. The FAS is also faced with the need to assess the integrity of the actions of various social networks, marketplaces and aggregators in the struggle for the number of users that determine market power and revenues without any established criteria. This situation can lead to heterogeneity of judicial practice and negative consequences for the entire IT market.

Conclusion

Having admitted the core role of the FAS in Russia as to the regulation of the antimonopoly area and its attempts to harmonise the legal regulation of this field, there are some warning signs which we have received in 2021. It was evidently demonstrated by the FAS that this government agency jumped, with enthusiasm, on the bandwagon of the current state trend to exercise special oversight of the foreign companies. To say the least, such a bias looks quite unreasonable and, put bluntly,

intimidating. The foreign IT companies are demonised, and this tendency will lead to nothing but foreign capital flight.

Is this necessary in the current economic situation? The question is rhetorical. It remains to be hoped that the FAS will change the vector of its activities in terms of foreign IT companies and will be able to create conditions under which any market participant, both local and foreign, will be equally interested in and able to profit from, being a part of the Russian economy.

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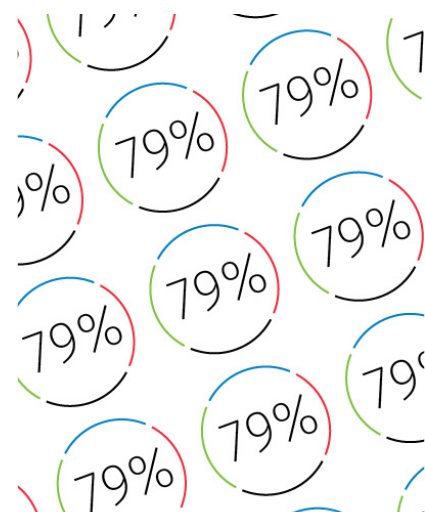
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