

FAS Russia's practice approaches in the case regarding Google Inc., Google Ireland Ltd.

Following the global economy's digitalization, the direct influence of transnational companies on the competition on national markets increases. In the field of information technologies the effect of global actors is significant *inter alia* due to the fact they own basic platforms (such as Google, Apple, Microsoft operation systems). In this regard, preserving and ensuring stability and balance of interests of the IT markets' participants and defending state interests requires a timely reaction to the appearance of new particularities and mechanisms of activity on the IT markets.

Considering the global character of markets of software and services, as well as the importance of compliance with the competition law on the markets of information and telecommunication technologies for the innovation development, we suppose it is essential to inform you on the FAS Russia's fulfilled investigation in relation to Google.

Grounds for initiating the case

The case regarding Google Inc. (1600 Amphitheatre Parkway, Mountain View, CA 94093 USA), Google Ireland Limited (Gordon House, Barrow Street, Dublin 4, Ireland) was initiated due to the application from the company "Yandex" which operates in the field of development and distribution of custom software and is a competitor of Google.

In its statement Yandex pointed out that Google restricted the rights of producers for pre-installing applications similar to those included into the package of Google Mobile Services (GMS package) containing pre-installed applications, as well as for placing them on mobile devices' screens. Consequently, manufacturers refused to pre-install applications (services) developed by the applicant. For instance, such manufacturers of mobile devices as Explay, Fly, Prestigio which were addressed by the applicant refused to cooperate with him concerning the pre-installation of applications (services) developed by the applicant on their mobile device.

The applicant provided correspondence (in electronic form) that justified that manufacturers of mobile devices (smartphones and tablets) refused pre-installing Yandex' products precisely as a consequence of the restrictions imposed by Google.

1. Market analysis

Google gains a significant market power on the market of pre-installed app stores (Google play) for Android OS that are localised for the Russian Federation.

1.1. Definition of a good and product boundaries of the commodity market

Product boundaries of the market were determined as the pre-installed app store (Google play) for Android OS localised for the Russian Federation, on the grounds of the polls with end users of smartphones and tablets intended for distribution in the territory of the Russian Federation, with and without a pre-installed app store.

Identifying the good: app store.

App Stores perform important functions / guarantees for end users in terms of search and installation of applications. In addition, users are guaranteed to be protected from viruses and inappropriate / unethical applications, and are provided with application updates. Thus, the vast majority of mobile users consider the presence of an app store on a device a prerequisite for the acquisition of such a device (according to a VTsIOM¹ poll 63.3% of smartphone users and 67% of tablet users, 69% of respondents according to the information from Romir²).

Self-installation of applications is used by consumers significantly less compared to downloading apps from the app store;

Self loading of applications by users (i.e. not via app stores) requires technical knowledge in comparison to what is required for using app stores. In particular, users need to change settings of their mobile device in such a way as to allow the installation of applications "from an unknown source", overcome the mental barrier for the installation of "possibly dangerous" applications from the customers' point of view;

Self-installation of the app store by end users is not possible;

The need of mobile devices' end-users in the Google Play app store determines the interest of producers in its installation on their mobile devices.

Based on these facts, the preliminary determined product is *Google Play app store preinstalled on mobile devices*.

Identifying interchangeable goods.

Mobile devices require special operating systems. At the time of the analysis the mobile devices circulating in the Russian Federation worked mainly on 3 operating systems: Android, iOS and Windows Phone.

According to J'son & Partners Consulting, about 85% of smartphones sold in Russia are running on the Android OS. If to exclude smartphones running on the closed system iOS, then the smartphones supplied to Russia working on the Android OS represent 94.8% of sales, while smartphones running on Windows Phone represent 5.1%. The remaining 0.1% of smartphones are based on other operating systems. The situation regarding tablets is similar: if we exclude the share of tablets based on iOS, due to the fact that it is not available to manufacturers of mobile devices, according to the marketing company GfK, sales of tablets based on the Android operating system will account for almost 100% of all tablets shipped to Russia.

Based on the above, product market boundaries were specified as "pre-established app store (Google play) for Android OS."

The specialised organisation One Platform Foundation, performing studies and promotion of app stores for Android alternative to Google Play, provides publicly available information about the pre-installation, i.e. the actual choice of applications by a manufacturer regarding 14 stores (we took into account not only direct references to pre-installation, but also the information on exclusive relationship of a store with certain devices or manufacturers):

¹ VTsIOM is the Russian Public Opinion Research Center.

² Romir is the Russian private Research Holding.

Name	Interface language	Distribution
Amazon Appstore	English; Chinese	Pre-installed on all Kindle devices
AppLand	English	Pre-installed on smartphones of three mobile operators
AppsLib	English	Pre-installed on devices of more than 20 original equipment manufacturers
Google Play	English; Russian; others	Pre-installed on the majority of Android mobile devices
Lenovo	Chinese	Pre-installed on all Lenovo devices in China
Nook Apps	English	Pre-installed on all Nook tablets (about 10% of the U.S. tablets' sales)
Opera Mobile Store	English	Pre-installed on 40 million smartphones
Pdassi	English; German	Pre-installed on Grundig and the German operator Mobilcom's smartphones as well as the Alessi tablets
Samsung Apps	English; Chinese; Korean; Russian; others	Pre-installed on almost all Samsung devices
SlideMe	English	Pre-installation of devices of more than 20 producers
SnappCloud	English	Pre-installed on different tablets including Toshiba and Polaroid
Soc.io Mall	English	Pre-installed on more than 5 million devices
Yandex.Store	English; Russian.	Pre-installed on 6 OEM devices and mobile devices branded "JSC Megafon"

Given the fact that the present study focuses on the territory of Russia, and in Russia only 5% of the population can read freely enough in one of the European languages (not necessarily English), **it makes it essential to translate all the mobile device software** (including operating system, application store, mobile applications) **into Russian**. Based on this, while for mobile devices delivered to Russia only application store with the interface in Russian can be regarded as interchangeable for Google Play, i.e. Samsung Apps and Yandex.Store.

It is important to note that all the mobile devices, supplied by Samsung to Russia are equipped with the pre-installed Google Play as well as the Samsung-owned app store Samsung Apps.

Therefore, product market boundaries include application software, pre-installed on mobile devices based on the Android operating system that provide functions of searching, purchasing, downloading and updating other applications (the pre-installed app stores for Android OS) and including the interface in Russian or otherwise localised for distribution on the territory of Russia in accordance with the Russian legislation.

An important aspect here is the localisation for distribution on the territory of the Russian Federation, which includes the interface in Russian.

1.2. Definition of geographic boundaries.

The main producers of mobile devices on the Android OS are located in the South Korea (Samsung, LG), Taiwan (NTS, ASUS), the USA (Motorola), China (Lenovo, RCA). (Google Play), South Korea (Samsung Apps) and Switzerland (Yandex.Store).

At the same time it is worth noting that pre-installed app stores as software do not require transportation costs and may be sold throughout the world with no additional expenses. The main factors limiting the spread of a pre-installed app store is the language of its interface, the offered applications and obligation to respect national legislation's requirements.

Thus, manufacturers of pre-installed applications for the Android OS localised for Russia compete with each other for manufacturers of mobile devices regardless of the territory where the first or the latter are located, which makes the the market of pre-installed app stores for the Android OS localised for Russia global.

Based on the above, the geographic boundaries of the market are determined as global.

1.3. Definition of composition of economic entities acting on the commodity market

The composition of the economic entities performing activities on the commodity market under consideration includes producers of applicable software pre-installed on mobile devices on the base of the Android OS performing functions of searching, purchasing, downloading and updating other applications (the pre-installed app stores for Android OS) and including the interface in Russian or otherwise localised for distribution on the territory of Russia:

Name of app store	Name of economic entity	Address of location
Google Play	Google Inc.	1600 Amphitheatre Parkway Mountain View, CA 94043 USA
Samsung Apps	Samsung Electronics Co., Ltd.	1320-10, Seocho 2-dong, Seocho-gu Seoul 137-857, South Korea
Yandex.Store	Yandex Europe AG	Werftstrasse 4 6005 Luzern, Switzerland

1.4. Calculation of shares of economic entities on the market.

The share of business entities should be calculated on the basis of sales of goods. Indicators can be used in bulk, value, as well as in conventional computational units.

Given the particularities of the terms of provision of mobile devices' manufacturers with the goods in question (freely on the basis of agreements containing non-price conditions), the use of value indicators for assessment of market size and market shares is not possible. However, physical indicators to determine the scope of the relevant product market can be identified.

Such an indicator for this commodity market is the number of mobile devices based on the Android OS on which application stores localised for Russia are pre-installed. Since, as it had been mentioned above, these app stores are pre-installed on all the mobile devices sold in Russia, the volume of the app stores market on Android OS localised for Russia can be indirectly determined due to the number of mobile devices that use the Android operating system and that had been sold in the Russian Federation.

Shares of the economic entities with respect to the preinstalled application stores for Android OS localised for Russia over 2012-2014 on the basis of J'Son & Partners Consulting and GfK's data on sales of smartphones and tablets, respectively, were as follows:

	3 quarter of 2014	2013	2012
Number of smartphones sold in Russia, pcs.	17 789 560	17 692 863	12 381 485
of them smartphones on Android OS, pcs.	15 122 726	14 314 895	7 249 849
Number of tablets sold in Russia, pcs.	6 692 159	6 762 535	4 400 316
of them tablets on Android OS, pcs.	5 939 474	5 491 756	2 860 945
Number of mobile devices (smartphones and tablets) on Android OS, pcs.	21 062 200	19 806 651	10 110 794
of them smartphones with Google Play, pcs.	13 705 240	13 747 814	7 231 399
of them tablets with Google Play, pcs.	3 860 658	3 295 054	[н/д]
Number and share of pre-installed app stores for Android OS localised for Russia developed by Google Inc.	17 565 898 pcs. / 83,4%	17 042 868 pcs. / 86,05%	7 231 399 pcs. + tablets / ____%

Number of Samsung smartphones on Android OS, pcs.	3 604 160	4 778 512	3 376 624
Number of Samsung tablets on Android OS, pcs.	1 187 895	1 702 444	[n/d]
Number and share of pre-installed app stores for Android OS localised for Russia developed by Samsung Electronics Co.	4 792 055 pcs. / 22,75%	6 480 956 pcs. / 32,72%	[n/d] pcs. / ____%
Number and share of pre-installed app stores for Android OS localised for Russia developed by Yandex Europe AG (including the app store pre-installed by “JSC Megafon” under the brand GetUpPs!)	2 600 123 pcs. / 12,34%	1 013 491 pcs. / 5,12%	0 (Yandex.Store launched in February 2013)

Based on this, shares of economic entities out of the total number of delivered exemplars of pre-installed app stores for the Android OS localised for Russia are the following:

	3 quarter of 2014	2013	2012
Share of <i>Google Inc.</i>	70,4%	69,46%	[n/d]
Share of <i>Samsung Electronics Co.</i>	19,2%	26,41%	[n/d]
Share of <i>Yandex Europe AG</i> (including the app store pre-installed by “JSC Megafon” under the brand <i>GetUpPs!</i>)	10,4%	4,13%	[n/d]
Total:	100%	100%	100%

2. Consideration of the case and establishing violation of the antimonopoly legislation.

The pre-installation channel is the most efficient way for promoting and distributing software and services on mobile devices.

Pre-installation is the most efficient channel of promoting mobile applications ensuring the most considerable coverage of the audience and the volume of applications' usage on a mobile application due to the following factors:

- guaranteed placement on a big number of devices (according to the data provided to the case's materials in Russia the quantity of mobile devices on which

Google Play and other GMS applications and services amounted to 25.6 million in 2014);

- high frequency of usage (according to the VTsIOM polls, more than a half of respondents use the Google Chrome browser every day. The analogous indicators for other browsers for the Android OS are much lower);

- passive behavior of users (usually the end users do not change the pre-installed applications and services and do not download analogous applications on their own (information from the polls by VTsIOM, Romir).

The consumer behavior has developed in such a way that future (after buying a mobile device) self-installation of software by end users is used immeasurably more rarely than the usage of pre-installed software.

Besides, an important factor was the following:

- many developers of mobile application do not distribute their applications via websites. Equally this channel is not used by Google itself. Besides, mobile devices on the Android OS contain settings that complicate downloading applications from the developers' websites. This implies warnings that a downloaded program may present a threat for the devices, which creates preconditions for refusals by a considerable share of customers to install application from anywhere except the pre-installed app store Google Play;

- downloading applications from other sources than websites of developers or app stores is usually not permitted. This policy is used not only by Google but also by many other developers. In addition, downloading from other places of distribution requires a customer to perform a number of additional actions (searching application, making certain technical manipulations) and more serious technical knowledge than required for using an app store (in particular the users have to change setting of a mobile device in the way to allow downloading from "an unknown source").

At the same time downloading directly from an app store or using a pre-installed application does not require those actions: due to that presence of a pre-installed application on a device *per se* diminishes incentives for searching and downloading an alternative (regardless of its quality) from other external sources.

In particular, such a behavior of customers explains the existence of "the knuckle effect" or "the locking effect" on the market which is in general typical for software and services' markets, and the existence of such effects makes **measures aimed at immediate suppression of competition restriction necessary for the further development of innovations.**

The FAS Russia analyzed contracts between Google and mobile devices manufacturers over the period from 2012 to 2015 of the three types:

- agreement on promotion (distribution) of mobile applications (Mobile Application Distribution Agreement, hereinafter MADA). According to which a manufacturer is obliged to pre-install on its devices all the applications from the GMS package (and not those selected by him);

- agreement on non-fragmentation (Anti-Fragmentation Agreement, hereinafter AFA);

- agreement on sharing revenues (Revenue Sharing Agreement, hereinafter RSA).

In the mentioned contracts the following restrictive practices of Google were detected:

The application store Google Play is distributed by Google only together with other applications and services developed by Google (the so-called GMS) by through pre-installation on mobile devices sold/aimed at being sold on the territory of the Russian Federation. The Google's contractors (producers of mobile devices, mobile operators and other economic entities on whose orders/in whose interests the mobile devices are produced by side manufacturers) for receiving the Google Play store should follow a number of requirements from Google that have a restrictive character, in particular:

- mandatory purchase of the whole application GMS package as a condition of receiving the Google Play app store;
- obligatory setting/pre-installation of the Google search as a default search engine in all points of inserting search queries for general search on the Internet;
- condition of advantageous placement of the Google application on the screens of mobile devices;
- prohibition to pre-install applications and service of Yandex;
- prohibition to pre-install applications and services of competitors ensured by provision of rewarding from Google (rewarding is provided only with the condition of refusal from pre-installing competitors' programs).

It is important to note that the examined contracts are not specialised for Russia and are also applicable to the conditions of software pre-installation on mobile devices distributed in other countries.

Assessment of the grounds for Google's restrictive practices

The FAS Russia established that Applications included into the GMS package may work separately from one another. Any GMS application may be replaced with an alternative (competing) application without losses of functionality of both the other GMS applications and the mobile device in general; the use of separate GMS applications does not require an obligatory presence on the mobile device of other applications from the same package: the GMS applications themselves may be downloaded by users from the Google Play app store without losses of their functionality, similarly to any other applications of other developers.

As a confirmation Google states that in case of replacement of a GMS application for a competing application the existing connections between applications of different types remain (for example, between a search engine and maps or between a calendar and mail client), and the user who is "unsatisfied with the work of some of the Google's services may de-activate it and/or replace it with an analogous application of a side developer".

The FAS Russia also established that any technical reasons for pre-installing the Google search as default on a device do not exist.

A default search means a particular setting of the application that uses functionality of general search on the Internet, which is selected by mobile device manufacturers or the application's developer. The selected search engine provides

results of search upon users' queries (for example, in case of searching through the browser's address bar). Search by default also involves cases of setting a search application by a manufacturer with placing the widget (search bar) on the main screen, as well as setting an application of the main screen (launcher) containing a search bar of the relevant search provider.

Due to the practice of tying Google achieves pre-installation of a bi number of its applications and services without paying any rewards to manufacturers. In their turn, the competing developers of application are *de-facto* deprived of the possibility to pre-install their applications and services together with Google Play and on the same conditions that the Google's applications and services. As a result of creating barriers to entry, the competitors are pushed out of the markets of circulation of the GMS applications and services.

Thus, the practices used by Google are aimed exclusively at promoting its own products through the most beneficial distribution channel (pre-installation of applications) and simultaneously restricting promotion of its competitors' products.

Moreover, Google does not refute the argument of benefits of priority placement of applications on mobile devices' screens and that priority placement increases the probability of usage of the Google's application.

The FAS Russia after having considered the anticompetitive practices of Google established that in case of presence of a dominant position on the market of pre-installed app stores as well as creation of advantageous conditions for own applications ensuring priority usage of the Google's applications by customers and as a consequence **earning profits equaling to the size as if the defendant was the only applications' supplier**, Google affects the general conditions of circulation of a good on related commodity markets (of application stores).

As a result of the investigation undertaken, the FAS Russia established that Google abuses its market power.

The practices of Google admitted as violating the Law on Protection of Competition are the following:

- the requirement to mobile device manufacturers on tying the Google Mobile Services application package with the app store as a condition of getting the Google Play app store;
- the requirement on an obligatory installation/pre-installation of the Google search as default all the points of inserting search queries for the general search on the Internet;
- the conditions to place the Google applications on the main screen of mobile devices;
- the prohibition to pre-install competitors' applications and services ensured by the provision of a rewards from Google.

The Google's restrictive practices are fixed in the agreements concluded by Google:

- agreement on promotion (distribution) of mobile applications (Mobile Application Distribution Agreement);
- agreement on non-fragmentation (Anti-Fragmentation Agreement);

- agreement on sharing revenues (Revenue Sharing Agreement).

Also, in the agreements concluded by Google with manufacturers of mobile devices limitations are set on pre-installation of applications, products, services developed by the competitors ensured by the provision of a reward by Google in the form of a share of revenue acquired from mobile advertisement (Revenue Sharing Agreements (RSA)).

The FAS Russia came to conclusion that the practices of Google lead to restriction of competition on the markets of mobile applications, in particular the following conclusions were made:

1. Actions of Google on tying the Google Play app store and other GMS packages have led to the situation where the channel of pre-installation is reserved completely by Google.
2. By imposing requirements on preferential placement of its applications and setting its search as default at all the points of inserting search queries Google creates considerable competitive advantages for its own applications.
3. The requirement to pre-install the Google search as default lead to the creation of barriers to entry for the competing economic entities on the search market, which can lead to restricting competition due to the reduction of the number of economic entities on the commodity market, as end users generally use what is pre-installed on mobile devices.
4. The Google's prohibition to pre-install applications, products, services developed by the third parties ensured by the provision of a reward by Google leads to limiting competition as it stimulates successfully the manufacturers of mobile devices to refuse cooperating with Google's competitors.

The fact of negative consequences for competition, in particular the mobile device manufacturers' refusals to work with the Google's competitors exactly as a consequence of the practices applied by Google was established by the FAS Russia in the communications between Yandex and manufacturers of mobile devices.

On September 18, 2015 the FAS Russia made the decision on the violation of the Law on Protection of Competition by Google through the abuse of its dominant position.

With the purpose of recovering conditions for competition the FAS Russia issued the Ruling to Google. The company has to terminate the violation and not to impose the following requirements as a condition for pre-installation of the Google Play application store:

1 on obligatory pre-installation together with the Google Play app store other Google's applications, products, services including the Google search engine as default;

2 on obligatory placement of other Google applications pre-installed together with the Google Play application store on the main screen or in relation to the main screen of a mobile device;

3 on compliance with the prohibition of pre-installing applications, products, services developed by other economic entities including that ensured by the material stimulation of contractors (manufacturers of mobile devices) in any forms.

For this, Google should to undertake actions necessary for amending the existing agreements/contracts that contain the anticompetitive requirements.

Also with the purpose of minimisation of consequences of the Google's violation the company should at the next Android OS' updating inform customers of mobile devices working on the Android OS on the possibility to de-activate the pre-installed Google applications, to change the search engine in the Google Chrome browser, on the possibility to install another search widget or to install other applications analogous to those of the GMS package, as well as on the possibility to change the placement of icons on the device's screen in the form accessible to get acquainted with a notification on the screens of mobile devices.

Google had to execute the prescription within 3 months.

The FAS Russia's decision and prescription were approved by courts of first and second instances and entered into force on August 17, 2016.

Due to the fact of abuse of dominant position, the case of administrative offence of Article 14.31 of the Code of Administrative Offences of the Russian Federation was considered, and on August 11, 2016 Google Inc was imposed a fine of 438.067.400,39 roubles.

As it had been mentioned previously, the trend of producing and distributing mobile devices together with the software pre-installed on them is global.

The Google's practices based on the substantial power of the company on the market of pre-installed app stores and limiting competition on the market of software are applied equally to all the countries unless special rules or limitations are established there.