

Russian Federation¹
Roundtable on “Abuse of Dominance in Digital Markets”
OECD Global Forum on Competition
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Summary

In a number of sectors, large digital companies continue to occupy dominant positions, having a significant impact on the economy. The direct influence of transnational corporations on competition in national markets increases, the global economy is digitized.

The basis of the market power of companies has changed significantly with their ability to influence markets, monopolize entire industries, uniting them with a system of digital platforms' links. At the heart of modern market power is the ownership of information and its processing technologies, not the ownership of production facilities.

Antimonopoly legislation has to take into account all these innovations and implement policies that not only effectively suppress the restriction of competition, but also ensure the development of innovations in the future.

Significant changes in the structure of commodity markets in connection with the digitalization of the economy lead to the need to change the methods for determining the boundaries of commodity markets, assessing the influence of adjacent markets on each other.

Over the past five years, the FAS Russia has been actively considering cases of abuse of a dominant position in digital markets in relation to the largest Russian and foreign companies, providing conditions for competition in both the Russian and global IT markets.

Abuse of dominance in digital markets

In a number of sectors, large digital companies continue to occupy dominant positions, having a significant impact on the economy. The direct influence of transnational corporations on competition in national markets increases, the global economy is digitized.

The influence of global players is significant, also because they own the basic platforms (from software to payment systems, from social networks to patents for technology and equipment). In this regard, maintaining and ensuring a balance of

¹ The report prepared by the FAS Russia jointly with the Association of Antimonopoly Experts

interests of participants in digital markets, as well as protecting national market participants, require a timely response to the emergence of new features and mechanisms of activities of suppliers and buyers.

At the current stage of economic development, the competitive advantage is gained by the manufacturer that uses digital platforms, and not the one that continues to seek or increase sales using only traditional, non-digital methods of competing and attracting consumer attention, such as outdoor advertising, advertising on television, etc.

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At the same time, one of the features of digital markets is the existence of large players who are interested in acquiring new technologies, as well as investing in promising projects. A consequence of this may be the absence in some digital markets of an established distribution of shares between economic entities. Due to the fact that the situation on the market is dynamic, the distribution of shares in a short time period may change, which, in turn, may affect the possibility of establishing a dominant position of economic entities in digital markets.

Thus, significant changes in the structure of commodity markets in connection with the digitalization of the economy lead to the need to change the methods for determining the boundaries of commodity markets, assessing the influence of adjacent markets on each other.

Over the past five years, the FAS Russia has been actively considering cases of abuse of a dominant position in digital markets in relation to the largest Russian and foreign companies, providing conditions for competition in both the Russian and global IT markets.

In the period from 2015 to 2020, the FAS Russia considered cases against such companies as Google Inc.², Apple Inc.³, Microsoft Corporation⁴, Booking.com⁵,

² <http://en.fas.gov.ru/documents/documentdetails.html?id=14677>

³ <http://en.fas.gov.ru/documents/documentdetails.html?id=15363>

⁴ <http://en.fas.gov.ru/documents/documentdetails.html?id=15352>

⁵ <http://en.fas.gov.ru/documents/documentdetails.html?id=15364>

Gett Taxi, as well as digital job search platforms Headhunter⁶ and Superjob⁷. As a result of these investigations, several major challenges for the regulator were identified.

1) Features of determining the dominant position of the digital platform

Investigations made it clear that standard economic analysis mechanisms are insufficient in cases where the regulator deals with digital platforms, "zero-price" markets.

The competition authority began to develop new approaches to assessing multilateral markets, determining market shares based on radically different indicators for calculating market share (number of applications, users and big data, ads, downloads, transactions through the platform, etc.), assessing the level of direct and indirect network effects and the platform gaining market power, including the degree of influence on dependent markets as a key digital infrastructure.

Thus, in the antimonopoly investigation against Google, the FAS Russia concluded that it has a dominant position in the market of pre-installed app stores for smartphones running on Android operating system (OS).

As part of the economic analysis, the competition authority took into account the degree of importance of this application, its non-intersubstitutability for vendors, developers of applications and services of the Android OS, the number of applications in their dynamics commensurate with the growth of consumer demand (network effects), as well as Google's rights to the Android OS.

Likewise, as part of the antimonopoly investigation against Apple Inc. the regulator concluded that there is a dominant position in the distribution market for iOS applications. In particular, the FAS Russia analyzed the opinions of application developers, which, as part of the hypothetical monopolist test, indicated the impossibility of replacing the App Store for application distribution.

Considering a case regarding HeadHunter.ru, Superjob.ru and Rabota.ru (digital platforms on the market for information interaction between employers and job seekers), the FAS Russia found that these platforms occupy a collective dominant position in this market. The user agreements of the hh.ru, superjob.ru, rabota.ru platforms contained provisions prohibiting users of these platforms (including employers who paid for access to the platforms) from using third-party software when working with the platforms without confirming that such third-party software affects and disrupts the operation of the respective platform. In addition, it was found that the hh.ru platform had blocked users (employers) for using third-party

⁶ <http://en.fas.gov.ru/press-center/news/detail.html?id=54702>

⁷ <http://en.fas.gov.ru/press-center/news/detail.html?id=53974>

automated recruiting software and offered users to switch to hh.ru's own software products of similar functionality.

In another case of the FAS Russia against Booking.com B.V. LLC, the competition authority determined that this company occupies a dominant position in the market for providing aggregators of information on accommodation facilities. Violation of the antimonopoly legislation was expressed in the imposition on accommodation facilities (hotels, hostels, etc.) on the territory of the Russian Federation of the terms of an agreement on the need for the mandatory provision and observance of prices and rooms parity, as well as conditions for interaction with closed user groups. The company's actions to impose unfavorable terms of the contract, according to which the accommodation facility cannot set the price for its services on one aggregator of information about accommodation facilities lower than on another, and is unable to offer the best price for its services to third parties, could lead to infringement on the interests of accommodation facilities, as well as to limit and eliminate competition in this market.

In the FAS Russia case against GetTaxi Rus LLC, the competition authority established that the company interfered with the functioning of the MUYER smartphone application developed by Smart City Technology LLC by forcibly blocking its users⁸. When trying to install the Gett Drivers application on users' devices with the MUYER application already installed, messages from Gett Drivers appeared, indicating that there was another application on the device that prevents the Gett Drivers application from working correctly. When contacting Gett Drivers technical support, users were told that without uninstalling the MUYER application from the user's device, the Gett Drivers program will not work on it.

As part of the consideration of the case against Microsoft Corporation, the FAS Russia concluded that it has a dominant position in the market for the provision of RTM-versions⁹ of OS for stationary computers and laptops in order to adapt application software based on the established inextricable connectivity and interdependence of the OS market for stationary devices for end users and the market RTM OS versions for stationary devices for application software developers.

2) Features of assessing the practices of digital platforms in terms of the degree of influence on competition in related markets (downstream market effects)

⁸ The users of the MUYER application are taxi drivers who are officially registered in various electronic systems for aggregating taxi orders, one of which is the Gett Drivers application;

⁹ RTM-version (Ready To Market) - designation of the product's readiness for replication and release

It should be noted that one of the most common types of abuse of a dominant position in digital markets is abuse, expressed in the fact that the dominant entity, while being the owner of the platform and the owner of other goods circulating in adjacent markets (related to the platform), uses its platform to preferential promotion of their own products and prevents the free promotion of competitors. Such benefits can be provided through linking (providing bundled offers) or in other ways (for example, through access to big data collected on the platform, through the use of special algorithms, etc.). Thus, often an element of abuse arises when the interests of the platform owner go beyond the development of the platform itself and spread to adjacent markets.

For example, Google Inc., being the owner of the Google Play application store platform, has built a distribution system for its application store that completely closed the possibility of pre-installation of competing applications on the Android OS, providing its own applications with priority access to the consumer. As a result of the performance by Google Inc. the requirements of the FAS Russia and the settlement concluded during the consideration of the case in court, the restrictions were removed, a "selection window" was implemented, in which the consumer was equally presented with a choice of search engines to choose from by default, such as Google, Yandex, Mail.ru, Yahoo! and etc.

Microsoft Corporation deliberately made the procedures for agreeing on compatibility with the Microsoft operating system unfeasible, thereby effectively "squeezing out" third-party antivirus application developers, while actively promoting its own antivirus program built into the operating system.

The violation was eliminated during the consideration of the case against this corporation, which led to a number of significant changes in company policy. Microsoft Corporation has made changes to the "Antimalware Platform Requirements" that govern the relationship between the corporation and independent antivirus software vendors. Microsoft Corporation has also extended the term for future pre-release versions (RTMs) of Windows 10 for independent antivirus software vendors, as well as improved communication between the corporation and independent antivirus software vendors.

At the same time, complying with the requirements of the FAS Russia, Microsoft Corporation changed its global policy of relations with developers of programs and applications for Windows.

In August 2020, the FAS Russia ruled against Apple on violation of antimonopoly legislation¹⁰. During the investigation, it was found that Apple has a dominant position with a 100% share of the distribution market for mobile applications on the iOS operating system. The offence has resulted in Apple's consistent policy

¹⁰ <http://en.fas.gov.ru/press-center/news/detail.html?id=54965>

since October 2018 to limit the tools and capabilities for developing parental control applications, with the result that most of the functionality of third-party applications has been lost. The FAS Russia found that the relevant policy began to be implemented immediately after Apple launched its own parental control application. By limiting competing developers, Apple created an advantage for its own product.

The FAS Russia Commission found that Apple abused its dominant position in relation to developers of parental control mobile applications and limited competition in the distribution market for applications for mobile devices operating under the iOS operating system. Apple was issued a remedy to provide non-discriminatory access for developers of relevant applications and services to the App Store while maintaining their key functionality¹¹.

3) The analyzed actions of digital platforms are often or almost always associated with intellectual property and generate in each case the task of finding a balance between the public interests of protecting competition and the private interests of the rights holder

Often, within the framework of investigations in digital markets, the competition authority is faced with arguments from the defendants that the practices considered by the regulator are solely their exercise of intellectual property rights, to which antimonopoly legislation cannot be applied.

Thus, in the case against Google, the FAS Russia concluded that the practice of providing packaged applications and prohibiting the pre-installation of competitors' applications in general cannot be an exercise of intellectual property rights, since they are an abuse of market power and are aimed at restricting competition.

Rejecting the relevant arguments of Apple, the FAS Russia established that the subject of the antimonopoly investigation is not Apple's actions to provide for use or disposal of its own computer programs, including the iOS operating system, the App Store and other computer programs, but the company's behavior in the product market against developers of competing applications, preventing their distribution and limiting competition.

4) Determination of product and geographical boundaries of the market

Determination of geographic boundaries of ICT markets is carried out on the basis of the Law on Protection of Competition and the Procedure for analyzing the state of competition in the product market (hereinafter – the Procedure), approved by the FAS Order dated April 28, 2010 No. 220, which establishes a clear procedure, and is publicly available and includes next steps:

¹¹ <http://en.fas.gov.ru/documents/documentdetails.html?id=15363>

- preliminary determination of the geographical boundaries of the product market;
- identification of the conditions for the circulation of goods, limiting the economic possibilities of purchasing goods by the acquirer(s);
- determination of territories included in the geographical boundaries of the considered commodity market.

When conducting a study of the market for app stores for mobile devices running the Android operating system during an antimonopoly investigation against Google, the FAS Russia determined that a specific property of a product (app store) that determines its functionality is the language of its interface, which, taking into account all circumstances, allowed to draw a conclusion about the national nature of the borders of this product market.

Experience in the Google case highlighted the need to take into account the circulation of goods in markets that are inextricably linked to the functioning of ICT markets: in the Google case, this relationship was studied in the markets for software for mobile devices and the markets for mobile devices themselves. In addition, individual software groups (application software) do not function without the underlying software – operating systems. In such cases, when defining the geographical boundaries of the application software market, the functioning of the market for operating systems is taken into account, which, in turn, are inextricably linked with hardware.

In addition to benefits, the digitalization of the economy also carries risks associated with the monopolization of commodity markets, the possibility of abuse of market power by "digital giants" to the detriment of the interests of consumers. The FAS Russia considers it important to pass a number of laws providing for antimonopoly restrictions for digital giants.

In the course of modernization of the antimonopoly legislation, four antimonopoly packages were adopted. In view of the development of new technologies and in pursuance of the instruction to improve antimonopoly regulation in the digital economy, which was given by the President of the Russian Federation in the National Competition Development Plan for 2018-2020, the FAS Russia has prepared new legislative initiatives to amend the Law on Protection of Competition and the Code of Administrative Offences of the Russian Federation ("the fifth antimonopoly package").

Within the framework of the "fifth antimonopoly package", the FAS Russia proposes to ban various forms of abuse by digital giants.

The document will define new criteria for "dominant position" in the Internet market, including ownership of the infrastructure (software or computer programs),

which is used to conclude transactions between sellers and buyers, network effects, over 35% share in the market for interchangeable transaction support services.

This will not impede the operation of digital platforms, but if they dominate, it will establish a prohibition on discrimination against customers, as well as a monopoly high price for the services provided.

At the same time, antimonopoly rules will not apply to startups of small companies with annual revenue of less than 400 million rubles. The mechanisms will only apply to those companies that have significant turnover and can influence the market.

In addition, direct and indirect network effects, "parallel use" of multiple online services and switching possibility, economies of scale, access to competitively relevant data and the role of innovation must be considered.

It is also proposed to consider the appropriate sanctions for violation of such rules and requirements of antimonopoly legislation. Such sanctions must be commensurate with and adequate to the scale of the violations.

Since the subjects of such liability will be digital monopolies, which, as a rule, are global in nature, the consequences of their violations can significantly violate economic processes and the rights of a large number of users. As a result of the discussion of the "fifth antimonopoly package" with experts from different governmental and non-governmental jurisdictions, representatives of the business community and other stakeholders, it was decided to revise the draft law only in terms of doubling the penalties for digital platforms in cases where they neglect the requirements of the antimonopoly legislation and repeatedly maliciously fail to comply with the legal orders of the competition authority.

Currently, all interested parties participate in the public discussion of this document, and, inevitably, the "fifth antimonopoly package" will undergo some changes taking into account the positions of all stakeholders.

It's worth noting that in 2019, BRICS Competition Authorities within the activity of the BRICS Working Group on Digital Economy prepared a report "BRICS in the digital economy: Competition Policy in Practice"¹². The research project aims to exchange of information on the experience of the BRICS countries in suppressing anticompetitive practices in the digital economy, including abuse of dominance in digital markets.

In its work, FAS Russia strives to simultaneously improve both law enforcement and legislation, create pro-competitive rules of the game in the markets common for business entities of all forms of ownership, observing the principles of

¹² <http://en.fas.gov.ru/documents/documentdetails.html?id=15348>

competitive neutrality, established in the fundamental law of the Russian Federation – the Constitution of the Russian Federation, which states that "in the Russian Federation recognition and equal protection shall be given to the private, state, municipal and other forms of ownership".