

Russian Federation
Roundtable on “The Implications of E-commerce for Competition Policy”
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At present, the government bodies of the Russian Federation at all levels pay special attention to the digitalization of the global economy and the growing influence of transnational corporations on competition in national markets.

In 2017, the Government of the Russian Federation approved the program "Digital Economy of the Russian Federation"¹. The program defines the goals, objectives, directions and timeframes for the implementation of the main measures of state policy to create the necessary conditions for the development of the digital economy in Russia. In this regard, the data in digital form is a key factor for production in all spheres of social and economic activity, which is a necessary condition for improving the country's competitiveness and the quality of life of citizens, for ensuring economic growth and national sovereignty.

Therefore, on October 5, 2017, a meeting of the Government of the Russian Federation took place, at which the Head of the FAS Russia Igor Artemiev presented the annual Report on the State of Competition in Russia. Pursuant to paragraph 4 of the Minutes of the Governmental meeting of 05.10.2017 No. 28² on the State of Competition in the Russian Federation, the FAS Russia, the Ministry of Economic Development, the Ministry of Communications, jointly with interested federal executive bodies, was instructed to submit proposals to the Government aimed at improving Russian antimonopoly legislation (including its applying to the results of intellectual activity) in order to include these proposals in action plans for implementation of the program "Digital Economy of the Russian Federation".

The President of the Russian Federation signed the Decree No. 618 "On the Main Directions of the State Policy on the Development of Competition" (hereafter – the Decree), which approves the National Competition Development Plan in the Russian Federation for 2018-2020 (hereafter – the National Plan)³.

The Decree and the National Plan are the first such documents in the history of the Russian Federation. The documents determine the principles of interaction between the state and the society, implying intolerance to any incidents of unfair competition, cartels and abusing monopolistic position. The authorities at all levels are obliged to

¹ The Resolution of the Government of the Russian Federation of 28 July 2017 No. 1632-p <http://static.government.ru/media/files/9gFM4FHj4PsB79I5v7yLVuPgu4bvR7M0.pdf>

² <http://government.ru/meetings/29535/>

³ <http://en.fas.gov.ru/documents/documentdetails.html?id=15342>

evaluate administrative decisions, taking into account the consequences of such decisions for competition.

As one of the fundamental principles of the state policy for the development of competition, the Decree No. 618 defines the improvement of antimonopoly regulation in the digital economy and its globalization.

In order to implement provisions of the program "Digital Economy of the Russian Federation", to adopt antimonopoly legislation for the needs of the digital economy in accordance with the Decree No. 618, as well as to prepare amendments to the draft federal law "On Amendments to the Federal Law of 26.07.2006 No. 135-FZ "On Protection of Competition" and the Code of the Russian Federation on Administrative Offenses", the Working Group of the FAS Russia on the development of new approaches to antimonopoly regulation that takes into account the challenges of the wide spread of global value chains and the unfolding Fourth Industrial Revolution (hereinafter - the Working Group) was established.

The Working Group drafted a law (the so-called "fifth antimonopoly package") that is planned to submit to the Government in the first half of 2018.

In the law drafted by the Working Group:

- 1) the goals and objectives of antimonopoly regulation and the terminology apparatus of competitive legislation are clarified taking into account the new economy;
- 2) legal instruments to counteract anticompetitive agreements (concerted actions) and illegal coordination of economic activity are supplemented by prohibitions on such activities carried out with the help of digital algorithms and platforms;
- 3) requirements for prohibitions on abuse of dominant position regarding use of data (information) and digital platforms for monopolistic activities are specified;
- 4) there are tools to control economic concentration in the digital economy, including the concentration of large data as a means of monopolizing and accounting for the network effects of digital platforms as a factor in strengthening market power.

Abuse of dominant position

Standard methods for determining the dominant position of an economic entity in the commodity market are quantitative methods⁴.

⁴ The methodology for analyzing commodity markets in the Russian Federation is set forth in legislation: the Procedure for analyzing the state of competition in commodity markets is approved by the FAS Order No. 220 dated April 28, 2010. The specified Procedure provides quantitative methods for determining the dominant position of an economic entity in the commodity market.

The FAS Russia deems it appropriate to divide methodological approaches to the analysis of markets where intangible goods are inextricably linked with a tangible medium and to analyze markets where a digital product shows its consumer value outside specific hardware devices.

The main methodological approaches to the analysis of markets of the first type can be considered on the example of the FAS Russia case against Microsoft Corporation⁵.

If the goods in the digital market acquire consumer value exclusively in connection with hardware devices, then the application of quantitative methods of analysis is possible. At the same time, the evaluation of the "versatility" of digital markets is coming to the fore - a balanced and thorough evaluation of all aspects of the market that can influence determination of product boundaries of a market, of shares in the commodity market, and of behavior of sellers and buyers.

Therefore, within the framework of the antimonopoly investigation against Microsoft on the complaint of Kaspersky Lab, the developer of the anti-virus software, the market analysis was conducted using quantitative methods.

The reason for the antimonopoly investigation was Microsoft's actions to significantly reduce the timeframe (from several months to several days) of providing RTM versions (final versions of the operating system) to third-party software developers (including Kaspersky Lab). Such a reduction could lead to negative consequences for competition in the anti-virus software market: third-party developers did not have time to adapt their programs and users were left without a vendor choice, automatically receiving the anti-virus program of Microsoft itself - Windows Defender.

The FAS Russia concluded that such behavior of Microsoft can have negative consequences for the market only if Microsoft occupies a dominant position in the market of operating systems for personal devices.

In the course of the analysis, an integral link between the market for operating systems and user devices was revealed. Accordingly, the FAS Russia identified interchangeable goods and the specification of product boundaries of the commodity market in relation to the market of user devices, and projected the results on the market of operating systems.

The FAS Russia calculates the shares of economic entities in the relevant product market, determines the level of prices, the level of concentration of the commodity market.

⁵ The FAS Decision in the case on violation by Microsoft of the antimonopoly legislation No. 1-00-168/00-11-16 of 15.08.2017: <http://solutions.fas.gov.ru/ca/upravlenie-regulirovaniya-svyazi-i-informatsionnyh-tehnologiy/ag-56549-17>

In view of the fact that stationary and mobile personal devices are used in the territory of the Russian Federation, it was necessary to determine whether stationary and mobile devices form a single commodity market in order to determine product boundaries of the market.

To identify the intersubstitutability, a survey of consumers was conducted, according to which stationary and mobile devices were assigned to different categories.

Therefore, consumers were asked to evaluate the possibility of changing the operating system on the device. 90% of the respondents answered negatively, confirming the FAS Russia's assertion about the integral link between the market for operating systems and personal devices.

Accordingly, the circulation of operating systems installed on stationary devices and the circulation of operating systems installed on mobile devices form separate commodity markets.

Based on the findings and taking into account the analysis objectives, the FAS Russia determined the commodity market as the market of operating systems (final build) for stationary consumer devices.

The volume of the commodity market and the distribution of shares of sellers in the commodity market was determined on the basis of data reflected in the report of the international research company B2B International "On the use of operating systems in the market of the Russian Federation": Microsoft's share is 95.6%; Apple's share is 2.5%; the share of companies implementing operating systems based on Linux and other operating systems - 1.9%.

Barriers to entering the market are defined as high, and with this in mind, it is established that Microsoft occupies a dominant position in the market for operating systems for stationary personal devices in the Russian Federation.

Thus, during the analysis of the market, the following aspects were considered: the behavior and conditions of activity of buyers-software developers, the behavior of buyers-end users of personal computers, the influence of the behavior of end-users on the circulation of goods in the commodity market under consideration, as well as in related markets of system software and user devices.

Moreover, the product and geographic boundaries of the commodity market are determined on the basis of the identified characteristics of the circulation of operating systems, which, in turn, depend on the conditions for the circulation of personal devices.

Having considered these circumstances, the FAS Russia issued two warnings to Microsoft on termination of actions (inaction), which contain signs of violation of the antimonopoly legislation.

As a result of fulfilling the requirements of the FAS Russia, equal conditions were created for developers of anti-virus products not only in Russia, but also in all areas of Microsoft's presence, thereby ensuring effective competition in the global IT market.

Despite a successful example of the case against Microsoft, in digital markets, especially when it comes to digital platforms, the definition of market shares is very difficult. There are cases when it is not possible to determine exact shares. The problem of applying quantitative methods to the analysis of digital markets is relevant for many countries, including Russia.

Important features for antimonopoly regulation are also the "gratuitousness" of the provision of goods (if monetization occurs in related markets) and the complexity, and often the inability to quantify the market.

When services are provided free of charge, for competition control, as a rule, this means the absence of a market (no price - no market). It is almost impossible to identify intersubstitutable goods using standard methods (pricing analysis and price dynamics, calculation of the indicator of cross-elasticity of demand) without taking into account the price. Hypothetical Monopolist Test at a zero price will also fail. In other words, using methods developed for one-sided markets, one can not describe the interdependence between the prices in the markets where the multilateral Internet platform operates.

The fact that a consumer does not pay anything for a service or a product does not mean that he or she does not lose anything (watching a commercial, transferring personal data, etc.). The presence or absence of a price means the choice of a particular business model, but does not necessarily serve as a criterion for assessing the competition between different goods.

An approach focused on the final result, an effect-based approach, is considered relevant. The key tasks in this approach are an analysis of the dynamics of market changes, an assessment of the actual impact on the market, an assessment of potential competition and the insurance of long-term interests of consumers.

Therewith, it is necessary to supplement the current Russian antimonopoly legislation with provisions concerning the assessment of the dominant position of the economic entity, as well as with criteria that allow to classify owners of large infrastructure platforms, Internet platforms that have the appropriate market power as dominant entities.

Anti-competitive agreements and concerted actions

Nowadays anticompetitive agreements are implemented through the performance of implicative actions, and this is a rare situation when it is an oral or written agreement, often all agreements are reached through the use of computer technologies.

Participants in anticompetitive agreements actively use new opportunities for unlawful activities, which are expressed through the use of data of large volumes and of significant variety (the so-called "big data") and computational algorithms.

Certain business entities (resellers that trade both with the use of retail facilities (offline), and without the use of retail facilities (online), and vendors) use price algorithms to determine retail prices for the products they sell or to control retail prices for products of a particular brand.

Price algorithms that collect information on retail prices for goods of a specific brand, compare them with recommended / minimum vendor prices, and send notifications to infringing resellers are considered by the FAS Russia as an instrument of illegal coordination of economic activities of resellers, leading to restriction of competition. In addition, price algorithms can also be considered as a tool for coordinating economic activity without a function of control over the recommended/minimum price, if the vendor uses them to control the price of resellers for brand products.

Undoubtedly, similar price algorithms can be used by both resellers and other business entities (in other markets) when implementing anticompetitive agreements (as an implementation tool).

The relationship between the supplier and the retailer can be formed according to the following scenarios:

1. There are "agreements with an authorized dealer" between the supplier (vendor) and the retailer (they may both provide for "direct" deliveries from the vendor, as well as not provide for them).
2. Using "price robots", the retailer generates "reports" on the prices of competitors and sends them to the supplier (vendor), demanding "to influence" competitors who sets "incorrect" prices.
3. If the retailer does not comply with the prices sent by the supplier (vendor), the supplier (vendor) may stop delivery, refuse to renew the contract for a new period, or start to deliver only those models of products that are in less demand (signs of violations under parts 4 or 5, Article 11 of the Law "On Protection of Competition").
4. Retailers may begin to refuse the purchase of supplier's (vendor's) products if the supplier (vendor) does not take steps to correct the "wrong" prices (signs of

violations under part 4 of Article 11 or part 3 of Article 11.1 of the Law "On Protection of Competition").

At the same time, the provisions of the current antimonopoly legislation do not provide for liability for developers of price algorithms that have potentially unlawful functionality, and for those who use price algorithms to generate market price reports used by the coordinator to establish control over prices and bring them to a certain level (accomplices of the illegal coordination of economic activities).

As an example, we can cite the case of the FAS Russia against LG⁶. Within the period from 2016 to 2017, the FAS Russia requested information regarding the use of price-optimizing software from a number of resellers and vendors of electronics and household appliances and several developers of such products, and also conducted inspections with respect to certain vendors using such software products (LG, Philips⁷).

The FAS Russia found that LG coordinated the economic activities of resellers by setting recommended retail prices, which were published on the Russian site of LG and brought to the attention of resellers; controlled the prices of resellers; influenced them in order to comply with recommended retail prices; applied sanctions for non-compliance with recommended prices (termination of delivery). To monitor and control the prices of resellers, LG used a special algorithm program.

The FAS Russia found that a very large number of resellers and vendors use price algorithms (software products or online services) to determine retail prices for products sold or to control retail prices for products of a certain brand.

In our opinion, the use of price algorithms does not affect the degree of market transparency, but, on the contrary, the transparency affects the use of such algorithms. Thus, price monitoring, usually carried out using algorithms, is based on open data (prices placed on websites / in online stores) and would not be possible in a non-transparent market.

The use of price algorithms that allow to collect and analyze the prices of competitors and adjust to the prices of competitors is a characteristic feature of the market in question.

⁶ The FAS Decision in the case on violation by LG of the antimonopoly legislation No. 1-11-18/00-22-17 of 02.03.2018: <http://solutions.fas.gov.ru/ca/upravlenie-po-borbe-s-kartelyami/ats-14552-18>

⁷ Materials regarding the company-importer of smartphones Philips were transferred to the Eurasian Economic Commission (since the alleged violation is of cross-border nature for the member countries of the Eurasian Economic Union), which began its investigation.

It should be noted that the provisions of the existing Russian legislation do not provide for the responsibility for the development and distribution of price algorithms (complicity in the illegal coordination of economic activities).

At present, the FAS Russia has not established the "dominance" of one or more algorithms used by electronics resellers. There are many similar products proposed by various developers (Russian and foreign) or developed on request of the users themselves. Currently, the FAS Russia identified more than 10 similar algorithms provided by third-party developers.

In addition to price algorithms, there is a problem associated with the use of auction robots aimed at violation of the antimonopoly legislation.

The auction robot is an optional (special program module) functionality of the personal account of the auction participants on the electronic platform, allowing the automatic submission of price proposals on a specific electronic auction on behalf of the auction participant to the price offer limits introduced by such participant, on the basis of the electronic document with the settings of the auction robot filled and signed by the participant.

These robots, used after the economic entities reach an agreement on the limit of reduction of the initial (maximum) contract price and the auction winner, are an effective tool for implementing an anticompetitive agreement aimed at maintaining the price at the auction.

For instance, on June 3, 2016, by the decision of the Murmansk Regional Office of the FAS Russia LLC ORKO-Invest and LLC Management Company "Center for Waste Management" were found to have violated paragraph 2 Part 1 Article 11 of the Law "On Protection of Competition" regarding the conclusion of an oral anticompetitive agreement, the implementation of which led to the maintenance of the price at the auction.

The FAS Russia found that during the 25 electronic auctions the participants of the anticompetitive agreement practically did not reduce the initial (maximum) price of the contract, allowing each other to win bids in accordance with a predetermined strategy.

One of the evidence of participants' awareness of each other's actions was the participation of economic entities in bidding on the electronic platform CJSC Sberbank-AST through programmed auction robots.

When creating auction bots, LLC ORKO-invest and LLC Management Company "Center for Waste Management" have always programmed bots to set limits of reduction of the initial (maximum) contract price ranging from 0.5% to 1%, depending on which of them should win the auction.

This fact, in the opinion of the FAS Russia, testified that economic entities agreed before the beginning of electronic auctions about the limit of reduction of the initial (maximum) price of the contract and the winner of the auctions.

Concerning the fight against digital cartels, we can not fail to mention the use of digital technologies to quickly detect signs of anticompetitive behavior. The digital resources available to regulators play a big role in this process.

The FAS Russia is currently considering the use of digital technologies, not only from the point of view of detecting algorithms for creating cartels, but also of the need for having its own algorithm for identifying cartels.

To detect cartels the FAS Russia uses a multiple-parameter system for identification and proving cartels (including bid rigging) (hereafter – the System) that is based on a certain algorithm of searching for cartel evidence by specially selected indicators or combinations of indicators that can identify and document the empirical evidence of unlawful activity and indicate a high probability of the cartel. Its functioning is possible only if it is connected to the Single Electronic Tender System related to 6 electronic trading platforms that operate in Russian Federation. The System has been approbated by the Anti-Cartel Department of the FAS Russia, as well as in the federal state autonomous organization "FAS Russia Center for Education and Methodics" (Kazan) in 2016. The System is currently being successfully used.

The developed System allows one trained expert to detect signs of a cartel within one day and collect all necessary evidence within one month.

The possibility of operative cartel detection and evidence collection allows to significantly reduce limitation periods for consideration of cases on violation of the antimonopoly legislation and to increase the effectiveness of antimonopoly bodies in combating bid rigging.

In 2016, signs of bid rigging have been detected in the territory of 40 regions of the Russian Federation; in 2017 – of 42 regions.

As a result of the further proving procedure, the FAS Regional Offices initiates 10 proceedings on signs of violation of paragraph 2 part 1 Article 11 of the Law “On Protection of Competition”⁸ in the total amount of contract guaranteed maximal price of more than 2.5 billion RUB (33 million euro). Remaining cases are under inspections and consolidation of evidentiary basis.

⁸ Agreements between competing economic entities – that is economic entities that sell goods on the same market or between economic entities, purchasing goods on the same market, shall be recognized as cartels and shall be prohibit if such agreements lead or can lead to increasing, reducing or maintaining prices in course of competitive bidding.

Control over economic concentration

The FAS Russia believes that competition policy should respond in time and flexibly to market changes.

The specific feature of the circulation of goods in digital markets is their multi-sided (integral) character, when persons who are both sellers and buyers operate in the same market.

Digital markets are generally closely connected with other markets, which, in particular, is reflected in various ways of monetizing the activity of market participants.

The current Russian legislation does not contain definitions of such relations, which can limit the protection of competition.

Change in the functioning of markets, especially multi-sided markets, is important for proper control over economic concentration.

Nowadays a transaction made on one commodity market can have consequences on the multi-sided market, especially if digital platforms are formed in the industry that combine and manage all technological and value chains of production.

For example, such was the Bayer/Monsanto mega-merger considered by the FAS Russia.

In 2017, the FAS Russia has concluded a review of the merger between “Bayer AG” (Germany) and “Monsanto Company” (USA) filed according to paragraphs 8 and 9 of Part 1 of Article 28 of the Law “On Protection of Competition”.

This merger affects the markets for the products used by agricultural producers including agricultural crops (seeds), certain crop protection products, in particular nonselective herbicides, as well as digital offerings for agriculture.

In the course of this merger review, the FAS Russia organized a series of consultations with the relevant federal authorities, as well as scientific and business communities, and foreign competition authorities. The FAS Russia also met the parties of the merger in order to discuss the possible negative effects the merger could have on competition as well as remedies helping to eliminate them.

Having realized that the merger would have a material impact on industry innovation and technological development dynamics in the agricultural sector, the FAS Russia considered a number of program documents and technological foresights adopted by the Russian federal ministers and the government including the National Strategy for Scientific and Technological Development of the Russian Federation⁹,

⁹ The Decree of the President of the Russian Federation of 01.12.2016 No. 642: <http://static.kremlin.ru/media/acts/files/0001201612010007.pdf>

Agrotechnology Foresight 2030¹⁰, Federal Program for Scientific and Technological Development of Agricultural Sector for 2017-2025¹¹, Federal Targeted Program on Digital Economy¹² and etc.

Considering that technological transformations, including digitalization worldwide, have become key to understanding competitive dynamics in the agricultural sector, the FAS Russia has applied new methodological approaches to identify potential anticompetitive effects of the merger both in the Russian and global markets. These new methods were developed in cooperation with reputable academic institutions including the HSE-Skolkovo Institute for Law and Development. The FAS Russia has also relied on its analysis of the best practices developed within other jurisdictions, relevant recommendations of the OECD Competition Committee, and international scholarship, as well as on proceedings of the BRICS Working Group on Global Food Value Chains (formed by the BRICS Competition Authorities in 2015).

The FAS Russia has conducted market analysis for the factors of agricultural production relevant to the merger review including emerging market of integrated agrotechnological solutions that has been recently formed in a process of ongoing systemic technological and business transformations within the agricultural sector.

In assessing the impact of the transaction on competition in the Russian market, the FAS Russia based on the assumption that the combined company possesses strong capacities including big genetic data; latest technologies for accelerated genetic selection allowing the development of biotechnology seeds with predicted characteristics not subject to regulatory restrictions aimed at the control of cultivation of genetically modified organisms; as well as big data and algorithms for digital farming. All this may allow the combined company to increase its market power in a technologically changing environment quickly and effectively. This may possibly lead to a fast increase in the combined company's market share up to reaching a dominant position in the affected markets dependent on the abovementioned technological changes; as well as to creation of high entry barriers for market player lacking some of those technological and data capacities at once.

The FAS Russia has concluded that the merger can cause the following anticompetitive effects:

¹⁰ https://issek.hse.ru/data/2017/05/03/1171421726/Prognoz_APK_2030.pdf

¹¹ The Resolution of the Government of the Russian Federation of 25.08.2017 № 996 <http://static.government.ru/media/files/EIQtiyxIORGXoTK7A9i497tyyLAmnIrs.pdf>

¹² The Resolution of the Government of the Russian Federation of 28.07.2017 № 1632-p <http://static.government.ru/media/files/9gFM4FHj4PsB79I5v7yLVuPgu4bvR7M0.pdf>

- creating new and increasing existing barriers to entry in relevant markets (including those generated by introduction of closed digital agronomic platforms to the Russian market);
- enhancing incentives for anticompetitive agreements and concerned practices (considering already high level of concentration in this sector, the merger might substantially reduce a number of market players having all necessary technical and data capacities to effectively compete in the new technological and economic environment);
- increasing possibility of abuse of market power (combining innovative technologies, data, and platform solutions will allow the combined company to rapidly increase its market share up to a dominant position in a short term perspective).

Hence, the FAS Russia has concluded that the merger creates substantial risks of restriction of competition, and those risks should be leveled in the course of the merger review.

Consideration of the transaction lasted for a year, and on April 20, 2018, the FAS Russia approved the transaction, issuing a ruling to the merging company.

The FAS Russia managed to achieve non-discriminatory access to the "big data" of the merged company for Russian developers specializing in the field of agrotechnologies and selection, as well as for consumers (the organizations of the agriculture complex of Russia).

The merged company will transfer to Russian participants of the agro-industrial market a certain amount of molecular selection tools and germplasm of the selected crops, which are important for the Russian Federation.

During the whole period of validity of the FAS Russia's ruling (5 years), the scope of supply of seeds of the merged company to the territory of the Russian Federation will not be reduced. At the same time, the supply will be executed on a non-discriminatory basis.

Bayer will support the training of Russian specialists in each culture and will create the Training Center in Russia.

The assistance in execution of the obligations assumed by the merged company will be carried out by the specially created Center for Technology Transfer on the basis of one of the leading Russian universities - the Higher School of Economics under the Government of the Russian Federation.

Despite the fact that the decision taken by the FAS Russia on this transaction is a novelty in the Russian practice of antimonopoly regulation, it lies in the general direction of changing approaches to transactions of economic concentration in

innovative markets. It also corresponds to the current trends of the development of international competition law in the era of digitalization and the strengthening role of innovation in the world economy.

Another example is the consideration by the FAS Russia of the merger of Yandex.Taxi and Uber in 2017¹³.

The FAS Russia identified the market as the market for the organization of information interaction between taxi drivers and passengers. The results of analysis of the market showed that the market is in the stage of active growth, depending on how this happens, and in this case, there will be aggregators providing services through a new convenient way to order a taxi - in the mobile device application.

The FAS Russia approved the transaction with issuing a prescription¹⁴ aimed at development of competition and insurance of passengers' and drivers' safety.

Companies should provide users with the most complete and accessible information of the legal person carrying out the transportation, with the preservation of the history of trips; should not limit the ability of partners, drivers and passengers to work with other taxi aggregators.

The FAS Russia considers that, in order to properly control economic concentration, it is necessary to provide for an assessment of new production mechanisms in Russian legislation, as well as to stipulate additional more stringent requirements that relate to the control of transactions in the context of economic concentration associated with the acquisition of technology or other intangible assets.

First of all, a new condition for controlling transactions should be introduced - if the transaction volume exceeds seven billion rubles.

The rules for involving proxies should be clearly defined in order to fulfill the functions of monitoring and facilitating the execution of orders issued within the framework of economic concentration, including in connection to the transfer of technology.

Application of the antimonopoly legislation to the objects of intellectual property

Given the current state of markets, "immunities" for the objects of intellectual property should be excluded from the application of the antimonopoly legislation.

¹³ The FAS Decision of 24.11.2017 No. АГ/82029/17:

<http://solutions.fas.gov.ru/ca/upravlenie-regulirovaniya-svyazi-i-informatsionnyh-tehnologiy/ag-82029-17>

¹⁴ The FAS Prescription of 24.11.2017 No. АГ/82030/17:

<https://solutions.fas.gov.ru/ca/upravlenie-regulirovaniya-svyazi-i-informatsionnyh-tehnologiy/ag-82030-17>

Software, databases, management systems are recognized as the result of intellectual activity (RIA), and they are protected by law. However, in the field of information technology, software that is a RIA is put into circulation, but with respect to such actions, when they are carried out in the territory of the Russian Federation, an exception is applied from the general rules for the protection of competition (Paragraph 4, Article 10 of the Law "On Protection of Competition"). For instance, the dominant economic entity can establish in the license agreement:

- requirements for the acquisition of goods, works, services, including those that are RIAs or created with their use, not directly related to the subject of the license agreement, even if such goods, works, services are complementary (the so-called "binding practice");
- restrictions on the supply of goods created using RIA, by geographical location, by consumer circle, by type and/or volume of products supplied;
- prohibition to the partner to conclude other agreements with competitors of the legal owner (the so-called "provision on avoidance of competition");
- for partners of a particular country (Russia) conditions that are incommensurably worse than those for partners from other countries. Such a situation can be critical if, for example, the subject of the contract is the standard-forming technology (patent): then Russian products (equipment) will remain uncompetitive in the world;
- unreasonable discriminatory conditions for different partners, with the clear goal of creating advantages for certain partners in the market;
- restrictions on the independent determination of prices for products;
- restrictions up to a complete ban on a partner's ability to use his own technology or technology of other persons;
- in the case of granting the right to rework/modify, the requirement to transfer the right to the dominant or a certain person.

All of the above actions can be carried out by concluding horizontal or vertical agreements, or the agreement between the owner of an exclusive right and another person providing for payment for refusing to produce a similar product or for delaying the development of technology.

The current provisions of the antimonopoly legislation do not allow ensuring equal conditions for competition between foreign and Russian suppliers in related markets in the digital economy. Therefore, the FAS Russia plans to determine the procedure for applying antimonopoly legislation to actions and agreements for the implementation of exclusive rights to the results of intellectual activity.

The most important aspect of the protection of competition in relation to RIA rights is how exactly, based on which principles and methodology, antimonopoly regulation will be applied to the sphere of intellectual property.

Undoubtedly, antimonopoly regulation at the same time should be based on the principles of reasonableness and the promotion of innovations, which is directly provided by the current Law "On Protection of Competition".

Other approaches to regulation and enforcement

In the opinion of the FAS Russia, many competition related issues in electronic commerce are subject to regulation not only of the competition law, and should be discussed by competition agencies jointly with other state authorities and the expert community.

Currently, the Russian Federation is working on approaches to regulate cross-border electronic commerce through joint efforts of experts from different legal fields.

In 2017, a working group was formed under the FAS Russia with the participation of representatives of federal executive bodies, industry associations, scientific organizations, business society, whose activities are aimed at finding and developing approaches to solving the problem of emerging unequal business conditions for Russian and foreign sellers (Internet platforms) in the field of electronic commerce.

In particular, foreign Internet sellers send goods to the Russian buyer as "goods for personal use", in respect of which a special customs regime operates. This regime provides that goods of up to 31 kg and an estimated value of less than 1000 euros per month are not subject to customs duties.

Currently, foreign online shops do not pay value-added tax (18%) of goods sold to a Russian buyer.

Moreover, goods transported in international mail are practically not subject to customs duties in virtually all cases (the average cost of goods in a parcel is a little more than 1,000 rubles).

Under such conditions, foreign suppliers have the opportunity to reduce costs and offer a more attractive price for the goods sold. It puts them in a prime position compared to their Russian competitors.

During the meetings of the working group, in the course of 2017, its members elaborated two plans of actions for solving the problem of the developing unequal conditions.

First of all, the possibility of imposing a compulsory VAT - registration with the imposition VAT on goods sold by Internet shops, Internet platforms (as tax agents), if the place of sale of the goods is the Russian Federation.

At the conclusion of a purchase and sale transaction online on the foreign e-marketplace (in the online store), the price of the goods is proposed to include Russian VAT in case the foreign online store has passed the VAT registration procedure.

It is assumed that the mechanism of VAT registration will be based on the already existing infrastructure of VAT registration - the service "VAT - the office of Internet companies"¹⁵. With the help of it, from January 1, 2017, foreign Internet companies can apply for registration with Russian tax authorities, take an online test and independently check whether a foreign company providing services in electronic form has to register for taxation in Russia. To register a foreign company it is necessary to fill out an application with the help of the service and attach an extract from the register of foreign legal entities of the relevant country of origin or other equal document in legal force. This mechanism has proved itself well.

At the same time, the following problems were identified by the working group as problems in the administration of VAT registration:

1. There are no mechanisms for forcing foreign companies (sellers and Internet aggregators) to register and pay VAT.
2. The seller may not apply for registration.
3. There is a risk of understating the taxable base.

Therewith, the reputational risks of large foreign companies can serve as motivation for registration.

Secondly, the possibility of introducing a customs fee is being considered. The scheme assumes detailed administration of the procedure for performing customs operations with respect to goods sent to individuals.

The scheme of the customs fee provides for the automation of customs control of registered mail in the place of international postal exchange.

It is planned to create an information system managed by an authorized operator where all designated operators and carriers of goods sent to individuals will provide information about the goods shipped and their value voluntarily or on the basis of bilateral agreements with the Federal State Unitary Enterprise "Russian Post".

¹⁵ The mechanism was introduced by the Federal Law of 03.07.2016 No. 244-FZ "On Amending Part One and Two of the Tax Code of the Russian Federation", which entered into force on 01.01.2017

The customs authority verifies the data on the goods in the postal mail with the fact of payment of the fee to the logistic operator. In case of confirmation of payment of the fee, the goods (parcel) access the territory of the Russian Federation.

The working group considers that the administration of the customs fee as an experiment can be initiated by the order of the Russian Federal Customs Service.

The working group also believes that the imposition of a customs fee should be coordinated with neighboring countries in order to exclude cases of import of goods into the territory of the Russian Federation from countries with higher duty-free import limits.

The working group continued its activities in 2018, in order to select the most optimal scheme for equalizing the conditions for conducting business activities using the Internet, since it is not yet possible to carry out an objective calculation of the economic effect in the implementation of the proposed approaches, including the expected amount of revenues to the federal budget.