

Russian Federation
Roundtable on “Using Market Studies to Tackle Emerging Competition Issues”
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Summary

Market studies play an important role in determining the trends of various changes in a certain product market.

Analysis of the state of competition in the product market is a mandatory step in establishing the dominant position of an economic entity and identifying other cases of preventing the restriction or elimination of competition.

In the opinion of the FAS Russia, market analysis is one of the main tools at the disposal of the antimonopoly body capable of reliably assessing the state of the competitive environment in the product market and seeing the objective situation on the studied product market, which allows it to make competent and balanced decisions aimed at maintaining and/or increased competition and effective protection of entrepreneurship in the Russian Federation.

In order to implement the Federal Law of 26.07.2006 No.135-FZ "On Protection of Competition" by order of the FAS Russia dated 28.04.2010 No. 220, the Procedure for analyzing the state of competition in the commodity market was approved.

FAS Russia in its activities, including when considering cases of violation of antimonopoly legislation, exercising control over economic concentration, is guided by this Procedure.

Using market studies to tackle emerging competition issues

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¹ <http://en.fas.gov.ru/documents/documentdetails.html?id=14737>

cases of violation of antimonopoly legislation, exercising control over economic concentration, is guided by this Procedure.

In accordance with clause 1.1, the Procedure is used to analyze the state of competition in order to establish the dominant position of an economic entity (economic entities) and identify other cases of non-admission, restriction or elimination of competition, including:

a) when considering cases of violation of the antimonopoly legislation;

b) when making decisions within the framework of state control over economic concentration in accordance with Chapter 7 of the Law on Protection of Competition, with the exception of consideration of transactions and other actions that are carried out within a group of persons;

c) when deciding on the compulsory separation of commercial and non-commercial organizations engaged in entrepreneurial activity, in accordance with Article 38 of the Law on Protection of Competition.

In its activities, the FAS Russia pays special attention to the quality of market analysis, since a properly conducted study of the commodity market contributes to the adoption of economically sound decisions when determining behavioral conditions issued, for example, in the framework of monitoring economic concentration or when considering cases of violation of antimonopoly legislation

The main problem that FAS Russia faces when conducting market analysis is identifying the composition of economic entities operating on the product market, which, according to FAS Russia, is the norm for competitive product markets, where there is a possibility of overcoming barriers to market access, including due to the lack of government regulation, lack of special registration of market participants, etc., which allows new market participants to easily enter and exit the commodity market.

The results of the studies carried out can clearly illustrate the cause-and-effect relationships between various processes occurring in the commodity market, as well as show the positive or negative dynamics of the influence of certain state regulatory instruments.

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Agro-industrial complex

An in-depth market analysis was carried out by the FAS Russia as part of the review of the Bayer/Monsanto transaction in 2017-2018².

FAS Russia conducted a market analysis of agricultural production factors related to the transaction, including integrated agro-technology solutions for emerging markets, which were recently formed during the ongoing systemic technological and business transformations in the agricultural sector.

All these markets were analyzed by the FAS Russia in the context of the increasing globalization of the world economy and the integration of agricultural production into global value chains. This required FAS Russia to assess not only the “horizontal” relations between market competitors, but also the “vertical” interactions between different segments of the global food value chains.

In the context of accelerating the pace of innovation in the agro-technological sector, FAS Russia assessed not only the market shares of the merging parties, but also the most likely scenarios of market transformations, including changes in their competitive structure and dynamics in the short and medium term.

These changes are driven by the ongoing systemic shift in agricultural technology markets, which requires companies, if they want to be competitive in the global market, provide end-to-end solutions for farmers that include targeted crop protection solutions as well as digital solutions based on big data analysis on soil, climate and other agronomic parameters) collected and processed on digital farming platforms.

In addition, due to the high degree of globalization of Russian agricultural production, both in terms of agricultural exports and imports of factors of production, the above global systemic transformations in the agricultural sector are being transferred to the Russian market.

When assessing the impact of the transaction on competition in the Russian market, FAS Russia proceeded from the fact that the merged company possesses significant opportunities, including large genetic data; the latest technologies for accelerated genetic selection, allowing the development of biotechnological seeds with predictable characteristics that are not subject to regulatory restrictions, aimed at controlling the cultivation of genetically modified organisms; and big data and algorithms for digital farming.

All this can allow the merged company to quickly and efficiently increase its market power in a technologically changing environment. This could lead to a rapid increase in the market share of the merged company to the point of achieving a dominant

² <http://en.fas.gov.ru/documents/documentdetails.html?id=15347>

position in the affected markets, depending on the aforementioned technological changes; as well as creating high barriers to entry for market participants lacking some of these technological and information capabilities at the same time.

At the same time, the FAS took into account the need to reduce the dependence of the domestic market on foreign selection and genetic materials, associated agrotechnological solutions to develop competition among Russian agricultural enterprises.

In this regard, FAS Russia approved the Bayer/Monsanto deal with the issuance of a ruling containing obligations for Bayer AG, which are aimed at creating conditions for the development of potential competition from Russian companies in the field of selection and digital farming.

In 2017, the BRICS Center for Competition Law and Policy prepared a report on agriculture and food. The research project was prepared in the context of the BRICS competition authorities' cooperation, aimed to provide the first in-depth analysis of the regulation, from a competition policy perspective, of the food industry by the BRICS countries, and selected developed countries (European Union, United States)³.

Analysis of the state of competition in the market of retail trade in 2008-2009

In accordance with the Work Plan of the FAS Russia to analyze the state of competition in the commodity markets for 2008 in 2008-2009 the agency analyzed the state of competition in the market for retail trade.

As a result of this study, a number of barriers to entry into the market for retail trade were identified.

The results of this study largely helped in the development of the first edition of the Federal Law "On the Basics of State Regulation of Trade Activities in the Russian Federation" No. 381-FZ, which was adopted on December 28, 2009.

This law contributed to the development of retail trade: in spite of the crisis circumstances, the growth rates of retail chain objects in 2009 amounted to 15%.

Analysis of the pharmaceutical market

In 2015, the Headquarters for Joint Investigations of Violations of Antimonopoly Legislation in the CIS Member States conducted a study of the pharmaceutical market. Based on the results of the study, the Report "On the state of competition in the commodity markets of medicines of the CIS member states" (hereinafter - the Report) was prepared, approved by the Decision of the Council of CIS Heads of Governments on October 30, 2015.

³ <http://bricscompetition.org/agriculture-and-food/>

The main problems in the Report include overpriced pharmaceuticals' prices in the CIS member states, unresolved issues of pharmaceuticals intersubstitutability, and negative public procurement practices.

The FAS Russia has formed the following ways to solve these problems:

- transition from licensing to a notification procedure for carrying out pharmaceutical activities with a simultaneous strengthening of control by sectoral regulators;
- development of state programs of pharmaceuticals supply for the population of small municipalities;
- setting an economically justified level of retail mark-ups for vital and essential pharmaceuticals;
- providing pharmacies performing social functions with preferences for concluding lease agreements for municipal premises and rental benefits.

Within the framework of the adopted recommendations contained in this Report, FAS Russia in the period 2015-2020 achieved the following:

- As a result of an international comparative study of prices for medicines included in the list of vital and essential medicines, and the set of measures taken by the FAS Russia, it was possible to significantly reduce the maximum selling price of 967 registered manufacturers for expensive life-saving and essential medicines. The average decline was 43%;
- The concept of intersubstitutability of medicinal products was introduced into the national legislation on the circulation of medicinal products and a regulatory framework was formed for the functioning of the institute of intersubstitutability of medicinal products in the Russian Federation;
- Special requirements for the procurement of medicines have been introduced into the legislation on public procurement. In particular, a ban was introduced for state and municipal customers to indicate the trade names of purchased pharmaceuticals, with the exception of purchases for individual patients for medical reasons by decision of the medical commission. A limit value for the initial (maximum) contract price (lot price) has been established, above which it is prohibited to combine several medicines with different international nonproprietary names in one lot. Also, a ban was introduced on the inclusion in the composition of mixed lots of pharmaceuticals that have no analogues, and narcotic, psychotropic, radiopharmaceutical medicines;
- Based on the results of many years of law enforcement practice of the FAS Russia, the most typical examples of restricting competition in the procurement of medicines were formulated, and all clarifications on the issues of public procurement of medicines were summarized;

- At the legislative level, bans on unfair practices of interaction between pharmaceutical companies and the medical community have been introduced;
- The obligation of medical workers to prescribe medicines on prescription forms, as well as requirements for prescribing medicines under international nonproprietary names, was introduced, which is aimed at increasing the assortment and price availability of medicines for patients and ensuring a level playing field for manufacturers of competing medicines;
- The Rules for the formation of lists of medicinal products provided for by the legislation of the Russian Federation were approved, which established objective criteria and transparent procedures for the formation of lists, prevented a conflict of interest among decision-makers, introduced the requirement for an annual review of the list of vital and essential medicinal products;
- Based on the results of consideration of cases against international pharmaceutical companies, FAS Russia developed requirements for all dominant pharmaceutical companies on the interaction with distributors, published Recommendations for the development and application of commercial policies that provide clear and transparent criteria and procedures for selecting distributors and working with them, and market participants signed the Code of Good Practice in the Pharmaceutical Market.

The Government of the Russian Federation approved the action plan (roadmap) “Development of competition in healthcare” developed by the FAS Russia. The roadmap is designed for the period until 2021 and includes, among other things, measures to develop competition in the pharmaceuticals markets. Among them:

- improvement of procedures for state registration of medicinal products and dietary supplements;
- changing the mechanism for regulating prices for medicines included in the list of vital and essential medicines;
- ensuring the functioning of the institute for the intersubstitutability of medicines;
- improvement of legislation in the field of procurement of medicines for state and municipal needs;
- settlement of issues of protection of intellectual property;
- development of competition between pharmacy organizations.

Digital markets

In 2015, the FAS Russia considered the case of abuse of dominance by Google Inc⁴. In the course of consideration of this case, the antimonopoly authority analyzed the state of competition in the market of pre-installed app stores for Android OS.

As it was established by the FAS Russia during the consideration of the case and the said analysis, preinstallation of mobile applications is the most effective channel for “bringing” applications to the end user. The users themselves (more than 80%) are not inclined to install applications on their own if applications of the same functionality are already preinstalled by the manufacturers of mobile devices at the production stage (follows from the results of the consumer survey conducted by ROMIR research holding and Russian Public Opinion Research Center).

Apps are usually downloaded from app stores that are not pre-installed at the production stage. It is important to note that basic monetization applications (such as the search browser) are preinstalled.

As a rule, applications are pre-installed, the developers of which are either operating system developers or mobile device manufacturers.

In such a situation, pre-installed apps gain a competitive advantage over those that the consumer downloads through the app store. Because preinstallation is the primary distribution channel for apps, operating system owners have the opportunity to significantly influence the state of competition in app markets by limiting both the ability to preinstall competing players (which was the subject of the Google case) and limiting competitors' ability to distribute through the store applications. In fact, this situation creates opportunities for influencing markets through all channels, thereby “regulating” access to them.

Also, for the most part, preinstalled applications cannot be deleted from the device's memory, you can only disable them, but not completely delete them. Failure to uninstall apps can also compromise consumer interests.

In order to eliminate these problematic issues, the FAS Russia in 2018 submitted to the Government of the Russian Federation an action plan ("road map") for the development of competition in the sectors of the economy of the Russian Federation and the transition of certain areas of natural monopolies from the state of natural monopoly to the state of the competitive market for 2018 - 2020.

This plan also contains legislative measures dedicated to the pre-installation of software and applications on user (subscriber) communication devices sold in the Russian Federation, as well as events dedicated to the possibility of complete

⁴ <http://en.fas.gov.ru/documents/documentdetails.html?id=14677>

removability of such pre-installed software and applications for the convenience of end users.

Thus, the practice and approaches formed in the framework of the consideration of the mentioned case against Google and the corresponding analysis of the product market of the app stores allowed the FAS Russia to further form a legislative initiative aimed at the systemic, rather than case by case, suppression of restrictions on access to the application markets and ensuring the rights and interests of consumers.

Another example of the successful application of market research in the field of digitalization was the phased outage of analogue broadcasting in 84 regions of the Russian Federation that took place during 2019⁵.

In order to carry out these events, the FAS Russia analyzed the state of competition in the retail market for devices connected to televisions that receive a digital signal from television channels of the DVB-T2 standard and transmit this signal in an appropriate form to a television receiver (TV), called TV/digital - set-top boxes, receivers, tuners and DVB-T2 receivers (hereinafter referred to as the Devices) on the territory of the Russian Federation for 2018.

The analysis was carried out in the course of reviewing the actions of LLC DNS Retail, LLC Eldorado, PJSC M.Video, NJSC Yulmart on the implementation of the Devices during the pilot project to turn off analogue broadcasting for signs of violation of antimonopoly legislation on the territory of Tver region⁶.

The purpose of the study was to assess the state of the competitive environment in the market for retail sales of Devices in the Russian Federation.

During the market analysis, it was found that the sale of Devices is carried out by a large number of small online stores, retail stores that do not specialize in the sale of audio-video electronics and others. At the same time, large federal networks have been identified that conduct intensive advertising campaigns aimed at attracting consumer attention to the network as a whole.

Thus, the advertising costs necessary to be able to compete with large federal networks can be named as one of the economic barriers to entering the market for the sale of Devices. Meanwhile, such costs may be insignificant depending on the channel for placing advertising materials, up to the creation and administration of various groups and communities in social networks. This kind of costs will not require financial costs.

⁵ On December 3, 2018, analog broadcasting was switched off in the "pilot region" - Tver region, on February 11 - in 7 regions, on April 15 - in 20 regions, on June 3 - in 36 regions, on October 14 - in 21 regions.

⁶ <http://en.fas.gov.ru/press-center/news/detail.html?id=53635>

Thus, the above economic barrier can be easily overcome. No other barriers to entering the market were identified during the analysis.

In the course of the analysis, it was determined that the aggregate share of LLC "DNS Retail", LLC "Eldorado", LLC "MVM" exceeds 50%, while the share of each of them is more than 8%. The relative size of the shares of LLC "DNS Retail", LLC "Eldorado", LLC "MVM" remained unchanged throughout 2018.

Information about the price of goods is available to an indefinite circle of persons (it is presented in retail stores and on sites in the Internet).

Based on the foregoing, it was established that LLC "DNS Retail", LLC "Eldorado", LLC "MVM" occupy a dominant position in the market for retail sales of digital set-top boxes (receivers) in the Russian Federation.

FAS Russia initiated cases on grounds of violation of paragraph 1 of part 1 of Article 10 of the Law on Protection of Competition, expressed in the establishment of a monopoly high price for digital set-top boxes in relation to large chain stores (LLC DNS RETAIL, LLC ELDORADO, PJSC M. VIDEO).

The initiation of cases by FAS Russia in relation to chain stores had a "warning effect" and was a factor in price stabilization and an increase in the share of digital set-top boxes in the "cheap price segment", which ensured the stability and transparency of the entire process of transition to digital broadcasting.

The summary results of the assessment of the competitive environment, the information provided by the participants of the studied market, as well as the comparison and analysis of quantitative and qualitative indicators characterizing the investigated market for retail sales of devices allowed us to conclude that the market for retail sales of receivers in the Russian Federation is a highly concentrated market with an insufficiently developed competitive environment.

The shutdown of on-air analogue broadcasting and the transition to digital broadcasting was preceded by a large-scale work carried out by the FAS Russia in terms of establishing economically feasible tariffs for technical means.

The FAS Russia has consistently set tariffs for technical means used to provide communication services for the purpose of on-air TV and radio broadcasting in digital format, in the DVB-T standard, then in the DVB-T2 standard.

The provision of communication services for the purpose of on-air television and radio broadcasting in digital format contributed to the increase in the efficiency of Russian Television and Radio Broadcasting Network.

The newly established tariffs for public telecommunication services for broadcasting digital television and radio broadcasting led to a decrease in the average payment for

broadcasters (service consumers) by an average of 4.7 times per transmitter in digital broadcasting compared to the average payment in analogue format.

The implementation of a balanced tariff policy by the FAS Russia made it possible to ensure a smooth transition from analogue to digital broadcasting, providing the population of the Russian Federation with high-quality digital television with an increase in digital broadcasting coverage to 98.4%.

Fuel and energy complex

Amid rising gasoline prices in 2019, the FAS Russia launched an investigation into stock exchanges, finding that the two largest national fuel traders were coordinating prices for trading in petroleum products⁷.

The agency established that Solid - Commodity Markets JSC and A-Oil LLC entered into an agreement on prices when trading petroleum products on the Saint Petersburg International Mercantile Exchange in 2018 (the text of the decision on this case is posted on the FAS Russia website⁸).

This case became precedent for FAS Russia, among other things, because a sufficiently large amount of time was spent to understand in detail the work of the Exchange and understand what kind of evidentiary information can be obtained from it. While the FAS Russia has a developed methodology for collecting and analyzing evidence, as well as an accurate understanding of what information electronic trading platforms have with regard to “typical” cartels at the auction, in relation to the collusion of traders, we had to actually go all this way from scratch.

One of the key pieces of evidence in this case was MAC addresses, in simple words, identifiers of specific computers from which the transactions that attracted the attention of the FAS Russia were made. Moreover, the exchange stores information that allows each action to be associated with a specific trader who performed this action. By analyzing information on all transactions made in 2018, and this is a huge array of data - tables containing more than 2 million lines of information, FAS Russia was able to identify those transactions that were made on behalf of the defendants by the same persons from the same computers.

In addition, the decision contains a number of other, more standard for FAS Russia, evidence - stable financial and corporate ties between companies, the actual behavior of the defendants and others.

⁷ <http://en.fas.gov.ru/press-center/news/detail.html?id=54981>

⁸ <https://br.fas.gov.ru/ca/upravlenie-po-borbe-s-kartelyami/cd94a098-aa37-4fc6-aa95-441c9b5735d9/>

As for the consequences of the collusion between JSC Solid - Commodity Markets and LLC A - Oil, it should be noted that the prices formed on the exchange are an indicator of market prices and are indicative for market participants, in this connection such collusion a priori affects market prices. Moreover, the FAS Russia additionally analyzed the trade policies of large oil companies (vertically integrated oil companies) in order to understand how applicable in practice, in real life, representative indicators formed on the exchange and found out the following. Basically, all large companies use stock indicators in one way or another when selling gasoline and diesel engines on the domestic market. Thus, the implementation of the anti-competitive agreement by the respondents directly influenced the formation of indices, which were subsequently used by other participants in the commodity market.

At the same time, after analyzing the registers of contracts concluded by the defendants both on the exchange and in the over-the-counter segment, it was also found that the implementation of the cartel allowed them to resell the same product several times both on the exchange and in the over-the-counter segment in order to increase the price for the final consumer, while the goods moved only once - from the vertically integrated oil company to the final buyer, but the price varied significantly.

The case was initiated back in February 2019, however, Solid-Commodity Markets JSC challenged the authority of the antimonopoly body to control price collusion in exchange trading. The Arbitration Court of the Moscow District recognized the legality of the actions of the antimonopoly authority and the legality of the order of the FAS Russia and the ruling on the appointment of the case for consideration in June 2020. The company Solid-Commodity Markets JSC filed a cassation appeal with the Supreme Court of the Russian Federation on this dispute for consideration at a meeting of the judicial board for economic disputes, but the court did not accept this complaint.

It should be noted that this is the first time that an agency has applied competition rules to trading on the stock exchange. The decision shows that competition rules are applied in the stock exchange and signals to other traders that they cannot negotiate price increases without facing antitrust and criminal prosecution.

Both companies are currently facing fines of up to 15% of their annual turnover. In addition, a criminal case is being investigated against them on the fact of a cartel and manipulation of gas prices.