

*The Russian Federation
Competition Issues in After-Markets
Competition Committee
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The experience of competition law enforcement by the Federal Antimonopoly Service of the Russian Federation (the FAS Russia) in the after-markets covers the use of traditional and soft forms of competition protection, including in regional markets.

Most recent enforcement experience of the FAS Russia on after-markets concerned the market of complex technological devices. In 2016, the FAS Russia initiated a case in relation to Apple Rus Ltd. on the grounds of violation of Part 1 Article 10 of Federal Law No. 135-FZ of July 26, 2006 "On Protection of Competition" (hereinafter - the Law on Protection of Competition), which resulted in failure to ensure the possibility of using the company's goods¹ during their term of service.

We note that modern economic theory (industrial organisation) considers complex technical devices as a system interface that influences technical parameters and characteristics of circulation of other goods connected to it and circulating in other markets. Markets associated with the market of complex technical devices are usually called the "markets system".

For a long period of time in economics, the dominant idea was that the presence of competition in the market A excludes the possibility of restricting competition in markets adjacent to the market A. They believed that the buyer, when purchasing goods on market A, evaluates this product while taking into account future expenses for repairs and spare parts.

Currently, this idea is inferior to another, according to which the company in market A may be interested in limiting competition in related markets and raising prices, as this will allow increasing its own revenues. A good example of related markets is the smartphone market (market A) and the retail market for smartphone spare parts (market B).

The aforementioned case against Apple Rus Ltd. was initiated based on a complaint from an individual who noted that in the Russian Federation's territory there is no possibility of replacing / repairing a damaged display on Apple iPhone 6 Plus smartphones, Apple iPhone SE, which is explained by the lack of supply of display modules to Russia.

The individual was offered instead to change the whole smartphone and pay an additional charge of 22,200 rubles-23,990 rubles (approximately 370-400

¹ Apple Inc.'s products: smartphones iPhone 6, iPhone 6 Plus, iPhone 6s, iPhone 6s Plus, iPhone SE.

euros).

During the analysis of the state of competition in the retail markets for spare parts for products of Apple Inc., the FAS Russia revealed that the only legal entity delivering products to Apple Inc. on the Russian market is Apple Rus Ltd, which makes part of the group of companies Apple Inc.

At the same time, Apple Rus Ltd does not provide repair services. On the territory of the Russian Federation, repair services (including warranty) for Apple Inc. products are provided by authorized service centers of Apple Rus Ltd. basing on an agreement between Apple Rus Ltd. and such centers.

In accordance with the agreement, the service centers of Apple Rus Ltd can use spare parts, service stock and resale goods received from Apple Rus Ltd., only within the scope of services established by Apple Rus Ltd. in regards to the service center. Thus, no person has the right to provide warranty repair services, as well as purchase spare parts produced by Apple Inc. without contract with Apple Rus Ltd.

Based on the above, Apple Rus Ltd. possessed a market power both in the primary and secondary markets.

In its analysis the FAS Russia also established that the manufacturer does not supply spare parts (such as screen modules and motherboards for the iPhone 6, iPhone 6 Plus, iPhone 6s, iPhone 6s Plus, iPhone SE) to the Russian Federation's territory, thus it is not possible to replacement the specified parts in Russia.

However, in accordance with paragraph 1 Article 5 of the Law of the Russian Federation No. 2300-1 of 07.02.1992 "On the Protection of Consumer Rights" (hereinafter - the Law on the Protection of Consumer Rights), manufacturers are obliged to provide consumers with the opportunity to use goods for their intended purpose and are responsible for significant deficiencies of their goods all over their term of service. For this purpose, manufacturers provide repair and maintenance of goods, as well as release and delivery of spare parts required for repair and maintenance to trade and repair organizations in the due amount and range.

Apple's documentation specifies that Apple's product term of service constitutes five years from the date of initial purchase by end users at retail stores.

As it has already been mentioned, in case of a breakdown of the screen or motherboard during the warranty service period, the service centers make a full replacement of devices for a similar new one for free. If a breakdown of a motherboard or display module occurs after the warranty period expired, the smartphone's owner has the right to get a replacement of such a device for a

similar new one and pay for that.

Taking into account all of the above, all the organisations operating in the markets of provision of non-warranty repair services and providing services for replacement of screen modules or motherboards either carry out such activities without an agreement with Apple Rus Ltd. or violate such an agreement. Consequently, owners of the Apple Inc. products, when using services of such organisations, lose the guarantee. Unauthorised repairs also increase the likelihood of a device's damaged and violate the conditions set by the manufacturer in the product's technical sheet and manufacturer's warranty obligations.

Thus, the lack of a legal opportunity to carry out post-warranty repair in case of a breakdown of a screen or motherboard leads to forcing consumers to purchase a new product of Apple Inc.

Thus, the retail markets of certified spare parts for Apple's products is highly concentrated, the only participant in such markets on the territory of the Russian Federation is Apple Rus Ltd. belonging to the same group of companies with Apple Inc.

The markets for warranty and non-warranty repair services are also significantly concentrated due to the high entry barriers to such markets. To obtain the right to provide warranty and non-warranty repair services for Apple's products, it is necessary to conclude a contract with Apple Rus Ltd. At the same time, certified spare parts from Apple Inc. can be purchased exclusively by authorized service centers of Apple Rus Ltd and only for the provision of those services that were agreed on by Apple Rus Ltd.

Currently, within this case in relation to Apple Rus Ltd, the FAS Russia's Commission decided to consider the actions of Apple Rus Ltd. based on the grounds of violation of the fifth paragraph of Part 1 Article 10 of the Law on Protection of Competition. This provision was violated through economically and technologically unjustified refusal to conclude contracts with business entities on a possibility to provide services for repair (replacement) of Apple's smartphone screens modules. In this regard, the FAS Russia issued a warning to Apple Rus Ltd. on the need to terminate these actions (failure to act) by performing necessary actions so that services for repair (replacement) of screen modules on all models of Apple Inc. smartphones sold in Russia could be provided. The deadline of the warning's execution is May 1, 2017.

Article 10 of the Law on Protection of Competition establishes the right of economic entities to provide evidence of the admissibility of its actions (failure to act) based on part 1 of Article 13 of the Law on Protection of Competition. In fact, actions (failure to act) are permissible if their result is or may be the

improvement of production, sale of goods or stimulation of technical, economic progress; increase of competitiveness of goods of the Russian manufacturers in the world commodity market; receipt by buyers of benefits commensurate with the benefits received by business entities as a result of their actions (failure to act). Apple Rus Ltd. did not provide such evidence.

In conclusion, it should be noted that application of the view according to which the existence of competition in market A does not exclude the possibility of restricting competition in markets adjacent to market A has recently imposed on the antimonopoly authorities the obligation to scrutinize more closely the matters related to after-markets. But ultimately it leads to more effective protection of the rights of economic entities and consumers.

It is also necessary to note the experience of the FAS Russia in countering restrictions of competition in after-markets through concluding agreements between a manufacturer and its official dealers, which led to a "division" of the single market of the Eurasian Economic Union (EAEU). In 2015-2016, the FAS Russia conducted dawn raids of representatives of Caterpillar dealers in cooperation with the Eurasian Economic Commission during its investigation of the case on the refusal by Caterpillar and its dealers to deliver products to the Kazakhstani market, as claimed by LLP Eurasian Group (Kazakhstan).

During the analysis of materials and information obtained due to the dawn raids, the FAS Russia established that agreements were concluded between the dealers and Caterpillar, which envisaged sales of machinery in strictly defined areas of the Russian market and the single market of the EAEU for the dealers and distributors of Caterpillar. At the same time, distributors (representatives of dealers) refused to conclude contracts with companies located in the territories of other distributors.

In 2016, the Eurasian Economic Commission, the FAS Russia and Caterpillar SARL (Switzerland) held a joint meeting on issues related to the state of competition in the markets for sale of Caterpillar equipment, spare parts and their maintenance in the territory of the Eurasian Economic Union. During the discussion, competition authorities demanded that Caterpillar SARL (Switzerland) amends dealership agreements between Caterpillar SARL and Caterpillar dealers providing its equipment and spare parts as well as maintenance services in the territory of the EAEU, which would be consistent with the principles of EAEU, including the principle of fair competition and the national antimonopoly legislation.

As a result of the interaction with the Eurasian Economic Commission and the FAS Russia, Caterpillar amended the international agreements regulating

distribution issues in the territory of the EAEU and also changed letters of certificates on the jurisdiction of the dealers.

Regulation of competition in the auto parts markets with the use of "soft" law instruments was made through the creation and signing of the Code of Conduct of Automobile Manufacturers², developed by the antimonopoly authority in cooperation with the Association of European Businesses in 2013. The Code was created due to the fact that the current Russian legislation does not provide direct regulation of certain aspects of relationship between automakers / auto distributors, official dealers and independent service stations in the automotive sector.

The document aims at establishing good business practices in the Russian automotive sector, including ensuring non-discriminatory access to spare parts. In particular, the Code included the provision, according to which the companies who have signed the code "should not forbid their official dealers to sell original and / or identical spare parts to independent service stations for the purpose of their maintenance and repair of cars". This practice was previously implemented by automakers or their exclusive distributors and was often discriminatory in relation to dealerships and service centers, which led to a significant increase in the cost of spare parts and warranty service. As of the end of 2016, the world's 20 largest automotive companies signed the Code. In 2017, the association "Russian Auto Dealers" made a proposal to automakers to render this document legally binding through mentioning this in all the dealer contracts, which proved the specific relevance of the Code's provisions for its participants.

² Available at the links: <http://fas.gov.ru/documents/documentdetails.html?id=14510> и <https://www.aebus.ru/en/aeb-committees-and-working-groups/code-of-conduct.php>