

Summary

Data of consumers of digital services is not only an important resource for developing the economy and personalizing offers on the market, but also an integral characteristic of the individual user and his autonomy.

Despite the fact that the data itself is non-rivalrous and in general it is not difficult to obtain it, and companies can quickly collect large amounts of data, some categories of data – primarily personal user data – need special processing and use protection measures.

The control over the processing and use of user data is realized by competent regulators. It should not be allowed that the data received by market participants is used unfairly as a competitive advantage and exclusive access to such data hinders the development of competition in the market.

The FAS Russia is fully aware of the need to control the non-rivalrous use of data in digital markets, while in the process of considering cases involving the consumer data rights, and guided by Federal Law of 27 July, 2006 No. 152-FZ "On Personal Data" in conjunction with Federal Law of 26 July 2006 No. 135-FZ "On Protection of Competition".

In order to develop data of the FAS Russia, Federal Law "On Amending the Federal Law "On Protection of Competition" and other legislative acts of the Russian Federation" (the fifth antimonopoly package) has been drafted, which includes changes to antimonopoly legislation in the context of digital economy.

Work of the FAS Russia on modernization of legislation and enforcement in the context of digital economy is part of the work of competition authorities and international organizations around the world to address changes that emergence of digital markets entails for the economy and consumers. The FAS Russia is ready to continue, as well as in cooperation with foreign partners, to monitor dynamics of digital markets development and participate in the generation of best practices for their regulation.

¹The report was prepared by the FAS Russia together with the BRICS Competition Law and Policy Centre (BRICS Competition Centre) and the Association of Antimonopoly Experts

Consumer Data Rights: Impacts on Competition

Introduction

Data of consumers of digital services is not only an important resource for developing the economy and personalizing offers on the market, but also an integral characteristic of the individual user and his autonomy. Despite the fact that the data itself is non-rivalrous and in general it is not difficult to obtain it, and companies can quickly collect large amounts of data, some categories of data – primarily personal user data – need special processing and use protection measures. The control over the processing and use of user data is realized by competent regulators. It should not be allowed that the data received by market participants is used unfairly as a competitive advantage and exclusive access to such data hinders the development of competition in the market. The FAS Russia is fully aware of the need to control the non-rivalrous use of data in digital markets, while in the process of considering cases involving the consumer data rights, and guided by Federal Law of 27 July, 2006 No. 152-FZ "On Personal Data" in conjunction with Federal Law of 26 July 2006 No. 135-FZ "On Protection of Competition".

In 2019, the FAS Russia was able to put into practice approaches to regulating markets based on the circulation of data when considering cases against online platforms for searching job and candidates for vacancies – companies "HeadHunter", "Superjob", "Rabota.ru".

The case against online platforms for searching job and candidates for vacancies

The companies "HeadHunter", "Superjob", "Rabota.ru" own and manage the largest online platforms for searching job and candidates for vacancies in the Russian Federation – "hh.ru", "superjob.ru", "rabota.ru".

These sites represent the Russian market of services to ensure information interaction between applicants, employers and recruitment agencies in Internet.

The market of services for providing information interaction between applicants, employers and recruitment agencies in Internet is a multi-sided market with network effects, where such platforms as hh.ru, superjob.ru, rabota.ru (hereinafter – platforms) connect applicants and employers. Employers use various subsidiary software, such as automated recruitment software, to help them select candidates more efficiently and quickly when working with these platforms.

The automated recruitment software allows automatically selecting candidates' CVs from the platforms databases according to various parameters, inviting these candidates to an interview, and conducting an initial interview with candidates

using a voice assistant. The activity of automated recruitment services directly depends on the ability to access the relevant databases of the platforms.

It should be noted that before posting their CVs and personal data on the platforms, users accept user agreements for the use of the platforms and give the platforms consent to the processing of their personal data. Platforms are required to obtain this consent in compliance with the Law on Personal Data. At the same time, the platforms are responsible for the proper processing of their users' personal data.

By posting their personal data and CVs on platforms, users fill in their databases. Thus, the platforms become attractive to potential employers, as they will be able to find suitable candidates for their vacancies there. This is how a multilateral platform emerges.

Further, the platforms use their accumulated database to provide paid services to various parties of the platform (access to the CV database, selection of relevant candidates, selection of relevant vacancies, assistance in preparing CVs, etc.).

The database becomes the main source of profit for platforms, they try to develop and fill it further (increase the capacity of data centers, train algorithms based on information from databases, use artificial intelligence, etc.)², as well as protect it from third-party attacks.

The combination of these processes leads to the appearance of network effects for individual platforms in the product markets, which help the platforms to increase market share and even serve as a source of platform dominance in the markets.

The FAS Russia found that the user agreements of the platforms hh.ru, superjob.ru, rabota.ru contain provisions that prohibit 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 does not affect and disrupt the operation of the relevant platform.

² Here's how HeadHunter Group PLC (platform hh.ru) describes the technologies they use in their activities:

Our AI uses machine-learning algorithms to analyze the data provided by our users as well as user behavior to offer job seekers and employers better functionality and enhanced service levels. For example, our Machine Learning Recommendation System provides job seekers with suggested relevant vacancies while offering employers recommendations based on their previous activity on the website.

Our AI system also efficiently assists with our CV moderation process. We evaluate and approve each CV submitted to our database to ensure quality, and for the year ended December 31, 2019, all of the CVs submitted to our database were screened by our AI and heuristics system, with on average approximately 70% of CVs receiving approval from our AI to be posted on our database without the need for further human action.

URL: <https://gov.sec.report/Archives/edgar/data/1721181/000119312520073148/d847382d20f.htm>

In addition, it was found that the platform hh.ru blocked users (employers) for using third-party automated recruitment software and suggested users switch to their own software products, which have similar functionality.

Terms of user agreements of hh.ru, superjob.ru, rabota.ru, and actions of hh.ru blocking users for using third-party software contained signs of violation of the antimonopoly legislation, which resulted in creating obstacles to access to the market of services to ensure information interaction between applicants, employers and recruitment agencies in Internet for automated recruitment software. Based on the identified features, the FAS Russia has initiated cases on signs of violation of the antimonopoly legislation in relation to these platforms.

During the case consideration, it was noted that the software for automated recruitment interacts with the databases of the platforms via the application programming interface (API). Using the API is a good business practice and allows the parties to control the process of obtaining the necessary information from the platform databases, as well as to ensure the proper and secure functioning of databases. Interaction not via the API can lead to negative consequences for platforms and databases in the form of data parsing, violations in operation, unauthorized transfer and processing of personal data, etc.

After consideration of the case against the mentioned companies, the FAS Russia concluded that in the user agreements of "SuperJob" LLC (superjob.ru), "RDV-Soft" LLC (rabota.ru) there is a section dedicated to the interaction of third-party software with databases of the specified platforms via the API, as well as that such interaction actually occurs in the specified way. Also, these platforms did not block their users (employers) for using third-party software with databases. In such actions, according to the FAS Russia, there are no violations of antimonopoly legislation.

However, with respect to the "Headhunter" LLC (hh.ru) the FAS Russia found that the specified platform restricted third-party service interaction via the API, blocked users (employers) of this service for using it when working with the hh.ru and suggested switching to a service with similar functionality that was developed by the hh.ru.

These circumstances served as an obstacle to access to the commodity market of services to ensure information interaction between applicants, employers and recruitment agencies in Internet for the developer of third-party software for automated recruitment. As a result of the consideration of this case, the "Headhunter" LLC (hh.ru) was found to have violated Russian antimonopoly legislation by creating obstacles to access to the commodity market.

During the consideration of these cases, one of the main arguments of the platforms justifying restrictions in user agreements and actual restrictions of users

(employers) was the argument that the use of third-party services by employers when working with databases could lead to compromising the personal data of platform users and thereby violate the Law on Personal Data.

The FAS Russia has studied this argument and it has not been confirmed. If the interaction with the platform databases via the API is properly, violations of the Personal Data legislation should not occur.

Thus, the example of the above behavior of platforms in relation to third parties (in this case, suppliers of automated recruitment software used by employers) shows that the platforms try to restrict access to their databases for them.

This behavior is dictated by both the commercial interests of the platforms (locking consumers to services inside the platform – "walled garden"), and concerns for their technologies and personal data of consumers, since the platform does not control their processing by third parties.

In this situation the issue of ensuring competition and the security of consumers' personal data becomes extremely important. According to the FAS Russia, these goals can become achievable, including by allowing platforms to access their data via the API.

However the issue of developing API standards in different areas, as well as the issue of access conditions to such APIs, remains open and should be discussed with all of the interested parties.

Antimonopoly legislation and consumer data

In the conditions of the digital economic development, personal data of users is becoming an important competitive advantage, and the boundaries of antimonopoly regulation are expanding, as the forms of anticompetitive behavior of market participants are changing dynamically. In this sense, the decision of the FAS Russia on the recognition of the "HeadHunter" LLC of violating the Federal Law of 26 July 2006 No. 135-FZ "On Protection of Competition" is represented by the corresponding global trends in reviewing the cases and the assessment of the transactions relating to the use of Big Data, including user data (Facebook/WhatsApp, Microsoft/LinkedIn, case against Facebook that was opened by the German Federal Cartel Office). In general, the practices of companies that have market power in the markets and prevent competitors from accessing Big Data in order to achieve a "critical mass" of data that allows them to stay in the market, can already be considered anticompetitive.

Models for the development of antimonopoly legislation and its application in the Russian Federation try to take into account the features of the functioning of digital markets, markets that depend on intellectual property rights, including database rights, and also take into account the barriers that restrict entry to such markets.

So, we note that in multilateral markets the very size of the digital platform's data asset, including user data, may prevent entry to the market and that was taken into account in the decision of the FAS Russia in the case against "HeadHunter" LLC³. The Competition Authority should therefore pay particular attention to platforms that aggregate large amounts of data, since even without the explicit intent of the platform itself, the competition in such markets may be restricted. At the same time, it is important to distinguish between transactional and non-transactional markets in order to determine the level of control that the platform exerts on the interaction of several market parties⁴.

Referring to multi-sided markets, in addition to restricting competition *per se*, the platform can pursue an exclusivity policy and restrict one of the market parties from using other platforms. This increases indirect network effects, attracting users from the other side of the market and thereby increasing the platform resource in terms of data. However, uniqueness of the processes taking place in multi-sided digital markets requires competition authority to carefully evaluate and apply case-by-case approach while considering possible violations. It should be mentioned that such an approach of consideration of specific cases does not prevent the establishment in the legislation such criteria that take into account known to date features of functioning of digital markets based on data.

Vkontakte vs Double Data case⁵

It is worth noting that in Russia enforcement practice of courts is also faced with issues of interrelation between Big Data and market competition.

For example, "Vkontakte" LLC (analogue of "Facebook" in Russia) filed a lawsuit against "Double" LLC, prohibiting "Double" from extracting and using publicly available user data from "Vkontakte" social network. "Double" has developed software for searching and verifying of information on individuals in public sources. Such software is used by banks to assess creditworthiness of customers. Search is carried out also through publicly available user data on "Vkontakte" website.

"Vkontakte" stated that activities of "Double" violate their related exclusive rights to the database.

"Double" indicated that developed software operates on the principle of universal search engines (Yandex, Google, etc.) with the difference that it only searches for information on individuals and does that with greater accuracy. "Double" does not

³ BRICS Digital Competition Report, P. 133, P. 562.

⁴ Ibid., P. 151.

⁵ No. A40-18827/17-110-180

create any of its own databases on the basis of "Vkontakte" data, but installs software for its customers through which they can search for open data.

Court of the first instance dismissed the lawsuit of "Vkontakte", appellate court upheld the lawsuit and the Intellectual Property Rights Court sent the case for retrial to the first instance.

Key legal issues addressed in the dispute:

A) Is information from public profiles of "Vkontakte" users a database within the meaning of Article 1334 of the Civil Code of the Russian Federation and does "Vkontakte" have the exclusive right to it?

By implication of Article 1334 of the Civil Code of the Russian Federation, in order to get the exclusive right of the database producer, person has to incur significant financial, organizational and other costs.

"Vkontakte" justified its related exclusive rights to user database by the following:

- it incurred and continues to incur substantial financial and organizational costs for the creation and maintenance of the infrastructure of the social network, exclusively through which the user database exists and increases;
- goal of the corresponding investment is provisioning and compiling of user database;
- creation of a social network user database is an important task for society, since the existence of a social network without users (and a database of them) is impossible.

At the same time, "Vkontakte" indicated its obligations to all users of the social network to ensure protection of their personal data from unauthorized or accidental access, copying, distributing, collecting, organizing, storing, or transmitting information from the social network for commercial purposes and/or for its retrieving for commercial or non-commercial purposes, as well as fully or in any part using it without the consent of the user.

"Double" denied exclusive right of "Vkontakte" to the database due to the following:

- actions of "Vkontakte" do not fall under the Article 1334 of the Civil Code as according to it a person should incur significant financial, organizational and other costs aimed specifically at creating a database, and not at managing the website - based on the nature of the social network, "Vkontakte" does not incur any costs for collecting database elements, as database provisioning is carried out by users;
- user database is a "spin off" of "Vkontakte" social network administration activities;

- user database is a "by-product" of "Vkontakte" as all corresponding investments were aimed at creating, maintaining and developing the social network itself.

B) *Abuse of rights by "Vkontakte"*

«Double» referred to abuse of "Vkontakte" of its rights, which was expressed in:

- attempt by "Vkontakte" to assign user data and infringement of their rights;
- contradiction of the public user agreement of "Vkontakte" with its actual behavior;
- violation of the right to publicly available information;
- actions aimed at monopolizing user data market, which is considered as unfair competition - recognition of the exclusive right to user data may lead to restriction of competition as companies developing and offering their own information search algorithms will be ousted from the market.

Currently, the case is under consideration in the court of first instance.

Modernization of the legislation of the Russian Federation in the context of the digital economy

The necessity to adapt Russian antimonopoly legislation to the realities of the digital economy is presented in several policy documents adopted by the President and the Government of the Russian Federation.

Foundation of modernization of antimonopoly legislation is laid down in Decree of the President of the Russian Federation No. 618 of December 21, 2017 "On the main directions of the state policy towards competition development"⁶, where one of the fundamental principles of state policy towards competition development is the principle of improving antimonopoly regulation in the context of the development of the digitaleconomy and its globalization in order to effectively suppress violations of antimonopoly legislation of a cross-border nature, as well as to increase the competitiveness of national companies in the global market.

National program "Digital Economy of the Russian Federation", which includes the Federal project "Statutory regulation", provides for amendments to the Federal Law "On Protection of Competition" and other regulatory legal acts regarding adaptation of antimonopoly legislation to digital economy⁷.

⁶ <https://en.fas.gov.ru/documents/documentdetails.html?id=15342>

⁷ National program "Digital Economy of the Russian Federation" (approved by the Presidium of the Presidential Council for Strategic Development and National Projects of the Russian Federation, Report No. 16 of 24.12.2018).

In order to develop data of the FAS Russia, Federal Law "On Amending the Federal Law "On Protection of Competition" and other legislative acts of the Russian Federation" (the fifth antimonopoly package) has been drafted, which includes changes to antimonopoly legislation in the context of digital economy.

1. Impact of platform economy on competition

Initiatives of the Russian Federation aimed at modernization of antimonopoly legislation pay sufficient attention to market features based on Big Data. Thus, adaptation of the existing competition control mechanisms to the digital economy is provided for by the "fifth package" of amendments to the antimonopoly legislation that is currently being reviewed by the Government of the Russian Federation. It is proposed to introduce concepts of "digital platform" and "network effect" that will make it possible to apply statutory and not theoretical models while analysing the state of competition. "Fifth package" provides that competition authority considers network effects and their impact on the ability of a digital market participant to influence terms of circulation of goods.

Moreover, there is a suggestion to develop new criteria for establishing dominant position in the market. For this purpose, amendments introduce the following cumulative conditions: existence of network effects for a market participant with a market share of more than 35% and revenue of more than 400 million rubles per calendar year.

Amendments also focus on the impact of digitalization on merger control. Thus, in order to take into account high cost of digital assets, the acquisition of which may be the subject of a transaction, it is proposed to increase the volume of the transaction that requires prior approval to 7 billion rubles. In addition, they provide for the issuance of rulings to eliminate discriminatory access to data, including consumer data.

Proposed amendments, as well as practice of the FAS Russia, follow the best practices for adapting antimonopoly legislation to digital economy (corresponding future amendments to German Competition Legislation, Austrian Competition Legislation and to JFTC Guidelines Concerning Companies which Constitute an Excessive Concentration of Economic Power).

2. Extending antimonopoly legislation to abusing dominance by intellectual property

Companies that possess massive intellectual property resources (such as, for example, databases, data collection and processing algorithms) can abuse their use of such resources and motivate other participants to exit the market, thereby promoting monopolization. Despite the fact that the Russian Federation currently provides for exclusions from antimonopoly control for intellectual property (so-

called "antimonopoly immunities"), the FAS Russia is actively developing initiatives aimed at disseminating general rules of antimonopoly regulation on intellectual property rights area.

The most significant of such initiatives seems to be the abolition of antimonopoly immunities for abuse of dominant position, cartels and antimonopoly agreements related to the exercise of intellectual property rights. Corresponding amendments aimed at abolishing exclusions for the results of intellectual property in the Federal Law "On Protection of Competition" is currently being considered by the Government of the Russian Federation.

Conclusion

Work of the FAS Russia on modernization of legislation and enforcement in the context of digital economy is part of the work of competition authorities and international organizations around the world to address changes that emergence of digital markets entails for the economy and consumers. The FAS Russia is ready to continue, as well as in cooperation with foreign partners, to monitor dynamics of digital markets development and participate in the generation of best practices for their regulation.