



YANDEX VS. GOOGLE ANTITRUST LAW CASE IN RUSSIA: RECENT DEVELOPMENTS



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On 20 February 2015 the Federal Antimonopoly Service of the Russian Federation (FAS) opened a case with respect to Google Inc. (1600 Amphitheatre Parkway, Mountain View, CA 94093 USA), Google Ireland Limited (Gordon House, Barrow Street, Dublin 4, Ireland), and OOO Google (Russia) upon an application of OOO Yandex.

Yandex asserted that the manufacturers of smartphones and tablet computers using Android operation system (Android OS) (hereinafter – the "Mobile Devices") being sold in Russia who previously pre-installed certain applications developed by Yandex as well Yandex search engine as the "default search engine" on the Mobile Devices refused to cooperate further with Yandex due to the prohibition to pre-install applications and services of other IT companies that Google imposed on such manufacturers.

In particular, according to Yandex, in 2014 Google prohibited pre-installation of all Yandex services on Fly, Explay and Prestigio mobile devices. This was due to the fact that the manufacturers could get access the key components of Android OS, in particular, Google Play app store without which it was practically impossible to sell the Mobile Devices, only on the conditions imposed by Google and as the result the latter could establish any restrictions including the prohibition for cooperation with competing service providers.

Initially FAS instituted the proceedings under Article 14 "Unfair Competition" of the Federal Law dated 26.07.2006 № 135-FZ «On Protection of Competition» (the "Competition Protection Law"), however, in June 2015 the case was additionally qualified by Article 10 of the Competition Protection Law "Abuse of a Dominant Position" a violation of which involves an administrative fine in the amount up to 15% of the proceeds of the perpetrator at the market in which the violation was sustained for the preceding year.

On 18 September 2015 FAS Commission that considered the case issued the decision and prescription in connection with violation by Google Inc., Google Ireland Limited and OOO Google (Russia) of part 1 of article 14 and part 1 of article 10 of the Competition Protection Law.

It was established that Google Inc. and Google Ireland Limited who hold the dominant position at the market of preinstalled applications' store for Android OS localized for distribution in Russia (due to the market share (58,18%) performed actions that lead to restriction of competition in adjacent commodities markets (applications' stores markets) breaching part 1 of article 10 of the Competition Protection Law since they provided to the manufacturers of the Mobile Devices the Google Play app store for pre-installation on the Mobile Devices intended for sale in Russia on the following conditions only:

- 1) mandatory pre-installation of other Google applications, products and services together with Google Play app store;
- 2) mandatory pre-installation on the Mobile Devices and/or setting together with Google Play app store of Google search engine as the default search engine;
- 3) mandatory placement together with Google Play app store of other applications of Google on the Mobile Device's screen on the spots precisely defined by Google;
- 4) compliance with the prohibition on pre-installation of applications, products and services developed by the manufacturers of the Mobile Devices in consideration of granting by Google of monetary remuneration or other incentives.

These actions were deemed an abuse of the dominant position since Google promoted its applications included in Google Mobile Services (GMS) package by tying them with Google Play app store pre-installed on the Mobile Devices managed by Android OS without technological reasons and thus established barriers for entering the market by developers of other applications.

The decision was based, in particular, on the findings contained in:

- the Analytical report prepared by FAS according to the Procedure for conducting analysis of the status of competition in the commodity market approved by FAS Order № 220 dated 28 April 2010, according to which the product boundaries of the commodity market were defined as the market of preinstalled applications' store for Android OS

localized for distribution in Russia and there are high barriers for entering this market which are difficult to overcome by competing service providers;

- the Technical report prepared by MGUPI MIREA (the Moscow Institute of Radio-electronics and Automatics) which confirmed that Google applications contained in GMS package may function separately from one another and any such application may be replaced for an alternative (competing) application without a loss of functionality of the other Google applications within GMS package and the Mobile Device on the whole, and that there are no technical reasons for setting Google search engine as the default search on the Mobile Devices;
- VCIOM sociological poll report, according to which more than 60% of the Mobile Devices users do not change the preinstalled applications and default search engines which confirmed that pre-installation of applications is the most efficient channel of their promotion.

OOO Google (Russia) was held not violating the antitrust laws of Russia.

The prescription was issued to Google Inc. and Google Ireland Limited:

1. to cease in term by 18 November 2015 the violation of part 1 of article 10 of the Competition Protection Law by imposing on the manufacturers of mobile devices the abovementioned tying conditions;
2. to stop conditioning pre-installation of Google Play app store provided to the manufacturers of the Mobile Devices functioning under Android OS intended for sale in Russia by the following requirements:
 - a) mandatory pre-installation together with Google Play app store of other Google applications, products and services;
 - b) mandatory pre-installation on the Mobile Devices and/or setting together with Google Play app store of Google search engine as the default search engine;
 - c) mandatory placement together with Google Play app store of other applications of Google on the Mobile Device's screen on the spots precisely defined by Google;
 - d) compliance with the prohibition on pre-installation of applications, products and services developed by the manufacturers of the Mobile Devices in consideration of granting by Google of monetary remuneration or other incentives;
3. to take in term by 18 November 2015 all the necessary actions for amending all the effective agreements/contracts that contain the abovementioned tying conditions entered into by Google Inc. and Google Ireland Limited or on their behalf with the manufacturers of the Mobile Devices functioning under Android OS intended for sale in Russia, in order to exclude the respective conditions;
4. Google Inc. - in term by 18 November 2015 to inform the users of the Mobile Devices functioning under Android OS sold in Russia on the possibility to deactivate the pre-installed applications of Google and to change the search engine in Google Chrome browser, on the possibility to install another search widget and other applications analogous to the ones included in GMS package, as well as on the possibility to change the location of icons on the screen of a device, by means of a notice that should appear on the screen of the Mobile Device.

Google Inc. и Google Ireland Limited were also required within 10 days from the moment of compliance with the above prescription to notify FAS Russia in writing on the measures taken for compliance with the prescription with properly completed and duly executed evidence enclosed.

However, on 17 November 2015 the information was published by Google Russia senior legal counsel on Google Russia official blog that Google is going to contest the abovementioned decision of FAS in a court on the following grounds:

- 1) the manufacturers of the Mobile Devices are not obliged to install Google applications together with Android OS since the latter is an open and free platform;
- 2) Android OS (unlike Apple devices) provides to the users many options of installation of applications, including the possibility to download and install applications from third party app stores;
- 3) the manufacturers may install competing applications on the Mobile Devices even if they pre-install Google applications (e.g. Samsung Galaxy S6 new smartphone);
- 4) it is easy for users of the Mobile Devices to download the applications in Google Play which is evidenced by the fact that according to App Annie data Yandex applications hold the second place for the total number of downloads in iOS AppStore and Google Play in Russia (from March through June 2015 года);
- 5) it is convenient for the users to use Google applications together, therefore they are being installed as a package on the Mobile Devices.

It is to be seen whether Google Inc. и Google Ireland Limited will manage to prove in a court that their business practices and the conditions of their agreements with the manufacturers of the Mobile Devices do not actually constitute an abuse of the dominant position based on the above arguments.

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GRATA Moscow office provides, in particular, the following services in the domain of antitrust compliance:

- legal advise on antitrust regulation of trade, advertising, state procurement, mergers and acquisitions
- preparing/review and obtaining a preliminary approval of FAS Russia of terms and conditions of agreements, commercial policies and other documents which may restrict competition
- obtaining of a preliminary approval of FAS Russia of transactions and other actions aimed at economic concentration.

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