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Data Portability, Interoperability and Competition – Note by the Russian Federation

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More documents related to this discussion can be found at
<https://www.oecd.org/daf/competition/data-portability-interoperability-and-competition.htm>

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1. Introduction

1. Digital services are becoming more widespread, while their functioning and further development are based primarily on the collection and processing of data. From the point of view of competition, particular concern is the growing economic concentration in certain areas, including the processes of differentiation (in terms of participants and/or services provided) of digital platforms and their transformation into digital ecosystems. In this context, questions about data portability contained in various services and on digital platforms, as well as their interoperability, are becoming more relevant and require special attention from the competition authorities.

2. Legal and regulatory framework

2. The existing Russian legislation does not regulate the issue of the portability of personal data. Federal law of 27.07.2006 No. 152-FZ "On Personal Data" does not assign the subject of personal data the right to receive his data from the operator of personal data in a structured and machine-readable format in order to transfer data to another operator. This requirement applies only to open data. In accordance with Paragraph 4 of the Article 7 of the Federal Law of 27.07.2006 No. 149-FZ "On Information, Information Technologies and Information Protection" open data is publicly available information posted by its owners on the Internet in a format that allows automated processing without preliminary changes by a person for the purpose of its reuse. The obligation to post open data and ensure their interoperability is provided only for public authorities².

3. Given the lack of industry regulation and the importance of data portability and interoperability issues to ensure competition in the digital economy, the FAS Russia in its practice pays special attention to issues related to access to data and their impact on the market power of business entities. Currently, the Government of the Russian Federation is considering amendments to the Federal Law of July 26, 2006 No. 135-FZ "On Protection of Competition" (the so-called "fifth antimonopoly package"). The adoption of the amendments will allow the antimonopoly authority to respond in a timely and flexible manner to the challenges of the digital economy, including issues related to data circulation. At the same time, a number of serious problems are identified in the field of data circulation associated with the activities of digital platforms and resolved on the basis of the principles and tools contained in the existing Russian antimonopoly legislation.

¹ The contribution was prepared by the FAS Russia in cooperation with the International BRICS Competition Law and Policy Center

² Decree of the Government of the Russian Federation of July 10, 2013 No. 583 "On providing access to publicly available information on the activities of state bodies and local governments in the Internet in the form of open data"; Order of the Government of the Russian Federation dated July 10, 2013 No. 1187-r "On Lists of Information on the Activities of State Bodies, Local Governments, Placed on the Internet in the Form of Open Data".

3. Law enforcement practice

4. Data portability and interoperability issues are essential for promoting competition, fostering innovation and protecting consumer interests. However, the relationship between these parameters is not linear. In some cases, ensuring access and exchange of data leads to increased competition and improves the quality of services, while in other cases, an order from the competition authority restricting the disposal of data by a business entity may lead to a decrease in innovative activity and harm the interests of end-consumers who cannot receive higher quality services.

5. In the practice of the FAS Russia, there are already cases in which the issues of exchanging user data between competing, including potentially, services were considered.

6. In particular, as part of the review of the deal to merge the taxi aggregators Uber and Yandex Taxi (2017), the parties to the transaction were issued a remedy not to prohibit partners, drivers and passengers of taxis to interact and use the services of other taxi aggregators³. This measure made it possible to ensure the free switching of all consumer groups between different aggregators and contributed to the development of competition for the benefit of passengers and drivers.

7. At the same time, in the opinion of the FAS Russia, the practice of closing data is not always anti-competitive. The topic of data is quite sensitive, so a thorough analysis should be carried out on a case-by-case basis. This thesis can be illustrated by the example of the case concerning the taxi ordering service Gett.

8. In 2019, the FAS Russia considered a case on violation of antimonopoly legislation (unfair competition) in connection with a dispute between the taxi aggregator Gett and the smartphone app Muver. The Mover app allowed taxi drivers to get information about free orders in taxi aggregator apps (Yandex.Taximeter, Citymobil Driver, etc.), select an order, change their status in the specified applications⁴. The applicant (Muver) claimed that when using its application and the Gett Drivers application at the same time, the latter sent a notification to the user that it was impossible to work correctly due to the presence of another application on the device (namely Muver).

9. Having considered this case, the competition authority concluded that there are no signs of violation of the antimonopoly legislation in Gett's actions, since these applications are not competitors.

10. This conclusion is based on the fact that any taxi order aggregation application can function independently, providing interaction between the passenger and the carrier. At the same time, the Muver application does not function without the preliminary installation of the taxi order aggregation application on the device and cannot independently ensure the interaction between the passenger and the carrier.

³ Decision of the FAS Russia No. AG/82030/17 (remedy) of 11.24.2017: <https://br.fas.gov.ru/ca/upravlenie-regulirovaniya-svyazi-i-informatsionnyh-tehnologiy/ag-82030-17/> (Russian version only)

⁴ Decision of the FAS Russia No. AK/111637/19 of 12.19.2019: <https://br.fas.gov.ru/ca/upravlenie-kontrolya-reklamy-i-nedobrosovestnoy-konkurentsii/029af148-affb-4bba-91f8-3d34f9ba5f81/>

11. The circumstances of the aforementioned case showed that in certain cases⁵, the closure of a digital service, which has an insignificant market share, from competitors⁶ might be justified, since it ensures the safety of the service itself and user data from possible illegal parsing and does not violate the antimonopoly legislation.

12. Another example of a case concerning the restriction of access to consumer databases for third-party applications and the assessment of its impact on competition is the case of abuse of dominance initiated by the FAS Russia in 2019 against three of the largest online sites for job search and job candidates⁷ in the Russian Federation. The analytical report on the state of competition in the commodity market conducted by the FAS Russia showed the presence of a collective dominant position of three companies in the commodity market of services for providing information interaction between applicants, employers and recruitment agencies on the Internet. At the same time, the terms of use of the sites of these companies contained provisions prohibiting users (including employers) from using third-party software (including automated recruitment software) when working with these sites.

13. The competition authority decided to allocate cases against HeadHunter.ru, Superjob.ru and Rabota.ru into separate proceedings. When considering the case against HeadHunter.ru, the FAS Russia established that the company was creating barriers to enter the product market for the Robot Vera software designed for the automatic selection of staff in the databases of various services. At the same time, the decision concluded that the obstacle of access to a specific computer program did not have a negative impact on the product market as a whole, since the company made changes to the terms of use of its website and established non-discriminatory terms of use for third-party software. HeadHunter.ru was issued a remedy to terminate the actions that led to the creation of obstacles for Staforti LLC (Robot Vera Software) to access the product market⁸.

14. In the process of considering the antimonopoly case against Superjob.ru the business entity recognized the illegality of restrictions on the use of third-party software for interacting with the site and made the necessary changes to the rules for using the site database. According to the information provided, in the period from 2017 to 2019, not a single user (employer, recruitment agency) was blocked for using third-party software, in connection with which the FAS Russia concluded that there was no violation of antimonopoly legislation⁹.

15. In the Rabota.ru case, a detailed study of the circumstances showed that the business entity allows employers and recruitment agencies to use third-party software through the API free of charge after concluding an additional agreement to the license agreement. Thus, FAS Russia found no signs of violation of the antimonopoly legislation¹⁰.

16. The FAS Russia also focuses on transactions of economic concentration, in which large amounts of data are combined. For example, in 2017 Headhunter LLC entered into

⁵ In the absence of a dominant position and the ability to unilaterally influence the general conditions for the circulation of services on the market

⁶ In this case, the closure of a service from competitors meant the inability of drivers to simultaneously choose between several digital services.

⁷ HeadHunter.ru, Superjob.ru, Rabota.ru

⁸ Decision of the FAS Russia No. AG/4087/20 of 01.23.2020

⁹ Decision of the FAS Russia No. AG/88904/19 of 10.11.2019

¹⁰ Decision of the FAS Russia No. AG/88905/19 of 10.11.2019

an agreement for the acquisition of intangible assets of Pronto Media Holding LLC. Headhunter LLC considered that the cost of the acquired intangible assets was less than 20% of the book value of Pronto Media Holding LLC, the transaction was made and executed reasonably without obtaining the prior consent of the FAS Russia. However, after examining the available documents, the FAS Russia concluded that the job.ru website and the database of applicants acquired by Headhunter LLC together account for 86.92% of the book value of all fixed production assets and intangible assets of Pronto Media Holding LLC. In 2019, Headhunter LLC was fined for failure to submit a petition to the competition authority to obtain consent to the transaction¹¹. Headhunter LLC appealed against the decision of the FAS Russia, but the Supreme Court upheld the position of the FAS Russia, and as a result, the established facts and conclusions in the case were recognized as legitimate¹².

4. Conclusion

17. The above examples show different approaches to the exchange of user data between competing services.

18. Currently, it is difficult to form a balanced approach to how this exchange should be organized between the dominant services and platforms, as well as other market participants.

19. In the opinion of the FAS Russia, the organization of such an exchange should be based on the needs of end-users, whose data form the databases of the dominant entities. In particular, it is advisable to identify areas in which the organization of free and non-discriminatory exchange of user information between competing services and platforms will be most useful for end-users (for example, messengers, social networks, contextual advertising services, etc.) and will lead to the development of competition and the emergence of new participants in these markets. It is also necessary to determine which types of user data form barriers to exit to markets and hinder the development of competition.

20. Extending the principles of openness, portability and interoperability to all services and platforms without taking into account the needs of end-users and the capabilities of the services may lead to the fact that such services will lose their competitive advantages and consumer value, and will not be able to provide the required level of protection of user data. These concerns are particularly applicable to the concept of data interoperability implemented through APIs, standardization, and data pools.

21. In the context of the described above, antimonopoly regulation is particularly important, aimed not only at protecting competition and the effective functioning of commodity markets, but also at protecting and taking into account the interests of consumers (users in digital markets).

¹¹ Resolution of the FAS Russia of 01.28.2019 in case No. 4-19.8-1974/00-11-18

¹² Decision of the Supreme Court of the Russian Federation of 07/29/2020 No. 305-AC20-4034 in the case No. A40-45414/2019; Decision of the Ninth Arbitration Court of Appeal of 12.16.2020 Np. 09AP-58690/2020