

# 'MULTI-HOMING BY ALL MEANS': RUSSIAN COMPETITION POLICY TOWARDS DIGITAL PLATFORMS



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## I. INTRODUCTION

Competition policy in digital markets, and, in particular, towards multi-sided platforms, remains a controversial issue.<sup>2</sup> On the one hand, the sheer size and persistent growth of the largest participants in digital markets, and their impact on adjacent markets, create competition concerns. On the other hand, the innovation-intensive business models of digital multi-sided platforms provide strong arguments in favor of the views that, first, innovation and “creative destruction” are sufficient to protect competition without any specific enforcement, and, second, in innovative industries, excessive competition enforcement may result in significant unintended distortions, reducing consumer benefits and total welfare. Along with the ambiguous predictions of certain theories of harm, there have been contradictory assessments of recent and on-going competition interventions in the sector.<sup>3</sup>

Russian competition enforcement is interesting in this respect for several reasons. First, the Russian competition authority, the Federal Antimonopoly Service (“FAS”), is among the most active in the world, with an extensive enforcement record. Second, in the scheme of FAS enforcement activity, decisions against abuse of dominance abound, and include decisions based on both exclusionary and exploitative theories of harm.<sup>4</sup> Third, in light of the first two reasons, the Russian Google Android decision, which was issued in 2015, three years before the similar 2018 European Commission decision, is interesting to analyze. Does the FAS develop specific theories of harm in competition enforcement? Do these specific theories of harm rely on exploitative effects (harm to counterparties) rather than on exclusionary ones?

<sup>2</sup> See, for instance, Collyer, K., Mullan, H., & Timan, N., “Measuring market power in multi-sided markets. Rethinking Antitrust Tools for Multi-Sided Platforms” (2018, available at <https://www.oecd.org/daf/competition/Rethinking-antitrust-tools-for-multi-sided-platforms-2018.pdf>)

<sup>3</sup> Compare, for instance: Falce, V., *Digital Disruption, Innovation and Competition Law. How the Google Shopping Case is Fitting the Framework?*, *Rivista Italiana di Antitrust/Italian Antitrust Review*, 2(3); Diaz, P. S. (2017). *EU Competition Law Needs to Install a Plug-in*, *World Competition*, 40 (3), 393-420; Iacobucci, E., & Ducci, F. (2019). *The Google search case in Europe: tying and the single monopoly profit theorem in two-sided markets*, *European Journal of Law and Economics*, 47(1), 15-42.

<sup>4</sup> Avdasheva, S., *Models of monopoly in the quarter-century development of Russian competition policy: Understanding competition analysis in the abuse of dominance investigation*, in *Competition law enforcement in the BRICS and in developing countries* (pp. 239-262). Springer (2016).

Professor Van den Bergh considers the Russian Google Android decision to be deficient in terms of effects-based analysis, noting:

The FAS may be criticized for not having undertaken a detailed analysis of consumer harm and rapidly dismissing the efficiency defense advanced by the U.S. firm. The decision has not proven that Google's practices reduced effective competition in the market, thereby harming consumers. As a consequence, the FAS appears to protect Google's competitors, in particular Yandex, rather than to foster competition or increase long-run consumer welfare.<sup>5</sup>

The goal of this paper is to summarize the enforcement record of the FAS in digital multi-sided platforms (as well as the use of digital remedies in primarily non-digital markets) in order to explain the theories of harm that the FAS uses in both competition enforcement and merger control. First, the paper will discuss antitrust enforcement: (1) the 2015 Google Android decision (in a case similar to the EU Commission's investigation into the same conduct); and (2) the 2017 Microsoft case concerning compatibility with competing developers' applications. Second, it will discuss two merger control decisions, concerning (1) the 2017 joint venture agreement between Uber and Yandex in digital cab-hailing; and (2) the 2018 Bayer-Monsanto merger, where a significant portion of the remedies addressed digital aspects of the business. In each case, the theory of harm either explicitly or implicitly used by the FAS is central to the analysis. The paper, in short, seeks to check if the theories of harm used by the FAS differ from the conventional approach to platforms.

## II. CONTEXT: RUSSIAN COMPETITION ENFORCEMENT IN DIGITAL PLATFORMS

Three important features of the Russian digital sector and Russian competition enforcement are important to explain FAS enforcement policies towards digital platforms.

First, in Russia, there are relatively few large digital market participants of domestic origin. Only Yandex, the largest Russian company in the digital sector, exceeds USD 10 billion in valuation, in contrast to, for example, China, which has about twenty companies larger in size. At the same time, the number of employees in the digital sector in Russia is comparable to that in Europe. Most Russian companies are small or medium sized. This is why any impact on Russian rivals is usually measured as an effect on a small number of (relatively) large companies.

Second, Russian competition enforcement is very proactive, and prioritizes the deterrence of exploitative conduct. Disadvantaging rivals might be sufficient evidence of violation of the law on "protection of competition." Most of the extremely large number of Russian abuse of dominance decisions (several hundreds annually recently, and up to three thousand decisions several years ago), explicitly concern exploitative conduct towards consumers and/or rivals. One explanation for this is that a large proportion of competition enforcement targets in Russia are so-called "natural monopolies" that control "essential facilities," and are thus able to restrict competition in downstream markets. Of all companies investigated for abuse of dominance in Russia, Gazprom is the undisputed leader, in terms of the number of decisions, warnings, precautions, and remedies addressed against it.

The FAS is often criticized both by domestic and international experts for opening too many investigations despite its limited resources, resulting in decisions lacking in economic analysis. However, when considering companies dominant on networks (so-called 'natural monopolies'), many experts (not only Russians) consider timely intervention preferable to drawn-out investigations.

Third, the FAS routinely uses remedies and quasi-remedies in merger control and in abuse of dominance investigations. Classical remedies for violations of competition law are complemented by specific *ex-ante* requirements for dominant companies, including in markets where such companies have not been found to infringe competition law.

Therefore, in antitrust investigations and merger control in digital markets, one may reasonably expect there to be "exploitative" theories of harm, and remedies aimed at protecting specific groups of competitors.

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<sup>5</sup> Van den Bergh, R. J., *Comparative Competition Law and Economics* (2017) Edward Elgar Publishing, pp. 328-329.

### III. THEORIES OF HARM AND REMEDIES IN ANTITRUST ENFORCEMENT

Two recent cases concerning digital platforms in Russia are the 2015 Google Android “bundling” case (“Google Russia”), and the 2017 Microsoft compatibility case (“Microsoft Russia”). Both were initiated on the basis of complaints by Russian competitors in downstream markets.

#### *A. The Russian Google Android Decision (2015)*

The terms of Google’s agreements with mobile device manufacturers were at the center of Google Russia investigation. These terms concerned the pre-installation of the Google Play app store, which was bundled with other Google mobile applications, on mobile devices. Revenue sharing agreements (“RSAs”) between Google and Android device manufacturers made it profitable for manufacturers to pre-install the bundle of Google Mobile Services (“GMS”) applications, and at the same time refuse to pre-install competing applications. The largest Russian application developer, Yandex, submitted a complaint to the FAS, citing evidence showing decreases in the shares of rivals in different application segments. For instance, in search applications, Yandex’s share decreased from more than 60 percent in 2014 to less than 40 percent after manufacturers entered into so-called anti-fragmentation requirements (“AFRs”) and RSAs with Google.

After half a year of investigation (this period would be considered to be too short for most competition authorities, but is normal in Russia), the FAS issued an infringement decision imposing remedies,<sup>6</sup> holding that Google was abusing a dominant position through anticompetitive bundling. The theory of harm was based on causal links between Google’s RSAs and AFRs, on the one hand, and the refusal of manufacturers to pre-install competing applications, on the other hand. AFRs favor refusal by manufacturers to pre-install other apps. RSAs provide additional benefits to manufacturers that comply with AFRs. The FAS concluded that bundling Google Play (where Google was found to be dominant) with other GMS applications restricted market access and could squeeze out undertakings competing with Google. Pre-installation combined with default requirements, enforced by contractual restrictions with exclusivity effects, limited the ability for competing applications to gain traction. On this basis, the theory of harm in this decision does not substantially differ from that in the EU Commission’s Google Android decision.

The FAS decision was criticized for not assessing any positive welfare effects of Google’s strategies. This is true. However, it is also true that Google did not undertake substantial efforts to present evidence of such positive welfare effects during either the FAS investigation or the subsequent judicial review of the FAS decision. In Google’s claim to annul the FAS decision, its arguments concentrated on weaknesses in the market analysis and product market delineation carried out by the FAS. In particular, Google claimed that operating systems (“OS”) do not differ from other applications, which should be deemed to form part of the same relevant product market (and that therefore the FAS was incorrect to find that Google was dominant). It is not unusual that the reviewing court did not accept this line of defense.

After its unsuccessful attempt to annul the infringement decision, Google signed a commitment agreement with the FAS, obliging Google not to restrict the pre-installation of other developers’ applications on Android mobile devices for a period of seven years, and to include options to choose between: (i) Google Chrome or competing browsers (including but not limited to Yandex); (ii) Google Play or Yandex.Market; and (iii) Google Maps or Yandex.Maps (or other mapping services). In turn, the monetary penalties imposed on Google were modest – less than USD 1 million.

#### *B. The Microsoft Compatibility Investigation (2017)*

The Microsoft Russia case concerned allegations that Microsoft discriminated against competing developers of anti-malware software. Specifically, the case concerned Microsoft’s policies on the advance provision to competing software developers of so-called “release to manufacturing” (or “RTM”) versions of its Windows 10 OS. Timely access to RTM OS versions is required to allow competing developers to update their anti-malware products to ensure compatibility with a new OS before its release.

Kaspersky Lab, one of the largest Russian anti-malware developers, submitted a complaint to the FAS, alleging that Microsoft provided the RTM version of Windows 10 to competing anti-malware developers only six days before the new OS was released. Second, Microsoft allegedly designed its Windows Defender security feature in a manner so as to induce users to favor Microsoft’s own anti-malware products over those offered by competitors. The FAS found Microsoft’s conduct to amount to an abuse of dominance by creating discriminatory conditions for rivals.

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<sup>6</sup> Decision AD/54066/16, Case 1-14-21/00-11-15, October 5, 2015 (in Russian), available at <https://br.fas.gov.ru/ca/upravlenie-regulirovaniya-svyazi-i-informatsionnyh-tehnologiy/ad-54066-15/>.

The investigation did not result in an infringement decision, because after receiving a formal “warning” (a specific type of procedure used by the FAS), Microsoft decided to comply with the warning’s requirements. Under Russian competition legislation, compliance with warning requirements allows the FAS to terminate further investigations or proceedings.

In both Google Russia and Microsoft Russia, the FAS found the business strategies of digital platforms to amount to restriction of competition, but not as disadvantaging rivals as such. Competition is presumably restricted by vertical foreclosure. The content of anti-competitive conduct in both cases was such that protection of competition at the same time meant protection of competitors. In both cases, the FAS preferred rapid intervention with specific remedies and precautions over infringement decisions with large financial penalties. In both cases, the goal of decision was to prevent discrimination and to ensure equal access to downstream markets. In other words, the FAS strategy in many features resembles the regulation of a network operator (or a “natural monopoly”).

## IV. THEORIES OF HARM AND REMEDIES IN MERGER CONTROL

Two merger control decisions allow us to analyze the approach of the FAS to potential adverse effects on competition arising from the enlargement of platforms through economic concentration. The first concerns a joint venture between the international taxi aggregator Uber and Russia’s Yandex. The second concerns a merger between Bayer and Monsanto affecting global markets for seeds and pesticides. The first is a “genuine” digital example, while the second illustrates the attitude of the Russian competition authority towards the impact of digital solutions on competition in downstream (adjacent) markets.

### *A. The Yandex-Uber Joint Venture (2017)*

The 2017 joint venture between Uber and Yandex (“Uber-Yandex”) created the largest participant in the cab-hailing aggregator market in Russia. In approving the deal, the FAS did not find the merging company to be dominant. A partial explanation for this is that the FAS defined the relevant product market to be for services that connect drivers and passengers. As a result, traditional radio taxi services were considered to be close substitutes for aggregators.

Despite finding no serious competition concerns, the FAS nonetheless imposed remedies. Central to the remedies is a requirement to protect multi-homing: the companies committed not to restrict the use of alternative aggregator applications by taxi drivers using their service. It is difficult to predict the long-term effects of the transaction or the impact of the remedies. However, the short-run effects are interesting. Soon after the joint venture was approved subject to the multi-homing remedy, a new entrant, CityMobile, entered several Russian city taxi markets (including Moscow), with an aggressive pricing strategy.

The absence of restrictions on multi-homing has resulted in heterogenous market participants. Some taxi drivers are “branded” by aggregators (e.g. Yandex, CityMobile, Gett, RuTaxi, or other companies). Others contract with the same aggregators, but without branding. From the second group, there are drivers that share working time between different aggregators. Therefore, switching between providers is easy for both drivers and consumers.

Under these heterogenous conditions, pricing becomes an important predictor of market share. Specifically, CityMobile, during its first year of operation (2018), attained a 20-25 percent market share in the Moscow cab-hailing market. Due to steadily decreasing prices, the market volume is steadily increasing. At the same time, there has been a wave of smaller deals in the taxi aggregator segment in Russia, both between Yandex and smaller regional providers, and between other smaller companies. The short-run effect of multi-homing remedies has been tough price competition. At the same time, the market structure in almost all Russian cities is changing rapidly.

## B. Digital Issues in the Bayer-Monsanto Merger (2018)

The Bayer-Monsanto merger (a transaction concerning companies accounting for one-quarter of the world's sales of seeds and pesticides) caused competition concerns beyond the traditional markets for agricultural inputs (seeds, fertilizers, pesticides, etc.). One such area of concern related to “digital agriculture,” which makes it possible for producers to plan and adjust necessary inputs in real time to maximize crop yield. The world's largest seed suppliers invest heavily in the development of IT platforms to provide decisional support for farmers. It is estimated that turnover in the digital agriculture market will reach USD 15 billion in 2021.<sup>7</sup>

According to the FAS merger decision, big data analysis and specialized software enable suppliers of traditional product portfolios (such as seeds and biopesticides) to offer one-stop solutions for farmers. Digital platforms also make effective bundling possible for suppliers of complementary inputs. Major suppliers of product bundles (such as the new Bayer-Monsanto entity) could strengthen their market power through the exclusionary use of IT platforms, thereby gaining the ability to engage in both exclusionary and exploitative anticompetitive behavior.

The remedies imposed by the FAS, in contrast to many other competition authorities, did not require divestitures of assets, but instead concentrated on fair, reasonable and non-discriminatory (“FRAND”) conditions for the supply of products, the licensing of particular product innovations (such as molecular selection tools and the germplasm of the selected crops), and access to digital platforms, not only in terms of software, but also to information collected by platforms (termed “big data” in the FAS decision). In light of considerable market and technological uncertainty, the FAS did not specify the precise conditions under which such access should be granted, but instead appointed a Trustee that would be responsible for elaborating particular terms and monitoring compliance.

In both the Uber-Yandex and Bayer-Monsanto decisions, FAS' theories of harm concentrated on foreclosure issues. In Uber-Yandex, the threat of foreclosure arose because of potential single-homing requirements, and the remedies explicitly sought to prevent them by protecting multi-homing. In Bayer-Monsanto, big data collected by a digital platform were, in essence, considered to be equivalent to an essential facility<sup>8</sup> that should be available to different market participants on a non-discriminatory basis in order to prevent foreclosure.

The Uber-Yandex decision favored competition in the market, at least in the short-run. As for the remedy in Bayer-Monsanto, it might seem extremely protectionist, but this also might not be the case. The remedies only establish a framework that is to be further specified.

## V. CONCLUDING REMARKS

During the last few years, the FAS has addressed record numbers of investigations and merger approvals that involve digital platform issues.

In investigations of anticompetitive conduct, which typically involve alleged abuse of dominance, vertical foreclosure is at the center of the theories of harm. The FAS has never issued a decision based on purely exploitative conduct by a digital platform, i.e. where the unfairness of contract terms for the final customer was found to be a sufficient condition for liability.

It is true that FAS decisions do not contain explicit assessments of efficiencies. One formal reason for this is that certain types of violation are illegal *per se* (including, for instance, the conduct in Google Russia). Another limitation on efficiency analysis arises from the fact that national authorities, when analyzing welfare effects, concentrate only on domestic markets. Given the global presence of a digital multi-sided platforms, efficiencies captured by a platform would be missing from the analysis.

Remedies, both for anticompetitive conduct, and in merger control, address inter-platform as well as intra-platform competition. A typical remedy promoting inter-platform competition would be a multi-homing protection (such as in Uber-Yandex). Multi-homing by end customers is also an important issue for remedies protecting intra-platform competition. By requiring fair and non-discriminatory terms for competing “unbundled” sellers to supply competing services using a platform (such as in Google Russia and Microsoft Russia), the FAS treats platforms as essential facilities. Therefore, multi-homing protections are a universal remedy used in both antitrust investigations and in merger control. In this respect, the Russian approach contradicts neither the economic theory of competition in digital platform markets nor the approach of mature competition jurisdictions.

7 PA Consulting, “Digitizing Agriculture,” 2015, available at <https://www.paconsulting.com/insights/2015/digitising-agriculture/>.

8 The notion of essential facilities is absent from Russian competition legislation. However, a large number of decisions, including decisions on digital platforms, essentially follow the logic of this concept.

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