Europe, Middle East And Africa Antitrust Review

2020

Russia: Federal Antimonopoly Service
GCR’s Europe, Middle East and Africa Antitrust Review 2020 is one of a series of regional reviews that deliver specialist intelligence and research to our readers – general counsel, government agencies and private practitioners – who must navigate the world’s increasingly complex competition regimes. Like its sister reports covering the Americas and the Asia-Pacific, this book provides an unparalleled annual update from competition enforcers and leading practitioners, on key developments in both public enforcement and private litigation. In addition to updates on the European Commission, Cyprus, Denmark, France, Germany, Greece, Norway, Romania, Portugal, Russia, Spain, Switzerland, Turkey, the United Kingdom, Ukraine, COMESA, Israel, Mauritius and Mozambique, this edition features a chapter on Angola, which launched its Competition Regulatory Authority in early 2019. In preparing this report, Global Competition Review has worked with leading competition lawyers and government officials. The latter group provides crucial perspective on the thinking behind cutting-edge matters such as the intersection of privacy, data and antitrust; ‘phygital’ retail distribution that combines brick-and-mortar with online sales; screening tools to detect collusion in public procurement; and much more.
Russia: Federal Antimonopoly Service

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In the Russian Federation, there is a substantial legislative framework for the protection and advocacy of competition. Four ‘packages’ of amendments to antimonopoly legislation have been adopted within the last 13 years. We also actively cooperate with international organisation to harmonise the antimonopoly legislation with best international practices. The government of Russia issued a number of documents, such as rules of non-discriminatory access in industries such as energy and other spheres of natural monopolies, and antimonopoly provisions also being introduced to more than 200 federal legal acts. These are fundamental laws – such as laws on biological resources, subsoil and land – that have antimonopoly regulation. Stabilising antimonopoly provisions are included in the sectoral legislation.

It all reflects the solid performance of government bodies in the formation of a regulatory framework concerning competition.

However, the significant presence and influence of state corporations remains in the Russian economy. Moreover, there is a need to update antimonopoly legislation, according to the new realities such as globalisation and digitalisation of the economy. There is also a need for the development of the potential of small and medium-sized enterprises (SMEs). A certain protectionism exists at the regional level, such as preferential conditions for the activities of individual companies. There are also problems with the transparency and fairness of the state procurement and procurement procedures of state-owned companies. Activity on such markets is often conducted by distorted, non-market rules.

The Resolution of the President of the Russian Federation and National Competition Development Plan

To face the challenges of the present, the Russian President signed the Resolution of 21.12.2017 No. 618 ‘On the Main Directions of the State Policy on the Development of Competition’ (the Resolution).

The Resolution establishes active promotion of the development of competition in Russia as a priority for activities of the President, the government, all federal executive bodies, legislative (representative) and executive public bodies of the constituent entities of the Russian Federation, and also all bodies of local self-government.

The document contains, on the one hand, approaches to setting priorities and principles of the competition policy. On the other hand, it contains specific objectives for competitive markets, as well as expected outcomes.

The Resolution approves the National Competition Development Plan in the Russian Federation for 2018–2020 (the National Plan) and an annex to the National Plan ‘List of industries (spheres) of the economy (types of activity) and expected results of the development of competition’, which contains instructions for the implementation of a set of organisational and legal measures and contributes significantly to the de-escalation of the public sector in the economy and the further supporting of SMEs.

According to the National Plan, special attention will be paid to the 13 sectors of economy.
Furthermore, on 5 April 2018, the meeting of the State Council of the Russian Federation on promoting competition was held, as a result of which the President instructed the government to establish the integrated ‘road map’ on the development of competition for 2018–2020. The document defines lists of key indicators, including the achievement of expected results in such sectors and spheres of the economy. A number of instructions refer to the activities of federal executive bodies, executive authorities and local self-government bodies. Heads of regions were instructed to identify key indicators of competition development in at least 33 of 41 economic sectors – from education to transport – and to devise and implement ‘road maps’ for developing competition.

The Resolution and the National Plan are the first such documents in our history. The documents determine the principles of interaction between the state and the society, implying intolerance to any incidents of unfair competition and abusing monopolistic position. The authorities at all levels will evaluate administrative decisions, taking into account the consequences of such decisions for competition.

In 8 June 2018, the head of the Federal Antimonopoly Service (FAS), Igor Artemiev, held a meeting with officials of the Russian Federation discussing the implementation of the National Plan and instructions, set out in the integrated ‘road map’, where high-level officials of more than 70 subjects of the Russian Federation took part. The parties discussed the development of key indicators for the road maps on the development of competition.

Besides this, in 2018, the head and deputy heads of the FAS in most subjects of the Russian Federation held meetings with senior officials of these regions on the implementation of the National Plan, which resulted in agreements on cooperation between the FAS and the heads of regions. Heads of regional executive bodies, the FAS regional offices, representatives of public organisations, business and the media also took part in these meetings.

As a result of such fruitful joint work, currently 100 per cent of subjects of the Russian Federation identified sectors (spheres) for developing competition and started implementation of regional road maps.

According to the Resolution and the integrated road map, the FAS will summarise the results of the implementation of the National Plan and submit it to the President on a regular basis.

Performance results

The most serious horizontal measures for the development of competition introduced or undertaken during 2018, in accordance with the Resolution and the National Plan, are the development of exchange trading, SMEs and a digital trading public procurement institute.

Sales volumes or qualitative changes significantly increased in all areas of exchange trading. For example, the use of stock quotes for fuel helped to cut budget subsidies twice compared to the previously announced by the regions of Russia. The annual turnover of all spot goods traded on the Russian exchanges has already reached US$14.5 billion, in the derivatives markets the annual turnover reached US$201.5 billion.

The share of the private sector is increasing. This has led to the expansion of the boundaries of commodity markets and their increasing range, including in socially significant markets, which entails price reduction for products and an improvement in the quality of goods.
The share of state corporations purchases from SMEs increased by 18 per cent. SMEs are developing, incomes in the SME sector are increasing, new jobs are being created. Competition in trading allows to reduce prices for the procurement of goods, works and services. This indicators are going to increase by 2020.

Authorities are working to reduce the number of violations of antimonopoly legislation. By 2020, it is planned to reduce their number at least twice.

Tariff regulation that provides the unification of all tariffs for the entire country is being reformed. In the defence industry, a new motivational pricing model was introduced, which is based on long-term pricing principles. This approach creates a long-term planning time-frame for enterprises of the military-industrial complex and increases their investment prospects.

Vertical measures affected industry markets.

The road maps on the development of competition in 17 markets (gas, information technology, telecommunications, mail, etc) were approved. These road maps are key elements of structural reforms in these markets. For instance, in December 2018, the government approved the rules for non-discriminatory access to public postal services developed by the FAS. The document served as the performance of one of the provisions of the National Plan.

Currently, in Russia there are more than 20 private companies providing postal services. Focusing on the speed of delivery, private business has to consider the geographical features of Russia. For the business community, especially small business, in certain cases the delivery of mail to inaccessible places results in costs and increased price on service. Considering that publicly accessible postal services is a natural monopoly, the duplicative infrastructure is inappropriate. However, non-discriminatory access of private companies to this infrastructure should be ensured. According to current developments, any private postal service operator will be able to independently provide services to consumers using part of the infrastructure of the public postal operator. The document states that access to its infrastructure for all market participants should be provided on equal terms.

Elsewhere, the FAS managed to cancel national and internal network roaming. By the end of 2018, telecom operators reduced roaming tariffs to an economically feasible level. As a result of this, roaming tariffs decreased by five times for voice calls, by up to 2.5 times for SMS and by 10 times for internet access. The FAS held meetings with market participants, where the basic principles of fair roaming were formed, the pricing proposals of telecom operators were analysed and inter-operator roaming rates were reduced. The FAS monitored and analysed the fulfillment of the obligations of telecom operators with the subsequent opening of an antimonopoly investigation. The FAS issued decisions on cases involving the three largest mobile operators. The FAS made an ex-post evaluation of the implementation of the fair roaming principles and found that the number of subscribers increased by 38 per cent, the volume of communication services used by subscribers increased by 60 per cent and the revenues of telecom operators under inter-operator roaming agreements amounted to 31 per cent. On 28 December 2018, the President signed the Federal Law that abolishes national roaming in Russia. Starting from 1 June 2019, operators cannot charge additional fees for communication services provided for a subscriber outside his home region.
Antimonopoly compliance

In accordance with the National Plan, the Russian government adopted the Resolution of October 18 2017 No. 2258-p 'On the approval of Guidelines for the creation and implementation by federal executive bodies of antimonopoly compliance systems’ (the Guidelines).

The Guidelines were adopted in order to form a unified approach to creating and implementing antimonopoly compliance systems, by the federal executive authorities, the executive authorities of the subjects of the Russia and the local governments (the Authorities).

The Guidelines identify the main goals, objectives and principles for the creation and implementation of antimonopoly compliance by the Authorities, the content and procedure for the adoption by the Authorities of a legal act on antimonopoly compliance and the procedure for creating and operating an authorised department responsible for the development and implementation of antimonopoly compliance.

The Guidelines also establish a procedure for identifying and assessing the risks of violating the antimonopoly legislation, which is an integral part of internal control over the compliance with the antimonopoly legislation by an authority. It includes an analysis of identified violations of the antimonopoly legislation for the previous three years (cautions, warnings, fines, complaints and prosecutions), analysis with the participation of representatives of the business community of existing regulatory legal acts, drafts of regulatory documents, monitoring and analysis of the practice of applying the antimonopoly legislation, development and maintenance up to date of methods of identifying internal and external risks of violating the antimonopoly legislation within or in connection with the general policy of application of antimonopoly compliance.

The Guidelines contain the 'risk matrix', an assessment of indicators that can be used by the authority to identify individual risks and compile a risk map.

At the same time, the Guidelines contain the procedure for familiarising employees of a governmental body with antimonopoly compliance and training them in implementing the requirements of the antimonopoly legislation and antimonopoly compliance.

In addition, the provisions of the Guidelines provide for the implementation by the government of an assessment of the effectiveness of antimonopoly compliance, which establishes key performance indicators for the implementation of antimonopoly compliance measures for both the authorised department and the authority as a whole.

The Guidelines are applied not only by the federal executive authorities, but also by the executive authorities of the subjects of the Russia and local self-government. The FAS regularly conducts training seminars for the specialists in the field of antimonopoly compliance.

New version of the Competition development standard for regions
To fulfil the National Plan, on 17 April 2019, the government approved a new version of the Competition Development Standard (the Standard). The goal of the Standard is to form a systemic approach to developing competition at the regional level in view of the specifics of each region in Russia.

After approving the Standard, the primary FAS task is to cooperate with regions to devise and fulfil competition development road maps, based on the lists of the key competition development indicators approved by regions under the frame of executing the orders issued by the President in the follow-up of the State Council.

This systemic approach to creating conditions for competition support and eliminating administrative barriers should generate positive results in stimulating business initiatives, involving broad segments of the population in business processes and developing self-employment.

Adopting the Standard will be an additional impulse for all levels of the Authorities in their efforts to support and protect competition.

The Fifth Antimonopoly Package

The Resolution deals, inter alia, with the issues of improving antimonopoly regulation in the conditions of the development of the digital economy and its globalisation.

In this regard, the FAS drafted a federal law ‘On Amendments to the Federal Law “On Protection of Competition” and other legislative acts of the Russian Federation’ (the Fifth Antimonopoly Package).

Technologies (primarily digital technologies), information, digital and information platforms, and intellectual property form the basis of the modern market system. Information and technologies can be spread and used among economic agents as part of legitimate cooperation or with the intent to prevent, restrict or eliminate competition. In practice, the intensive development of information technologies apart from benefits also leads to the creation of ‘advanced’ anticompetitive practices. In some spheres, new digital companies dominate exercising significant influence on the real sector of economy.

The FAS can provide more and more examples of how the structure of modern markets is changing. Evaluating the market position of a certain company, competition authorities have to take into account such phenomenon of the IT sector of the economy as direct and indirect network effects. Direct network effects result in increased demand for a product as a consequence of an increase in the number of users. Such effects can serve as a serious obstacle to market entry. Achievement of a certain level of demand, a certain number of customers, comparable to the network effect achieved by a competitor becomes the condition for entering the market. Indirect network effects, also referred to as network externalities, result in increasing demand for products and applications that come in addition to the core product.

In order to keep up with the evolving social relations in the digital economy, it is necessary to update antimonopoly legislation. The draft law considers the introduction of additional criteria to the Law on Protection of Competition that allow the designation of owners of digital platforms as dominant players, if such a digital platform has a share of more than 35 per cent in the market of substitute services delivered using digital platforms related
to ensuring interaction between economic entities – sellers and buyers – and if network effects based on the number of users of the digital platform give such an economic entity the opportunity to exercise a dominant influence on the general conditions for the commodity circulation in the relevant market or eliminate other economic entities from this market, or to impede access of other economic entities to this market.

At the same time, in order to support the development of new projects based on the use of digital platforms, the draft law proposes the instituting of a rule stating that the owner of a digital platform, or several similar (substitutable) digital platforms, whose revenues for the last calendar year did not exceed 400 million roubles cannot be designated as dominant player.

In order to implement the proposed provisions, the draft law also defines the digital platform as an infrastructure located in the internet, which is used to organise and provide interaction between sellers and buyers. It is also proposed to define the concept of ‘network effect’ as the dependence of the consumer value of goods on the number of consumers of the same group (direct network effect) or the change in the value of the goods for one group of consumers with a decrease or increase in the number of consumers in another group at the same time (indirect network effect). Under conditions of the modern ‘digital’ markets, approaches to controlling transactions of economic concentration should change as traditional criteria based on the amount availed or operations and value of their assets may not reflect the real impact on the economic conditions of a transaction carried out as part of economic concentration and related to the regulation of intellectual property rights.

Considering the above, a new condition should be introduced to control transactions of economic concentration – if the volume of the transaction exceeds seven billion roubles. Taking account of successful foreign practice, it is proposed to specify the rules in the Law on Protection of Competition for involving a trustee for the purpose of monitoring and facilitating the execution of a ruling issued under economic concentration, which includes the transfer of rights to intellectual property and technology.

In order to protect the interests of market participants, the draft law proposes to determine additional consequences of failure to comply with the ruling of the competition authority issued as part of monitoring economic concentration and associated with the use and transfer of intellectual property rights. Thus, it is proposed to establish that in case of non-compliance with the ruling of the competition authority, if such non-compliance leads or can lead to the prevention, restriction or elimination of competition, the competition authority has the right to:

- file a claim in court for exemption to use in the territory of a Russian Federation in the interests of competition development the results of intellectual activity and equivalent means of personalisation belonging to the person to whom the ruling was issued, if the ruling was related to the exercising by such person of the exclusive rights to the results of intellectual activity and equivalent means of personalisation, under conditions of the ruling; and
- file a claim in court with the request to prohibit (restrict) turnover in a territory of the Russian Federation by the person to whom the ruling was issued, of goods produced using the results of intellectual activity or the exercise of exclusive rights associated with the implementation of this ruling.
Adoption of the draft law will make it possible to ensure the effectiveness of antimonopoly compliance in the context of modern ‘digital’ markets, increase the protection of the rights and interests of bona fide participants in such markets from possible manifestations of monopolistic activity and create legal mechanisms to counter market power abuse by ‘digital monopolies’.

Another important aspect for legislative novels is pricing algorithms that analyse markets and adjust prices. In conditions when companies use similar algorithms to optimise relationships with competitors, one should talk about the formation of cartels. The draft law proposes to define the concept of ‘pricing algorithms’ as a software designed to monitor prices on the commodity market, calculate prices for goods, set prices for goods or monitor prices for goods or take actions when bidding.

To achieve the goals set by the President and the government in the framework of the Resolution and the National Plan, the Fifth Antimonopoly Package introduces several other important provisions to the antimonopoly legislation.

The FAS drafted the Law on Antimonopoly Control Procedure for the Creation of State and Municipal Unitary Enterprises. By 2021, all 18,000 unitary enterprises should be eliminated except for the sphere of national defence and security. If they are not modified or abolished, the FAS will issue warnings. If the warnings are not fulfilled, the FAS will open investigations and, if necessary, abolish them in court. The creation of new state and municipal enterprises will require the approval of the antimonopoly body.

The Fifth Antimonopoly Package deals also with compulsory licensing. The right holder’s misuse of his dominant position can lead to the refusal to manufacture or supply socially important goods (medicines, medical devices, for example). Such actions may lead to a threat to the life and health of citizens and also create an unfavorable environment for the development of competition. However, the Russian legislation does not provide for effective mechanisms of state influence on such violations.

According to clause 49 of the National Security Strategy of the Russian Federation until 2020, approved by Resolution No. 683, one of the main areas of ensuring national security in the medium term is determined to ensure the provision of high-quality and affordable medicines to the population. In the conditions of maintaining state regulation of prices for vital and essential medicines, there is a potential threat of foreign manufacturers’ refusal to supply medicines due to the possible unprofitability of their business in Russia. Since such a refusal is economically feasible, the application of measures provided for by the antimonopoly legislation is not possible. Under such circumstances, the economic dependence of Russia on medicine manufacturers with no substitutes, including those associated with unstable exchange rates, constant price increases, and other economic and political restrictions (sanctions) do not meet the requirements of the national security of the Russian Federation.

Production of patented medicines without the permission of patent holders is the most common measure aimed at achieving a balance between the interests of rights holders and retaining human rights, as well as a tool that allows governments of World Trade Organization (WTO) member states to ensure national security, respond to the emergence of problems associated with citizens’ provision with pharmaceuticals, fight with epidemics and budget savings. This possibility is provided for in article 31 of the TRIPS Agreement. The use of the patent object without the permission of the right holder is possible if the national legislation of a member of the WTO allows such use.
In accordance with article 1360 (‘Use of an invention, utility model or industrial design in the interests of national security’) of the Civil Code of the Russian Federation, the Russian government has the right, in the interests of defence and security, to allow the use of an invention, utility model or industrial design without the consent of the patent owner, notifying him or her of this in the shortest possible time and paying him or her commensurate compensation. In order to guarantee the supply of affordable medicines to the citizens, it seems appropriate to use the mechanism for introducing goods into circulation without the consent of the patent owners, provided for in article 1360 of the Civil Code, including the case of economically or technologically justified reduction or cessation of production (supply) of a medicine. Permission to use an invention, utility model or industrial design without the consent of the patent owner may be drawn up by acts of the Russian government, in which intellectual property, as well as the amount and procedure for paying remuneration to the right holder are listed.

The absence of an effective mechanism for compulsory licensing poses a threat to national security, as well as to the life and health of citizens. The FAS drafted a federal law ‘On Amendments to Article 1360 of the Civil Code of the Russian Federation’, which provides for clarification of the grounds for issuing permission to use an invention, utility model or industrial design without the consent of the patentee by the government in the interests of protecting the life and health of citizens. In addition, the draft law proposes that the procedure for making the decision provided for by the proposed article, as well as the procedure for paying compensation, should be determined by the Russian government.

Further, in order to ensure that the Russian government implements the provisions of article 1360 of the Civil Code to reduce the price of expensive medicines protected by a patent, necessary to combat epidemics that threaten national security, paragraph 4 of point 5 of Section I of the action plan (road map) ‘Development of competition in healthcare’, as part of measures to improve the regulatory framework in the field of intellectual property protection, provides for the development of drafts of normative legal acts that establish the procedure, for issuance by the government, of the permission to use the invention, useful model or industrial sample medicine without patentee permission. The adoption of the draft law will reduce the level of dependence of Russia on foreign patent holders, which, in turn, will increase the level of economic security of Russia.

Moreover, the FAS drafted the law that abolishes the Law on Natural Monopolies. Considering that natural monopolies in Russia are inefficient, own too many non-core assets, do not seek to reduce costs and the Law on Natural Monopolies of 1995 is invalid, the FAS proposes to reverse this law and add additional provisions on natural monopolies to the Law on Protection of Competition.

The FAS also drafted the Law on the State Regulation of Prices (Tariffs). In 2015, after the abolition of the Federal Tariff Service, the FAS was entitled to tariff regulation. However, so far in Russia there is no single legal act regulating relations in the sphere of state regulation of prices (tariffs). The main goal of the draft law is to form a unified and transparent legislative basis in the field of state regulation of prices and tariffs to fix the legal gap that has arisen after the elimination of many uncoordinated acts in this area.

Therewith, the FAS proposes to abolish antimonopoly immunities for actions and agreements regarding the results of intellectual activity (IPR). Currently, the Law on Protection of Competition stipulates that the requirements of the antimonopoly legislation do not apply directly to actions to exercise exclusive rights to the results of intellectual activity
and agreements to grant or alienate rights to use the result of intellectual activity. Actions and agreements on the use of exclusive rights to intellectual property objects, which lead to the prevention, restriction or elimination of competition in commodity markets, cannot be suppressed effectively by existing antimonopoly measures. This can create unjustified advantages to right holders to the detriment of fair competition in commodity markets. Moreover, the exceptions currently contained in part 4 of article 10 and part 9 of article 11 of the Law on Protection of Competition, the result of intellectual activity or means of individualisation can create conditions for the unfair application of such provisions to relations concerning the circulation of goods during production (manufacturing) of which the results of intellectual activity were used.

Recently, the FAS has increasingly begun to investigate cases in which defendants attempt to justify the legality of their anticompetitive actions by referring to exceptions related to the exercise of exclusive rights to intellectual property. For example, in the case brought on the grounds of a violation of clause 5, part 1 of article 10 of the Law on Protection of Competition by Teva Pharmaceutical Industries Ltd, related to evasion (refusal) of the delivery of the medicine Copaxone, the company referred to the fact that it could not be subject to competition law in view of the possession of a trademark on this medicine. It should be noted that the position of the FAS in this case was not supported by the court of first instance and was confirmed only in acts of appeal, cassation and supervisory instances.

There was the similar situation in the case against Google Inc, which was considered on the grounds of the abuse by the company of its dominant position. Google Inc, in the course of legal proceedings, also appealed to the fact that the provisions of the antimonopoly legislation do not apply to the company's pre-installation of software on mobile devices and smartphones due to the exclusive rights to the Android operating system and software. Google's appeal was not supported by courts.

In addition to the above mentioned examples, it can be stated that in practice there may be other situations when actions and agreements on the exercise of exclusive rights to intellectual property may lead to violations of antimonopoly laws. To solve these problems, to increase the effectiveness of antimonopoly regulation, as well as to reduce the level of dependence of the Russian Federation on anticompetitive behavior of foreign patent holders and increase the level of economic security of the Russian Federation, the FAS has developed a draft federal law 'On Amending the Federal Law on Protection of Competition'. The draft federal law provides for the recognition of part 4 of article 10 and part 9 of article 11 of the Law on Protection of Competition as no longer in force and extends the prohibitions contained in these articles to actions (inaction) and agreements using exclusive rights to the IP. The adoption of the draft law will make it possible to resolve issues related to the restriction or possible restriction of competition in the exercise of exclusive rights to the IP by the right holders.

Notes


2 Transport (including railroad, air and waterway); chemicals; communication and information technologies; road construction; defence industry; housing sector; oil and gas...
industry; electric energy; agroindustrial complex; fishing industry; healthcare; education; foreign trade activity.

3 The State Council of the Russian Federation is an advisory body that facilitates the exercising of the powers of the head of state on the issues of ensuring the coordinated functioning and interaction of public authorities. The State Council is composed of the chairman of the State Council and members of the State Council. The chairman of the State Council is the President of Russia.


12 The powers of the WTO member states in the field of health are specified in the Declaration on the TRIPS Agreement and Public Health adopted on 14 November 2001 in Doha.

13 https://www.zakonrf.info/gk/.


For example, a dominant entity that possesses exclusive rights can establish in a licensing agreement the requirements for the purchase of goods, works, services, including those which results from intellectual activities or created using them that are not related to the subject of the licensing agreement (a ‘binding practice’); can establish restrictions in the licence agreement on the supply of goods created using the inward processing relief (IPR); can prohibit the counterparty to enter other agreements with competitors of the right holder (the ‘provisions on non-compete agreements’); can create discriminatory conditions or establish monopoly-high price for goods produced using the IPR; can establish in the license agreement restrictions on the independent determination of prices for products; can refuse (evade) the conclusion of a license agreement, due to the separate agreement with a third party and so on.

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**PERFORMANCE RESULTS**

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In accordance with the National Plan, the Russian government adopted the Resolution of October 18 2017 No. 2258-p ‘On the approval of Guidelines for the creation and implementation by federal executive bodies of antimonopoly compliance systems’ (the Guidelines).

The Guidelines were adopted in order to form a unified approach to creating and implementing antimonopoly compliance systems, by the federal executive authorities, the executive authorities of the subjects of the Russia and the local governments (the Authorities).

The Guidelines identify the main goals, objectives and principles for the creation and implementation of antimonopoly compliance by the Authorities, the content and procedure for the adoption by the Authorities of a legal act on antimonopoly compliance and
the procedure for creating and operating an authorised department responsible for the development and implementation of antimonopoly compliance.

The Guidelines also establish a procedure for identifying and assessing the risks of violating the antimonopoly legislation, which is an integral part of internal control over the compliance with the antimonopoly legislation by an authority. It includes an analysis of identified violations of the antimonopoly legislation for the previous three years (cautions, warnings, fines, complaints and prosecutions), analysis with the participation of representatives of the business community of existing regulatory legal acts, drafts of regulatory documents, monitoring and analysis of the practice of applying the antimonopoly legislation, development and maintenance up to date of methods of identifying internal and external risks of violating the antimonopoly legislation within or in connection with the general policy of application of antimonopoly compliance.

The Guidelines contain the ‘risk matrix’, an assessment of indicators that can be used by the authority to identify individual risks and compile a risk map.

At the same time, the Guidelines contain the procedure for familiarising employees of a governmental body with antimonopoly compliance and training them in implementing the requirements of the antimonopoly legislation and antimonopoly compliance.

In addition, the provisions of the Guidelines provide for the implementation by the government of an assessment of the effectiveness of antimonopoly compliance, which establishes key performance indicators for the implementation of antimonopoly compliance measures for both the authorised department and the authority as a whole.

The Guidelines are applied not only by the federal executive authorities, but also by the executive authorities of the subjects of the Russia and local self-government. The FAS regularly conducts training seminars for the specialists in the field of antimonopoly compliance.

NEW VERSION OF THE COMPETITION DEVELOPMENT STANDARD FOR REGIONS

To fulfill the National Plan, on 17 April 2019, the government approved a new version of the Competition Development Standard (the Standard). The goal of the Standard is to form a systemic approach to developing competition at the regional level in view of the specifics of each region in Russia.

After approving the Standard, the primary FAS task is to cooperate with regions to devise and fulfill competition development road maps, based on the lists of the key competition development indicators approved by regions under the frame of executing the orders issued by the President in the follow-up of the State Council.

This systemic approach to creating conditions for competition support and eliminating administrative barriers should generate positive results in stimulating business initiatives, involving broad segments of the population in business processes and developing self-employment.

Adopting the Standard will be an additional impulse for all levels of the Authorities in their efforts to support and protect competition.

THE FIFTH ANTIMONOPOLY PACKAGE
The Resolution deals, inter alia, with the issues of improving antimonopoly regulation in the conditions of the development of the digital economy and its globalisation.

In this regard, the FAS drafted a federal law ‘On Amendments to the Federal Law “On Protection of Competition” and other legislative acts of the Russian Federation’ (the Fifth Antimonopoly Package).

Technologies (primarily digital technologies), information, digital and information platforms, and intellectual property form the basis of the modern market system. Information and technologies can be spread and used among economic agents as part of legitimate cooperation or with the intent to prevent, restrict or eliminate competition. In practice, the intensive development of information technologies apart from benefits also leads to the creation of ‘advanced’ anticompetitive practices. In some spheres, new digital companies dominate exercising significant influence on the real sector of economy.

The FAS can provide more and more examples of how the structure of modern markets is changing. Evaluating the market position of a certain company, competition authorities have to take into account such phenomenon of the IT sector of the economy as direct and indirect network effects. Direct network effects result in increased demand for a product as a consequence of an increase in the number of users. Such effects can serve as a serious obstacle to market entry. Achievement of a certain level of demand, a certain number of customers, comparable to the network effect achieved by a competitor becomes the condition for entering the market. Indirect network effects, also referred to as network externalities, result in increasing demand for products and applications that come in addition to the core product.

In order to keep up with the evolving social relations in the digital economy, it is necessary to update antimonopoly legislation. The draft law considers the introduction of additional criteria to the Law on Protection of Competition that allow the designation of owners of digital platforms as dominant players, if such a digital platform has a share of more than 35 per cent in the market of substitute services delivered using digital platforms related to ensuring interaction between economic entities – sellers and buyers – and if network effects based on the number of users of the digital platform give such an economic entity the opportunity to exercise a dominant influence on the general conditions for the commodity circulation in the relevant market or eliminate other economic entities from this market, or to impede access of other economic entities to this market.

At the same time, in order to support the development of new projects based on the use of digital platforms, the draft law proposes the instituting of a rule stating that the owner of a digital platform, or several similar (substitutable) digital platforms, whose revenues for the last calendar year did not exceed 400 million roubles cannot be designated as dominant player.

In order to implement the proposed provisions, the draft law also defines the digital platform as an infrastructure located in the internet, which is used to organise and provide interaction between sellers and buyers. It is also proposed to define the concept of ‘network effect’ as the dependence of the consumer value of goods on the number of consumers of the same group (direct network effect) or the change in the value of the goods for one group of consumers with a decrease or increase in the number of consumers in another group at the same time (indirect network effect). Under conditions of the modern ‘digital’ markets, approaches to controlling transactions of economic concentration should change as traditional criteria
based on the amount availed or operations and value of their assets may not reflect the real impact on the economic conditions of a transaction carried out as part of economic concentration and related to the regulation of intellectual property rights.

Considering the above, a new condition should be introduced to control transactions of economic concentration – if the volume of the transaction exceeds seven billion roubles. Taking account of successful foreign practice, it is proposed to specify the rules in the Law on Protection of Competition for involving a trustee for the purpose of monitoring and facilitating the execution of a ruling issued under economic concentration, which includes the transfer of rights to intellectual property and technology.

In order to protect the interests of market participants, the draft law proposes to determine additional consequences of failure to comply with the ruling of the competition authority issued as part of monitoring economic concentration and associated with the use and transfer of intellectual property rights. Thus, it is proposed to establish that in case of non-compliance with the ruling of the competition authority, if such non-compliance leads or can lead to the prevention, restriction or elimination of competition, the competition authority has the right to:

- file a claim in court for exemption to use in the territory of a Russian Federation in the interests of competition development the results of intellectual activity and equivalent means of personalisation belonging to the person to whom the ruling was issued, if the ruling was related to the exercising by such person of the exclusive rights to the results of intellectual activity and equivalent means of personalisation, under conditions of the ruling; and
- file a claim in court with the request to prohibit (restrict) turnover in a territory of the Russian Federation by the person to whom the ruling was issued, of goods produced using the results of intellectual activity or the exercise of exclusive rights associated with the implementation of this ruling.

Adoption of the draft law will make it possible to ensure the effectiveness of antimonopoly compliance in the context of modern ‘digital’ markets, increase the protection of the rights and interests of bona fide participants in such markets from possible manifestations of monopolistic activity and create legal mechanisms to counter market power abuse by ‘digital monopolies’.

Another important aspect for legislative novels is pricing algorithms that analyse markets and adjust prices. In conditions when companies use similar algorithms to optimise relationships with competitors, one should talk about the formation of cartels. The draft law proposes to define the concept of ‘pricing algorithms’ as a software designed to monitor prices on the commodity market, calculate prices for goods, set prices for goods or monitor prices for goods or take actions when bidding.

To achieve the goals set by the President and the government in the framework of the Resolution and the National Plan, the Fifth Antimonopoly Package introduces several other important provisions to the antimonopoly legislation.

The FAS drafted the Law on Antimonopoly Control Procedure for the Creation of State and Municipal Unitary Enterprises. By 2021, all 18,000 unitary enterprises should be eliminated except for the sphere of national defence and security. If they are not modified or abolished, the FAS will issue warnings. If the warnings are not fulfilled, the FAS will open investigations...
and, if necessary, abolish them in court. The creation of new state and municipal enterprises will require the approval of the antimonopoly body.

The Fifth Antimonopoly Package deals also with compulsory licensing. The right holder’s misuse of his dominant position can lead to the refusal to manufacture or supply socially important goods (medicines, medical devices, for example). Such actions may lead to a threat to the life and health of citizens and also create an unfavorable environment for the development of competition. However, the Russian legislation does not provide for effective mechanisms of state influence on such violations.

According to clause 49 of the National Security Strategy of the Russian Federation until 2020, approved by Resolution No. 683, one of the main areas of ensuring national security in the medium term is determined to ensure the provision of high-quality and affordable medicines to the population. In the conditions of maintaining state regulation of prices for vital and essential medicines, there is a potential threat of foreign manufacturers’ refusal to supply medicines due to the possible unprofitability of their business in Russia. Since such a refusal is economically feasible, the application of measures provided for by the antimonopoly legislation is not possible. Under such circumstances, the economic dependence of Russia on medicine manufacturers with no substitutes, including those associated with unstable exchange rates, constant price increases, and other economic and political restrictions (sanctions) do not meet the requirements of the national security of the Russian Federation.

Production of patented medicines without the permission of patent holders is the most common measure aimed at achieving a balance between the interests of rights holders and retaining human rights, as well as a tool that allows governments of World Trade Organization (WTO) member states to ensure national security, respond to the emergence of problems associated with citizens’ provision with pharmaceuticals, fight with epidemics and budget savings. This possibility is provided for in article 31 of the TRIPS Agreement. The use of the patent object without the permission of the right holder is possible if the national legislation of a member of the WTO allows such use.

In accordance with article 1360 (‘Use of an invention, utility model or industrial design in the interests of national security’) of the Civil Code of the Russian Federation, the Russian government has the right, in the interests of defence and security, to allow the use of an invention, utility model or industrial design without the consent of the patent owner, notifying him or her of this in the shortest possible time and paying him or her commensurate compensation. In order to guarantee the supply of affordable medicines to the citizens, it seems appropriate to use the mechanism for introducing goods into circulation without the consent of the patent owners, provided for in article 1360 of the Civil Code, including the case of economically or technologically justified reduction or cessation of production (supply) of a medicine. Permission to use an invention, utility model or industrial design without the consent of the patent owner may be drawn up by acts of the Russian government, in which intellectual property, as well as the amount and procedure for paying remuneration to the right holder are listed.

The absence of an effective mechanism for compulsory licensing poses a threat to national security, as well as to the life and health of citizens. The FAS drafted a federal law ‘On Amendments to Article 1360 of the Civil Code of the Russian Federation’, which provides for clarification of the grounds for issuing permission to use an invention, utility model or industrial design without the consent of the patentee by the government in the interests of protecting the life and health of citizens. In addition, the draft law proposes that the procedure
for making the decision provided for by the proposed article, as well as the procedure for paying compensation, should be determined by the Russian government.

Further, in order to ensure that the Russian government implements the provisions of article 1360 of the Civil Code to reduce the price of expensive medicines protected by a patent, necessary to combat epidemics that threaten national security, paragraph 4 of point 5 of Section I of the action plan (road map) ‘Development of competition in healthcare,’ as part of measures to improve the regulatory framework in the field of intellectual property protection, provides for the development of drafts of normative legal acts that establish the procedure, for issuance by the government, of the permission to use the invention, useful model or industrial sample medicine without patentee permission. The adoption of the draft law will reduce the level of dependence of Russia on foreign patent holders, which, in turn, will increase the level of economic security of Russia.

Moreover, the FAS drafted the law that abolishes the Law on Natural Monopolies. Considering that natural monopolies in Russia are inefficient, own too many non-core assets, do not seek to reduce costs and the Law on Natural Monopolies of 1995 is invalid, the FAS proposes to reverse this law and add additional provisions on natural monopolies to the Law on Protection of Competition.

The FAS also drafted the Law on the State Regulation of Prices (Tariffs). In 2015, after the abolition of the Federal Tariff Service, the FAS was entitled to tariff regulation. However, so far in Russia there is no single legal act regulating relations in the sphere of state regulation of prices (tariffs). The main goal of the draft law is to form a unified and transparent legislative basis in the field of state regulation of prices and tariffs to fix the legal gap that has arisen after the elimination of many uncoordinated acts in this area.

Therewith, the FAS proposes to abolish antimonopoly immunities for actions and agreements regarding the results of intellectual activity (IPR). Currently, the Law on Protection of Competition stipulates that the requirements of the antimonopoly legislation do not apply directly to actions to exercise exclusive rights to the results of intellectual activity and agreements to grant or alienate rights to use the result of intellectual activity. Actions and agreements on the use of exclusive rights to intellectual property objects, which lead to the prevention, restriction or elimination of competition in commodity markets, cannot be suppressed effectively by existing antimonopoly measures. This can create unjustified advantages to right holders to the detriment of fair competition in commodity markets. Moreover, the exceptions currently contained in part 4 of article 10 and part 9 of article 11 of the Law on Protection of Competition, the result of intellectual activity or means of individualisation can create conditions for the unfair application of such provisions to relations concerning the circulation of goods during production (manufacturing) of which the results of intellectual activity were used.

Recently, the FAS has increasingly begun to investigate cases in which defendants attempt to justify the legality of their anticompetitive actions by referring to exceptions related to the exercise of exclusive rights to intellectual property. For example, in the case brought on the grounds of a violation of clause 5, part 1 of article 10 of the Law on Protection of Competition by Teva Pharmaceutical Industries Ltd, related to evasion (refusal) of the delivery of the medicine Copaxone, the company referred to the fact that it could not be subject to competition law in view of the possession of a trademark on this medicine. It should be noted that the position of the FAS in this case was not supported by the
court of first instance and was confirmed only in acts of appeal, cassation and supervisory instances.\(^{18}\)

There was the similar situation in the case against Google Inc, which was considered on the grounds of the abuse by the company of its dominant position.\(^ {19}\) Google Inc, in the course of legal proceedings, also appealed to the fact that the provisions of the antimonopoly legislation do not apply to the company's pre-installation of software on mobile devices and smartphones due to the exclusive rights to the Android operating system and software. Google's appeal was not supported by courts.\(^ {20}\)

In addition to the above mentioned examples, it can be stated that in practice there may be other situations when actions and agreements on the exercise of exclusive rights to intellectual property may lead to violations of antimonopoly laws.\(^ {21}\) To solve these problems, to increase the effectiveness of antimonopoly regulation, as well as to reduce the level of dependence of the Russian Federation on anticompetitive behavior of foreign patent holders and increase the level of economic security of the Russian Federation, the FAS has developed a draft federal law 'On Amending the Federal Law on Protection of Competition'. The draft federal law provides for the recognition of part 4 of article 10 and part 9 of article 11 of the Law on Protection of Competition as no longer in force and extends the prohibitions contained in these articles to actions (inaction) and agreements using exclusive rights to the IP. The adoption of the draft law will make it possible to resolve issues related to the restriction or possible restriction of competition in the exercise of exclusive rights to the IP by the right holders.

Endnotes


2  Transport (including railroad, air and waterway); chemicals; communication and information technologies; road construction; defence industry; housing sector; oil and gas industry; electric energy; agroindustrial complex; fishing industry; healthcare; education; foreign trade activity.  \(^\text{Back to section}\)

3  The State Council of the Russian Federation is an advisory body that facilitates the excercising of the powers of the head of state on the issues of ensuring the coordinated functioning and interaction of public authorities. The State Council is composed of the chairman of the State Council and members of the State Council. The chairman of the State Council is the President of Russia.  \(^\text{Back to section}\)


5  https://fas.gov.ru/news/25677.  \(^\text{Back to section}\)


12 The powers of the WTO member states in the field of health are specified in the Declaration on the TRIPS Agreement and Public Health adopted on 14 November 2001 in Doha.

13 https://www.zakonrf.info/gk/.


20 Resolution of the Ninth Arbitration Court of Appeal on the case No. A40-240628/2015.
For example, a dominant entity that possesses exclusive rights can establish in a licensing agreement the requirements for the purchase of goods, works, services, including those which results from intellectual activities or created using them that are not related to the subject of the licensing agreement (a ‘binding practice’); can establish restrictions in the licence agreement on the supply of goods created using the inward processing relief (IPR); can prohibit the counterparty to enter other agreements with competitors of the right holder (the ‘provisions on non-compete agreements’); can create discriminatory conditions or establish monopoly-high price for goods produced using the IPR; can establish in the license agreement restrictions on the independent determination of prices for products; can refuse (evade) the conclusion of a license agreement, due to the separate agreement with a third party and so on.