The case is still pending before the Luxembourg Court, but it may well be a sign that despite the efforts of the Portuguese government in settling the disputes surrounding passenger transportation and the recommendations of the PCA so far, national regulatory regimes on transportation services may continue to be questioned, not only in light of competition law, but also under the rules governing the European internal market.

Notes

1 *Proposta de Lei No 50/XIII, 'Transporte em Veículo Descaracterizado a partir de plataforma electrónica'*.

2 '*Lei de Bases do Sistema de Transportes Terrestres*', approved by Law No 10/90, 17 March 1990.

3 *Asociación Profesional Élite Taxi v Uber Systems Spain, SL*, Proc C-434/15.

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Google case and its influence on the market and enforcement practices in Russia

In September 2015, the Federal Antimonopoly Service ('FAS Russia') found Google Inc and Google Ireland Limited ('Google') guilty of abuse of dominance in the Russian market of pre-installed application stores for Android OS, where it had established Google's market share of exceeding 50 per cent (approximately 58.6 per cent).

The above-mentioned decision is rather remarkable in light of the recent and ongoing discussions held around the world to approaches of anti-monopoly regulation in the developing and ever-changing area of information technology (IT).

As far as we are aware, similar cases concerning Google have been considered or are ongoing in a number of jurisdictions such as the European Union, the US, China and India.

Main stages of the case considered in Russia

The conflict between Google and FAS Russia began with the complaint of Yandex, one of the main players in the Russian market of pre-installed application stores for Android OS, whose rights had been violated by Google's anti-competitive activities.

Yandex claimed that some producers of smartphones based on Android OS had refused to pre-install Yandex services on the devices because it would have led to an infringement of contract terms with smartphone device producers and Google as the Android OS's owner.

FAS Russia regarded such market behaviour as unfair competition and initiated the case against Google in February 2015. However, after analysis of the market and a detailed case study, the Competition Authority requalified the case as an abuse of dominance one and issued the order for Google to cease its anti-competitive behaviour in the market of pre-installed application stores for Android OS. Google did not fulfil the obligation prescribed by FAS Russia, which resulted in the imposition of the turnover fine in the amount of RUB 438m (approximately US$7.4m) on Google for abusing its dominance.

Afterwards, Google appealed the decision of FAS Russia in the courts of appeal and cassation instances, but Russian courts upheld the position of the Competition Authority.[1]

During judicial proceedings, it was revealed that Google's failure to perform obligations prescribed by FAS Russia in its order resulted in negative consequences for the competition environment in the relevant market. FAS Russia issued the second order for Google to cease the infringement of competition in the market, however, the company failed to perform the order again.

As a result of the second act of non-compliance and because they ignored the orders issued by the Competition Authority, FAS Russia imposed a fine of RUB 1m (approximately US$17,000) on Google and, moreover, in January 2017, FAS Russia applied to compulsory execution of orders and prescriptions issued.[2]

Main arguments/concerns of the anti-monopoly authority

The main concerns of FAS Russia related to the aggregation of mobile services, mobile applications and system services provided by Google as a package: Google Mobile Services ('GMS'). Google insisted that the packaging did not infringe competition law as it was fully compliant with fair business practices.

FAS Russia also noted that packaging could not be deemed as a breach of competition legislation. However, rather than tying a dominant product (Google Play) to non-dominant products, Google ties several services and products together in order to create a market system for its own benefit that cannot be avoided even when competing with Google in several relevant markets. Moreover, due to the number of links that Google has built between its mobile services and applications, some of the ties are indirect and difficult to see.

FAS Russia established that contractual partners of Google (mostly producers of smartphones and communications service providers) were bound by the following restrictive conditions to purchase the rights of Google Play as a pre-installation on its devices:

Promotion of Google Play ('tying')

According to the terms of contract, producers are not allowed to purchase Google Play separately from other applications included in GMS. Moreover, users have no opportunity to delete pre-installed GMS applications: it can only be deactivated.

It should be noted that subsequent to the results of consumer inquiries in Russia, pre-installation of Google Play is an actual prerequisite of a smartphone's competitiveness in the Russian market.

Requirement of pre-installation of Google search as automatic search

Pre-installation of Google Search as an automatic search on a device has no technical background. It was proved by technical experts and representatives of Google.

GMS priority position on the screen of smartphone

Granting a highly visible position on the screen to GMS applications increases the level of probability that customers would use these particular applications. This argument of the Competition Authority was not denied by representatives of Google.

Prohibiting the pre-installation of Google's competitor applications

Some contracts include restrictions of producers to pre-install the applications, products or services of competitors on Google devices. These obligations were secured by Google via profit-sharing incentives from advertising.

'Anti-fragmentation'

Such terms as 'fragmentation' of Android OS is undetermined and is not fixed in any contracts. Technical experts consider that fragmentation includes any departure from 'anti-fragmentational' terms of contract such as pre-installation of non-GMS mobile applications on devices and service and the launch of devices without GMS.

Thus, Google turned to its advantage its control over Google Android to promote its applications and services, and ties its non-dominant products to its dominant products. This allows Google to collect user data that the company uses further for advertising. Herewith, the opportunity of pre-installation was entirely reserved by Google. Google also relies on the dominance of its apps to protect Android OS from competition, thus preserving its grip over the mobile advertising platform.

Conclusions and impact of the case on the market

Accusations of abuse of a dominant position against Google were given a hostile reception. The main concerns of the scientific and business communities are based on the possibility of recession in innovative development.

The antitrust investigations carried out are known to have been supported by FairSearch Alliance, a consumer protection organisation united to defend competition in online and mobile search. Acting as a community of major companies in the IT area (such as Microsoft, Nokia, Twenga), FairSearch thinks that Google implemented a 'bait and switch' strategy. In the Alliance's opinion, while Google claims that its success relies on merits and posits itself as an innovation champion, the truth is that Google does not know

whether competitors are more innovative or not, simply because Google has built barriers to entry that are virtually impossible to overcome.

Misstep in competition regulation could be harmful for national, and even international, economic efficiency. However, the decision made by the Russian Competition Authority is based on the idea of support and further acceleration of development in the information technology area.

We believe that consideration of the *Google* case is highly important for development of competition regulation in the IT area because strong competition in the relevant market forces companies to innovate and develop their best solutions. Companies should act within the non-discriminatory boundaries and should not be allowed to use their dominance to block competitors. A fair competition environment is the main leverage of blistering innovative development.

Moreover, the case shows the new trend of investigations by the Russian Competition Authority against global companies, in complex areas and with reference to the experiences of regulators in other countries.

Notes

1 Case No 1-14-21/00-11-15 development: 18 September 2015 – Decision on the violation of the Competition Law: http://solutions.fas.gov.ru/ca/upravlenie-regulirovaniya-svyazi-i-informatsionnyh-tehnologiy/ad-54066-15; 11 August 2016 – Decision on the imposition of the administrative fine: http://solutions.fas.gov.ru/ca/pravovoe-upravlenie/ad-55539-16; 15 March 2016 – Decision of the Arbitrazh Court of Moscow: http://kad.arbitr.ru/PdfDocument/0fd84f8d-5fb0-439f-b268-b6dadb01f847/A40-240628-2015_20160315_Reshenija%20i%20postanovlenija.pdf; 19 July 2016 – Decision of 9 Arbitrazh Appeal Court: http://kad.arbitr.ru/PdfDocument/3636987d-2fb0-4544-a38f-399b09fbe191/A40-240628-2015_20160819_Postanovlenie%20apelljacionnoj%20instancii.pdf.

2 FAS Russia, 'November 2016 – Imposition of the administrative fine' (2 November 2016): http://fas.gov.ru/press-center/news/detail.html?id=47652.

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Update on Singapore competition law

Since our last article for the IBA Antitrust News (dated December 2016), there have been developments in Singapore competition law, of which this article seeks to provide a summary.

CCS accepts capacity commitments by Singapore Airlines and Lufthansa in clearing their proposed joint venture

On 12 December 2016, the Competition Commission of Singapore (CCS) issued a press release announcing that it had accepted voluntary commitments from Singapore Airlines Limited and Deutsche Lufthansa AG (collectively, the 'Parties') in clearing their proposed joint venture (the 'Proposed JV').

On 5 February 2016, CCS received a notification for a decision with regard to the Proposed JV, which relates to the provision of international scheduled air passenger services between certain Asia/Asia Pacific countries (specifically Singapore, Indonesia, Malaysia and Australia) and certain European countries (specifically Germany, Austria, Switzerland and Belgium).

Under the Proposed JV, the Parties will cooperate in respect of pricing, inventory management, sales and marketing. The Proposed JV will also involve schedule coordination, capacity coordination and revenue sharing on the following routes involving non-stop or direct services: Singapore–Frankfurt; Singapore–Munich; Singapore–Dusseldorf; and Singapore–Zurich.

The CCS reviewed information provided by the Parties as well as feedback received from third parties in a public consultation. In the case of two specific routes, namely the Singapore–Frankfurt and Singapore–Zurich routes, the Parties are the only two airlines operating direct flights from Singapore and their combined market shares exceed 80 per cent. The feedback from the public consultation, with which the CCS agreed, was that the price and capacity coordination