YANDEX VS. GOOGLE

Federal Antimonopoly Service of the Russian Federation

RESOLUTION ON CASE No. 1-14-21/00-11-15

Moscow

The operative part of the resolution was announced on 14 September 2015.

The resolution was announced in full on 18 September 2015.

Commission of the FAS of Russia for review of the case of violation of antimonopoly legislation (the “Commission”) having examined the case No. 1-14-21/00-11-15 for the alleged violation by Google Inc. (1600 Amphitheatre Parkway, Mountain View, CA 94093 USA), Google Ireland Limited (Gordon House, Barrow Street, Dublin 4, Ireland) and Google LLC (Russia, 115035, Moscow, Balchug str., 7) of Article 14(1) and Article 10(1) of the Federal Law No. 135-ФЗ “On the Protection of Competition” dated July 26, 2006 (the “Competition Law”),

RESOLVED:

On February 18, 2015 YANDEX LLC (“YANDEX LLC”, “Yandex”, the “Applicant”), submitted an application with the FAS of Russia referring to the alleged violation of antimonopoly legislation by Google Inc., Google Ireland Limited and Google LLC (registration number 16067-ДСП/15) (the “Application”).

The Application was submitted with the antimonopoly authority following the refusal of manufacturers of smartphones and tablets based on the Android operating system (“OS Android”) (“Mobile Devices”) selling such products in the territory of the Russian Federation, which had been preinstalling individual Yandex’s applications as well as Yandex search as the default search engine on their devices, from further cooperation with YANDEX LLC. According to the Applicant, this was caused by the restrictions and prohibitions introduced by Yandex’s competitor, Google Inc., for its counterparties (manufacturers of Mobile Devices).

Pursuant to Order of the FAS of Russia dated February 20, 2015 No. 93/15, case No. 1-14-21/00-11-15 was initiated regarding the alleged violation by Google Inc., Google Ireland Limited and Google LLC of Article 14(1) of the Competition Law in the form of the actions aimed at
inducing manufacturers of mobile devices to restrain from entering into contractual relations with competing undertakings.

Pursuant to the ruling on the initiation of the case on the violation of antimonopoly legislation dated March 2, 2015, Google Inc., Google Ireland Limited and Google LLC (“Google”, the “Respondent”) were brought into the proceedings as respondents and YANDEX LLC as the applicant.

Pursuant to the ruling on the extension of the examination of the case on the violation of antimonopoly legislation dated May 29, 2015, the time period for examination of case No. 1-14-21/00-11-15 was extended until December 2, 2015 due to the need to obtain additional information.

The parties to the proceedings submitted information and documents into the case file, including those containing commercial secrets:


In the course of the proceedings, representatives of YANDEX LLC filed motions for the review of the case materials submitted by Google and containing commercial secrets.

In accordance with Article 4(1) and Article 6.1(1)(3) of the Federal Law No. 98-ФЗ “On Commercial Secrets” dated July 29, 2004, the exclusive right to consider any information as a commercial secret and determine the list and content of such information belongs to the owner of such information subject to the provisions of the above-mentioned law, and the owner of such information is entitled to grant or prohibit access to its commercial secrets and determine the procedure and terms of access to such information.

Since Google did not grant permission to disclose to YANDEX LLC any documents containing its commercial secrets, the Commission dismissed the above-mentioned motions.

In the course of the proceedings, the Commission heard the Respondent’s representatives’ explanations on various technical issues.
Google filed a motion on the dismissal of case No. 1-14-21/00-11-15 against Google LLC due to the absence of any violations of antimonopoly legislation by the latter. The Commission resolved this motion at the end of the proceedings.

YANDEX LLC justified its complaint by indicating that Google owns OS Android required for the operation of Mobile Devices and distributed by way of an open source license; OS Android is applicable to basic elements of user interface. According to the information provided by the Applicant, starting from 2012, the share of OS Android in the relevant market for OSs for Mobile Devices in Russia has been constantly greater than 50%. Moreover, the market position of OS Android is strengthened both globally and in Russia.

Google Inc. also owns Google Play app store, an application allowing to search for, purchase, download and update other applications on devices operated by OS Android. Considering the share of OS Android in the market for OSs for Mobile Devices, a significant number of applications available to users in Google Play as well as its popularity among users make this app store extremely desirable to manufacturers interested in offering a commercially successful mobile device.

Google Play is distributed under a mobile application distribution agreement as a part of GMS, a suite of mobile applications, which includes only Google’s applications and services.

Google is bundling Google Play, a product in respect of which Google holds a dominant position, with a number of other products – applications being part of GMS. As a result, it is not possible to acquire those products separately from each other.

The bundling of Google Play (dominant product) with other GMS applications (products circulating in competitive markets) hinders the access of undertakings competing with Google to the app store market and several adjacent markets. In particular, it affects the mobile search market, where Google requires pre-installation of its own search engine as an exclusive search option by default.

Google is directly introducing additional restrictions upon manufacturers of Mobile Devices in relation to the pre-installation of applications competing with the ones from the GMS suite on the OS Android based mobile devices.

In particular, <...> Google is restricting manufacturers’ rights to preinstall applications similar to the ones from the pre-installed GMS suite as well as to place them on screens of mobile devices. As a result, manufacturers refuse to preinstall applications (services) developed by the Applicant. <...>.

Thus, Google is promoting the GMS suite for pre-installation on Mobile Devices and at the same time induces manufacturers of mobile devices to restrain from entering into contractual relations with undertakings competing with Google.
Besides, the Applicant indicates that the Respondent’s actions caused losses to YANDEX LLC as a competing undertaking by disorganising its business and squeezing it out from the market as a result of counterparties’ refusals to cooperate or continue cooperation with it due to the restrictions imposed by Google.

According to the Applicant, Google does not agree that the actions in question may be qualified as a violation of the antimonopoly legislation.

OS Android is an off-the-shelf operating system functioning irrespective of the set of Google’s applications (Google Mobile Services or GMS). In addition to and separately from OS Android, Google, among other companies, is developing applications for OS Android and offers them to manufacturers of Mobile Devices producing Android operated devices, just as Yandex.

According to the Respondent, manufacturers of Mobile Devices may take a decision on the installation or non-installation of GMS on their devices at their full discretion. If manufacturers decide to purchase a license for GMS, they are still able to freely install competing applications on the same device and place them almost in any part of such device.

In order to compete for the deals on selling its applications to manufacturers of Mobile Devices installing OS Android on their devices, Google developed its own set of high quality applications offered to manufacturers for free as part of the GMS suite.

Unlike Google, which in addition to the costs of the development of applications also has to make up for the costs of the development and updating of OS Android, Yandex incurs no OS development costs. That is why the position of Yandex is more favourable than that of Google when it is offering application distribution deals to manufacturers of Mobile Devices installing OS Android on their devices, including a proposal to share income from search advertising with such manufacturers. To the extent that Yandex is not developing applications which are as attractive to manufacturers and users of OS Android as the applications offered by Google, or it is not willing to make a mutually beneficial offer to manufacturers in relation to sharing income from search advertising, or it is not advertising its applications to a sufficient extent, Google often gets such application distribution deals due to the popularity of its applications and its willingness to give to its partner manufacturers a bigger share of its search income than the one offered by Yandex.

OS Android allows end users to disable pre-installed applications, change initial settings and download and install competing applications.

GMS applications are Google’s intellectual property in relation to which Google has exclusive right to trade marks, copyright and objects of patent rights contained in GMS. Thus, Google is entitled to determine the terms of the GMS license, including an ability to deliver GMS as a set of applications, and to make demands regarding the placement of individual applications, which
is in full compliance with the requirements of the Russian Civil Code, the IP legislation and the Competition Law.

The bundling of applications into GMS is commercially justified, complies with the ordinary market practice and is not directed against any of Google’s competitors. It has a technical justification, since compatibility of all applications installed on a user’s device is required for the efficient operation of the applications on a smartphone.

Bundling of applications is an ordinary business practice. Google’s actions and agreements have no anti-competitive effects.

In order to justify its position, Google submitted to the case file an analytical report titled “The Analysis of the State of Competition in the Market Covering the Google Play App Store, i.e. the Market for a Set of Smartphone Applications Localised for Distribution in the Russian Federation”, pursuant to which a product in the market covering the Google Play app store is a set of basic applications providing for the necessary smartphone functionality and the most efficient use of its capacities in the user’s opinion; it is not correct to distinguish markets of individual mobile applications enabling smartphone’s basic functions; due to the high importance of the Russian language interface and software for smartphone users, the geographical boundaries of the relevant market should be defined as the territory of the Russian Federation; in spite of the high degree of concentration of the market for the sets of basic application with Russian localisation for smartphones, permeable market entry barriers and dynamic development of the IT sphere and mobile applications in particular allow to conclude that dominating undertakings are unable to abuse their dominant position in the market.

Upon the examination of the arguments set out in the Application and statements given by the parties to the proceedings and representatives of the parties to the proceedings in the course of hearings, and upon the review of information and documents submitted to the case file, the Commission has established the following.

Pursuant to the information provided by Google (rf. incoming No. 32020-ДСП/15 dated 03.04.2015; submission dated 14.09.2015) that includes commercial secrets <...>

Google Inc. owns OS Android required for the operation of such mobile devices as smartphones and tablets.

Google <...> is also developing mobile applications and services for the OS Android based mobile devices (“Mobile Devices”). Google <...> owns rights to OS Android and applications forming part of the GMS suite as well as the GMS-related trademarks.
In the course of the proceedings in case No. № 1-14-21/00-11-15, the antimonopoly authority examined the state of competition in the market for pre-installed app stores for OS Android localised for Russia.

OS Android is a specialised extensible operating system for various devices. At present, it is one of the most widespread and installed mobile platforms in the world.

The OS Android based smartphones available in the market could be divided into two types:
- Devices based on Android Open Source Project (“AOSP”) without the pre-installed GMS package. It should be mentioned that such mobile devices are less popular and competitive in comparison with the devices based on the closed source part of OS Android – GMS;
- Devices using the closed source part of OS Android with the mandatory GMS pre-installation. Mobile devices with pre-installed GMS are the most popular and widespread both globally and in the Russian market.

Google Mobile Services (GMS) is a set of services, applications and system services offered by Google which includes, inter alia, Google Play.

At present, software products required for the functioning of the OS Android based mobile devices, including solving of basic and applied tasks, are bundled into a single set of Google Play Services which forms part of the GMS suite.

Google Play Services is a system component providing for the correct operation of mobile applications and services that address various programming interfaces required to call for specific functionalities (displaying of maps in an application, in-app purchases, push notifications) or for the interaction with other Google’s applications and services.

One of the key mobile applications introduced by Google is the Google Play app store – an application designed for the search for, purchase, download and updating of other applications on the OS Android based devices.

The characteristic features of Google Play are the high degree of safety of installed and updated software guaranteed by app store developers (users are guaranteed protection from viruses, inadmissible/unethical applications and bugs, they are provided with application updates and guaranteed compliance with the IP rights when downloading application) and a possibility of feedback of end users to software developers.

The Commission notes that the Analytical Report submitted to the case file contains an assessment of the product interchangeability in accordance with the Regulation on the Performance of the Analysis of the State of Competition in the Relevant Market approved by the Order of the FAS of Russia No. 220 dated April 28, 2010 (the “Market Analysis Regulation”) with the determination of the potentially interchangeable products in the relevant market. In
particular, such software product as a browser is used for searching for, and viewing on the
device’s screen of, information from the Internet (web pages, content of web documents, files,
etc.). However, the browser does not provide functions of automatic updating of, and payment
for, applications and provides end users with no guarantees of safety of using the relevant
software product. Thus, the browser does not have all attributes required for the app store
functionality.

The Commission examined the arguments submitted by Google regarding the need to determine
the product boundaries as a set of basic applications (including Google Play) localised for their
distribution in the Russian Federation, and dismisses them on the following grounds.

Pursuant to the Market Analysis Regulation, establishing product features that determine
consumers’ choice requires analysis of the product designation, including the purpose of its
purchase and its consumer features.

Software (applications) developed for mobile devices and defined as “a set of basic applications”
has different applied purposes and, in particular, combines basic and applied software. Each
software product being part of the basic set is used for solving specific tasks and has its own
functionality. On the basis of the above, the Commission concludes that the functionality of a set
of basic applications which includes both basic and applied software products has not been
determined.

As follows from the survey performed by Romir, the question “Which of the following
statements, in your opinion, most accurately describes the app store installed on your
smartphone?” prompted users to express their attitude to an app store. Respondents were offered
the following answering options: “a means for searching for and accessing necessary
applications”, “an independent product”, “other” and “difficult to say”. However, the answers
received do not mean that it is not possible to distinct a separate market of “the pre-installed app
stores”, since the offered answering options are not mutually exclusive and do not deny special
functionality of app stores.

Thus, a set of such software products as basic applications having no independent functionality is
indefinite and may not form a separate product market.

The Commission also notes that Google Play as an app store for OS Android is provided only to
manufacturers of mobile devices. End users of mobile devices are not able to
download Google Play independently from any source, i.e. they are not able to use it unless it is
pre-installed on the relevant mobile device by its manufacturer. Besides, Google Play does not
allow downloading app stores of other developers.

The Commission established, using, *inter alia*, the results of surveys performed by the All-
Russia Public Opinion Research Centre (VCIOM), and the parties to the proceedings have not
disputed that the pre-installation of software products on a mobile device is the most efficient
mechanism of distribution of software products, and subsequent self-installation of software products (after the sale of a mobile device) occurs much less often than the use of pre-installed software products.

Thus, an app store pre-installed on a mobile device has unique functionality as a software product (application) and a customer value for manufacturers of mobile devices as a significant and necessary feature of mobile devices required for their subsequent sale.

On the basis of the established functionality of such software product as an app store and the conditions of its introduction into circulation, the Commission came to the conclusion that the Analytical Report reasonably and correctly determined boundaries of the relevant market as the pre-installed app store for OS Android localised for distribution in the territory of the Russian Federation.

Taking into account the established fact that an app store may be pre-installed only by manufacturers of mobile devices, manufacturers of mobile devices, which pre-install app stores on the devices produced by them for the purpose of subsequent resale of app stores to end users as a part of mobile devices, act as customers in this market. On the basis of the Analytical Report, documents contained in the case file and explanations provided by the parties, the Commission established that Google’s share in the market for pre-installed app stores for OS Android localised for distribution in the territory of the Russian Federation exceeds 50% (58.18%), i.e. Google holds a dominant position in accordance with Article 5(1) of the Competition Law. The Commission also notes that the Respondent’s dominant position is strengthened by the fact that it owns the rights to OS Android.

In the course of the examination of case No. 1-14-21/00-11-15, the Commission concluded that Google’s actions violate Article 10(1) of the Competition Law, and thus pursuant to the ruling dated June 3, 2015, Google’s actions examined by the Commission were additionally qualified as falling under Article 10(1) of the Competition Law.

Google’s Anticompetitive Practices

Google Play is distributed by Google only together with other applications and services developed by Google (so-called GMS) by means of pre-installation on Mobile Devices sold/designated for the sale in the territory of the Russian Federation. In order to obtain Google Play, Google’s counterparties (manufacturers of Mobile Devices, mobile network operators and other undertakings ordering/interested in the production of Mobile Devices by third party manufacturers) are required to comply with a number of restrictive requirements imposed by Google, namely the following:
- mandatory acquisition of the entire Google Mobile Services suite as a condition for obtaining Google Play;

- mandatory setting/pre-installation of Google Search as a default search engine in all search entry points in respect of the general web search;

- advantageous placement of Google’s applications on the screen of a Mobile Device;

- prohibition of the pre-installation of competing applications and services secured by a remuneration payable by Google.

The existence of such restrictive conditions is evidenced by the contents of agreements entered into by Google and submitted to the case file.

In particular, a set of the following agreements is entered into with counterparties:

- <...>;

- <...>;

- <...>.

Copies of the above-mentioned agreements entered into with counterparties doing their business in the territory of the Russian Federation, <...> were submitted by the Respondent to the case file upon the requests of the FAS of Russia.

Google’s Actions Related to the Promotion of Google Play (Bundling)

The demand of end users of Mobile Devices for Google Play makes manufacturers interested in its pre-installation on Mobile Devices produced by them.

In particular, the majority of users of Mobile Devices consider availability of an app store a mandatory condition for the purchase of such device (according to the survey performed by VCIOM, 63.3% of smartphone users and 67% of tablet users consider that, as well as 69% of the respondents according to Romir (rf. Schedule 3 to Google’s motion dated July 3, 2015, No. 66473/15).

According to the information provided by the Respondent, there are no devices in the Russian market without pre-installed Google Play, except for a number of devices the market share of which is negligible.

Thus, availability of Google Play is actually a necessary requirement for the production and sale of a competitive Mobile Device.
Manufacturers of devices are not able to obtain Google Play separately from other applications from the GMS suite.

This is also confirmed by the correspondence <...> provided by the Applicant to the FAS of Russia (rf. Schedules 17, 25, 47, 64 to the submission of Yandex LLC dated March 31, 2015, incoming No. 30740-ДСП/15).

Google itself confirmed that it is possible to acquire Google Play only as part of a bundle together with other applications forming the GMS suite (rf. response dated June 26, 2015, incoming No. 63977/15).

At the same time, the requirement to pre-install the entire GMS suite applies to all the OS Android based mobile devices produced by a specific manufacturer.

Google determines the contents of the GMS suite at its own discretion and changes it from time to time. Currently GMS includes a search engine (Google Search), a browser (Google Chrome), an email client (Gmail), a mapping application (Google Maps), a video hosting application (YouTube), a social network application (Google+), a calendar (Google Calendar), a video app (Google Camera), a cloud storage app Google Drive, a music app Google Play Music, a video viewing app Google Play Music and TV, a book reading app Google Play Books, a news app Google Newsstand, a blogs and magazines application Google Magazines, a gaming application Google Play Games, an application for exchanging messages Google Hangouts and a number of other Google’s applications and services.

The applications that are part of the GMS suite may operate independently from each other. Any application within GMS may be replaced with an alternative (competing) application without losing functionality of both the other GMS applications and the Mobile Device as a whole.

Use of the individual GMS applications does not require availability on a Mobile Device of other applications from the same suite, i.e. the GMS applications could be downloaded by users from Google Play without any damage to their functionality just like any other applications of other developers.

The above-mentioned statements are confirmed by the following:

- Technical Report of the Moscow State University of Radio Engineering, Electronics and Automation (MIREA/MGUPI) (pp. 15-17): “…the pre-installation of one or several of such applications on a mobile device is not a prerequisite for the operation of other applications. The only thing that they have in common is their developer (Google) as well as, generally, the usage of one package of app interfaces, Google Play Services. Besides, Google’s applications (such as Gmail, YouTube, Chrome, etc.) may be installed and operate separately on other operating systems (e.g. on iOS used on mobile devices manufactured by Apple) without any problems”;

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“…the applications included by Google in the GMS package may be technically separated both from each other and from Google Play. From the technical point of view, all the components required for the interaction with Google’s services may be available for developers to incorporate them into the application itself”;

- Google’s response to the request of the FAS of Russia dated July 16, 2015, incoming No. 71669/2015: “from the technical point of view, for Google’s applications downloaded via Google Play to run on a device, it is sufficient to have Google Play and the Google Play Services component on such device”; “it is technically possible to pre-install and correctly run on the OS Android based devices applications of different developers (including those with similar functionality)”; “it is technically possible for users to download applications from the GMS suite via Google Play, proper operation of such applications does not require their pre-installation”;  

- Oral clarifications provided by Google’s representatives at the hearing in the case on June 1, 2015: “both pre-installed applications and those downloaded via Google Play work in the same way, there is no difference and they have the same functionality”.

This being said, there is no confirmation of the Respondent’s argument that the GMS applications are designed to run as a whole, due to the existence of some special interconnection between them. On the contrary, in its written clarifications on the merits of the case dated August 26, 2015, Google states that upon the replacement of one GMS application with a competing application, the existing connections between various types of applications remain (e.g. connections between a search engine and maps or between a calendar and an email client), and users “not satisfied with the convenience of any separate Google’s service may deactivate it and/or replace it with a similar application offered by a third party developer”. Thus, pre-installation of a competing application instead of one of the GMS applications would not damage functionality of other Google’s applications and services or any interconnections between them.

Besides, during the hearings Google has also confirmed that functionality of pre-installed applications and applications downloaded by users independently is the same, which is an additional evidence of the absence of the need to pre-install all applications and services from the GMS suite.

Google’s applications and services are pre-installed due to Google’s policy of the distribution of Google Play bundled with other applications and services from the GMS suite on the majority of Mobile Devices sold in the territory of the Russian Federation.

Requirement of Setting/Pre-Installation of Google Search as the Default Search Engine
In addition to the bundled purchase of Google Play and the other GMS applications, Google also imposes additional requirements related to the pre-installation of Google Play, such as the mandatory setting/pre-installation on a Mobile Device of the following:

Default search means a special setting of an application using functionality of general search in the Internet selected by the manufacturer of the relevant Mobile Device or by the software developer, with the search engine selected by the manufacturer or software developer presenting search results upon user’s request (e.g. in case of any search via the browser’s address bar). Default search also applies to the situation where a manufacturer of a device installs a search application with the widget (search box) placed on the home screen, as well as where the home screen application (launcher) contains a search box of the relevant search engine provider.

Default search for all the search entry points available on a Mobile Device usually means that upon the purchase of such Mobile Device all the Internet search options available to a user on the device may be exercised only via Google Search (unless a user subsequently changes this setting for each separate application which uses the Internet search functionality).

There are no technical reasons for making Google’s search the default search engine for any device. This is confirmed by technical experts (pp. 15-16 of the Technical Report of the Moscow State University of Radio Engineering, Electronics and Automation (MIREA/MGUPI)) as well as by the Respondents themselves (at the hearing of the Commission of the FAS of Russia held on July 2, 2015, a representative of Google confirmed that if the default search engine is changed from that of Google to an alternative one, the GMS applications would continue running correctly).

At the same time, the existence of restrictions in the form of making Google’s search the default search engine is confirmed by (Schedules 18, 27, 29, 50, 51, 52, 55, 56, 57, 62, 63, 65, 66 and 72 to the letter of Yandex LLC dated March 31, 2015, incoming No. 30740-ДСП/15) as well as by Google itself (at the hearing of the Commission of the FAS of Russia held on July 2, 2015).

Requirement of the Priority Placement of Google’s Applications

Google requires from a manufacturer of Mobile Devices wishing to pre-install Google Play on its devices the following requirements to placement of Google’s applications.

Pursuant to the clarifications provided by Google’s representatives at the hearing of the Commission held on July 2, 2015, Google does not dispute advantages of a priority placement of applications on a Mobile Device, namely, that the priority placement increases probability of using Google’s applications.
Analysis of correspondence between Yandex LLC and manufacturers of Mobile Devices submitted to the materials of the case allows to conclude that Google is also prohibiting the installation of competing search widgets on the second screen or pre-installation of other applications using a competing search engine (Schedules 1-2 to the additional materials submitted by Yandex LLC on July 2, 2015, incoming No. 66236-ДСП/15).

Prohibition of the Pre-Installation of the Competing Applications

The Commission has established that...

Other agreements entered into between Google and manufacturers of Mobile Devices also provide for restrictions on the pre-installation of applications, products and services developed by competitors which are secured by Google’s paying a remuneration in the form of sharing income received from mobile advertising (…)

Specific refusals to pre-install Yandex’s applications and services by <...> were recorded (Schedules 8, 49, 7, 61 to the response of Yandex LLC to the request of the FAS of Russia dated January 30, 2015).

Anti-Fragmentation

Google introduced certain procedures that are applied for ensuring the compliance by manufacturers with the requirements <...>. Such as, for example, anti-fragmentation requirements <...>. In addition to including anti-fragmentation requirements in <...>, Google is also entering into separate anti-fragmentation agreements with manufacturers of Mobile Devices pre-installing applications and services within the GMS suite <...>

The term “OS Android fragmentation” is unclear and is not defined anywhere. Technical experts confirm that any deviations that are not approved by Google may be treated as fragmentation, including any installation on a Mobile Device of mobile applications and services not being part of GMS, as well as the production of devices without the GMS suite by a manufacturer which has an agreement with Google containing anti-fragmentation requirements (p. 25 of the Technical Report of the Moscow State University of Radio Engineering, Electronics and Automation (MIREA/MGUPI)). This conclusion is also confirmed <...> by the applicant <...>
(Schedules 6, 25, 72 to the letter of Yandex LLC dated March 31, 2015, incoming No. 30740-
ДСП/15).

Thus, by using the prohibition of fragmentation and creating a situation, where any production of
devices without GMS and/or with the pre-installed competing applications and services results in
high risks and uncertainty for manufacturers, Google ensures the implementation of its practices
as described above.

Based on the analysis of the above-mentioned facts, the Commission came to the following
conclusions:

Google’s practice of bundling the Google Play app store, in relation to which Google enjoys a
dominant market position, with the other GMS applications which usually face competition,
without any technological reasons for it, restricts access of undertakings competing with Google
to several markets where the GMS applications and services are circulating, and subsequently
may result in squeezing such undertakings out from such markets. In particular, as noted in the
Analytical Report, the market for the pre-installed app stores for OS Android localised for Russia
is characterized by high entry and expansion barriers which are hard to permeate. This hinders
successful entry to the app store market by competitors and the ability of competitors to
successfully enter and maintain their presence in the markets for mobile applications and
services where mobile applications and services included in GMS are circulating, is also
considerably impaired.

As a result of the practice of bundling, Google is able to provide for the pre-installation of a
significant set of its applications and services without paying any remuneration to manufacturers
for it. Competing software developers, in turn, are deprived of an opportunity to pre-install their
applications and services together with Google Play on the same terms as Google’s applications
and services. Restricted access results in squeezing out competitors from the markets where the
GMS applications and services are circulating.

The consequences described above are possible due to the fact that the pre-installation is the
most effective promotion channel for mobile applications and provides for the widest coverage
and frequency of use of applications on Mobile Devices, based on the following:

- guaranteed presence on a significant number of devices (according to the information submitted
to the case file, in 2014 in Russia there were about 25.6 million Mobile Devices with pre-
installed Google Play and the other GMS applications and services);

- high frequency of use (according to the VCIOM survey, more than 50% of respondents are
using the Google Chrome browser on a daily basis. Other browsers for OS Android are used
much less often);
passive behaviour of users (end users usually do not change pre-installed applications and services and do not download similar applications independently (according to the VCIOM survey, Schedules 7, 8, 9 and 10 to the Additional Clarifications provided by Yandex LLC on May 29, 2015) which is confirmed by the survey conducted by Romir upon Google’s request (slide “Attitude to the Basic Set of Applications”, Schedule 3 to Google’s motion to postpone the hearing dated July 3, 2015).

The priority role of the pre-installation in comparison with other means of promotion of mobile application, even taken together, is also confirmed by other materials in the case file (Schedules 2 and 3 to the letter of Yandex LLC dated May 29, 2015, incoming No. 53978/15; CRA economic report) and is not denied by Google.

In addition to the factors described above, it is also necessary to note the following:

- many developers of mobile applications do not distribute their applications via websites. Google itself also does not use this channel. Besides, the OS Android based devices have settings which hinder downloading of applications from developers’ websites. We mean notifications that the downloaded programme may cause harm to the device, which results in a significant part of users’ refusal to download applications from any sources other than the pre-installed Google Play app store;

- downloading of applications from any sources other than developers’ websites and app stores is usually not allowed. This policy is followed not only by Google, but by many other developers as well. Besides, downloading from other sources requires several additional steps from the side of users (i.e. the search for the relevant application and certain technical manipulations) and more serious technical knowledge than it is required for using an app store (in particular, users need to change settings of their Mobile Devices so as to enable installation “from unknown sources”). At the same time, direct downloading or use of a pre-installed application from an app store does not require such actions: thus, the existence of a pre-installed application on a device in itself discourages any search for and downloading of any alternative application (irrespective of its quality) from other external sources;

- such distribution channel as an app store is also incomparable with the pre-installation. As noted above, end users usually do not change pre-installed applications and services and do not download similar applications independently (according to the VCIOM survey, Schedules 7, 8, 9 and 10 to the Additional Clarifications provided by Yandex LLC on May 29, 2015; survey conducted by Romir upon Google’s request: slide “Attitude to the Basic Set of Applications” - Schedule 3 to Google’s motion to postpone the hearing dated July 3, 2015). Thus, the pre-installation of mobile applications and services on devices ultimately provides for a wider coverage and frequency of use of the relevant applications and services.
The effect of the pre-installation is enhanced by the absence of an option to delete Google’s applications and services pre-installed on a Mobile Device. According to the information provided by Google itself, such applications may only be deactivated but they are maintained on devices (rf. Google’s response to the request of the FAS of Russia dated June 26, 2015, incoming No. 63911/15). There are also no technical reasons for the absence of any options to delete the pre-installed Google applications that are part of the GMS quite: Google’s applications downloaded from Google Play may be deleted by users unlike the very same applications which were previously pre-installed.

Thus, as a result of described Google’s actions aimed at bundling Google Play with the other GMS applications, the pre-installation channel has entirely been reserved for Google. Google receives this competitive advantage for free due to its market power over Google Play.

The chosen method of product promotion (bundling) limits pre-installation options for competing applications and, as a result, may result in the restriction of competition in accordance with Article 4(17) of the Competition Law – namely, the decrease in number of undertakings not forming the same group in the product market.

The Commission does not agree with the Respondent’s argument according to which the GMS suite was developed and is being promoted solely together with Google Play in response to expectations of end users and manufacturers. Users’ expectations and that of expectations manufacturers of Mobile Devices, which derive from users’ expectations, come down to certain functionality of a device and a basic set of applications required for its implementation (such as maps, email and an app store), rather than to receiving applications of a specific developer (other than the Google Play app store). This statement is confirmed by the materials provided by the Respondent (i.e. pursuant to the survey conducted by Romir upon Google’s request, more than 50% of the respondents (together with those who do not consider the difference to be crucial), as opposed to the rest of 39%, do not think that the basic set should be comprised of applications of a single developer). Besides, the VCIOM survey presented by the Applicant also confirms that users would like to be able to change (select, delete) the pre-installed services. In this regard, packaging is just one of the ways of offering products to manufacturers which should be able to fill their devices with applications and services of one or several developers at their own discretion.

Potential consent of Google’s counterparties to the conclusion of agreements containing terms and conditions restricting competition is also irrelevant for the merits of this case, especially since manufacturers of Mobile Devices are not able to obtain Google Play other than by entering into an agreement with Google.

The Commission notes that packaging as a means of promotion is not, in itself, a violation of legislation, but becomes an unlawful bundling if a dominant product is included in the package,
and customers are not able to purchase it independently. For example, the Applicant was distributing the Yandex.Kit suite, which also included a set of applications for Mobile Devices. However, in addition to distributing Yandex.Kit, manufacturers were also able to purchase separately the applications developed by Yandex and included in Yandex.Kit.

**Priority Placement**

By introducing requirements regarding the priority placement of its applications which are to be complied with in order to obtain Google Play, Google is creating significant competitive advantages for its applications.

Priority placement of applications on the screen of a Mobile Device directly affects the frequency of their use: when applications’ icons are located on the home screen of a device, users are using such applications more frequently than the applications, icons of which are located on the second (and subsequent) screen(s). In particular, the FAS of Russia reviewed the information on the change in the share of search of the search engine offered by Yandex LLC depending on the method of its installation (Schedule 4 to the letter of Yandex LLC dated May 29, 2015, incoming No. 53978/15). It was shown that, when the search widget is located on the home screen, the share of search requests processed by it increases by several times in comparison with the situation where there was no pre-installation.

The Respondent’s argument that the requirement regarding the priority placement of mobile applications that are part of the GMS suite does not limit competitors’ rights since competitors are still able to place their applications on the screen of a Mobile Device on similar conditions, is not confirmed by the materials in the case file.

Thus, the placement of applications’ icons on the home screen has a significant influence on the frequency of use of the relevant applications and services.

**Pre-Installation of Google’s search as a Default Option**

Users of Mobile Devices are usually using what is available on their Mobile Devices by default. This is confirmed by the VCIOM survey (the majority of respondents (67.2%) have not changed the search engine installed in the smartphone browsers by default (and only a quarter of respondents made such change)). There are similar data for the tablet users (65.8% of respondents did not change their default search). Moreover, when answering the question what method(s) the respondents use for searching the Internet, the majority of respondents (67.5% of the smartphone users and 68.1% of the tablet users) replied that they were using an address bar of their browser, and more than one third (35.1% of the smartphone users and 35.2% of the tablet users) stated that they were using a search widget on the home screen. Only 17-18% of
respondents stated that they were using the search system’s website (i.e. they were not using the default search functionality).

Manufacturers of Mobile Devices reject the requests of other developers to install any competing search as the default search engine (rf. Schedules 18, 27, 29, 31, 32, 50, 51-52, 55-56, 57, 62, 63, 65-66 and 72 to the response of Yandex LLC to the request of the FAS of Russia dated March 31, 2015, incoming No. 30740-ДСП/15), and to pre-install competing applications on the home screen (rf. Schedules 10, 18-19, 27, 28, 29, 32, 50, 51-52 and 57 to the letter of Yandex LLC dated March 31, 2015, incoming No. 30740-ДСП/15), referring to the relevant restrictions imposed by Google.

The above-mentioned circumstances hinder access of competing undertakings to the search market, which may potentially result in the restriction of competition due to the decrease of the number of undertakings present in the relevant market.

Introduction of the Requirement to Refrain from the Pre-Installation of Competing Applications and Services Secured, inter alia, by a Remuneration Payable by Google

The fact that counterparties manufacturing Mobile Devices are provided with Google Play for its pre-installation on their Mobile Devices subject to the compliance with the prohibition of the pre-installation of applications, products and services developed by other undertakings is evidenced by the following:

- <...>;

- prohibition of the pre-installation of applications, products and services developed by third parties secured by a remuneration payable by Google pursuant to the RSA. Thus, entering into agreements providing for the payment of bonuses and other forms of remuneration, including those for the promotion, in exchange for the refusal to purchase competitors’ products is usually against the requirements of honesty, reasonableness and fairness and may be considered an act of unfair competition. At the same time, payment of a part of income from mobile advertising by a developer of applications and services to a manufacturer as a remuneration for the services of the pre-installation on Mobile Devices (during a fixed term, on specific models, etc.) may in itself not be considered as an unfair practice, since it is aimed at securing representation and promotion of this developer’s products and has no direct influence on competitors’ products.

Pursuant to the above, such terms of the Google Play acquisition should also be qualified as a market power abuse by Google in breach of Article 10(1) of the Competition Law, since they could potentially result in the restriction of competition as a result of the decrease in the number
of undertakings competing with Google in several markets. In particular, this is because payments are made not for the promotion of Google’s applications and services, but for the refusal to cooperate with Google’s competitors.

Upon the examination of Google’s anticompetitive practices, the Commission has established that, by virtue of Google’s dominant position in the market for pre-installed app stores, as well as by establishing privileged conditions for its applications ensuring the priority use of Google’s applications by users as if the Respondent were the only application supplier, Google influences general terms of the product circulation in adjacent product markets.

Non-Applicability of Exemptions for Exercising the IP Rights

In spite of the Respondent’s arguments, the exemption stipulated by Article 10(4) of the Competition Law does not apply in this case, since GMS is not a single object of exclusive rights (it is not a software complex, a single programme, multimedia product or a composite work), and the restrictions introduced by Google in <...> are out of the scope of the exclusive rights to separate Google’s applications. Relevant pieces of evidence were also submitted by the Applicant to the case file.

GMS comprises three groups of elements (Google Play (application software required for searching for, purchase, installation and updating of various applications); several additional applications (application software); as well as a set of system programmes (Google Play Services)) solving tasks in various subject domains. Each such programme is performing its own complete function and the system of such programmes is not forming a software package, and for the same reason GMS is not a composite work for the purposes of Article 1260 of the Russian Civil Code (see the legal opinion of the Moscow State Law University dated September 2, 2015).

Each separate computer programme (application) is an independent object of exclusive rights, and the relevant exclusive rights cover only the use of such programme rather than the whole range of business activities connected with it. Thus, the subject of any agreement by which the granting of the right to use a programme is executed may include only the description of the scope of the programme use. Any other aspects of relations between the parties which may also be governed by a license agreement would be out of the scope of the license-related legal relations. This position is based on the provisions of applicable civil legislation and is supported by the court practice.

We also dismiss the Respondent’s argument that the requirements set out in <...> in relation to the placement and customising of the GMS applications are valid due to the exercise by Google of exclusive rights to registered and protected trade marks in relation to the GMS applications and web services, since the exercise of the exclusive right to each trade mark is limited by the
description of the scope of use of such trademark. Moreover, Google provided no evidence of
registration of licencing any trademarks the rights to which, according to Google, were granted
to manufacturers. In accordance with Article 1232(6) of the Russian Civil Code, in such case
granting of exclusive rights is deemed void, which makes it impossible to refer to exercising
exclusive rights to any trademarks.

Besides, it is necessary to note that Google does not dispute that the exemption provided for by
Article 10(4) of the Competition Law does not apply to actions in relation to a product developed
by using the exclusive IP rights (rf. Google’s written clarifications dated August 26, 2015). At
the same time, Google’s actions in question are mostly connected with the prohibition of
manufacturing and sale of devices by manufacturers if they fail to comply with all the restrictive
practices imposed by Google.

Moreover, the situation in question is concerned with restrictions and prohibitions introduced by
the Respondent in relation to third party computer programmes (i.e. prohibition of the pre-
installation of programmes developed by Google’s competitors on the same conditions as
applications from the GMS suite), that is, in relation to the actions performed in relation to the
objects to which the right of use is not provided under an agreement. Since third party computer
programmes are involved, none of the parties to an agreement <...> has an exclusive right to such
programmes, and thus such prohibition is in no way connected with the existence or exercise of
exclusive rights (Expert Opinion dated June 30, 2015 No. 373-II).

Thus, Google holding a dominant position in the market of pre-installed app stores for OS
Android provided Google Play to its counterparties manufacturing Mobile Devices for the pre-
installation on the OS Android based Mobile Devices designated for the introduction into
circulation in the territory of the Russian Federation, under the following conditions:

- mandatory pre-installation in combination with Google Play of a suite of other applications,
  products, services of Google;

- mandatory pre-installation on Mobile Devices and/or setting on Mobile Devices together with
  Google Play of Google’s search as the default search engine;

- mandatory placement of other Google’s applications subject to the pre-installation together
  with Google Play strictly in specific places on the Mobile Device’s displays;

- adherence to the restriction to pre-install applications, products, services developed by other
  undertakings secured, *inter alia*, by provision of remuneration or other monetary stimulation by
  Google, which resulted or may have resulted in the restriction of competition.

Article 10(1) of the Competition Law prohibits any actions of an undertaking holding a dominant
position which result or may result in the prevention, restriction or elimination of competition.

<...>. 
The Commission found no confirmations of performance by Google LLC of any actions posing an abuse of its dominant position.

Since the Commission has established that the actions of Google Inc. and Google Ireland Limited that hold a dominant position in the market for pre-installed app stores for OS Android localised for distribution in the territory of the Russian Federation result in the restriction of competition in adjacent markets, the relevant actions of the said companies fall under the provision of Article 10(1) of the Competition Law.

The case under Article 14(1) of the Competition Law in respect of the actions in question is dismissed.

The Commission examining the case No. 1-14-21/00-11-15, acting pursuant to Article 23, Article 39(1), Article 41(1-4), paragraph 2 of Article 48(1) and Article 49(1) of the Federal Law No. 135-FZ dated July 26, 2006, “On the Protection of Competition”,

RESOLVED:

1. To recognise actions of Google Inc., Google Ireland Limited (hereinafter - Google) amounting to provision of Google Play app store to counterparties - manufacturers of Mobile Devices for pre-installation on mobile devices operated by Android operating system designated for introduction into circulation on the territory of the Russian Federation, under the following conditions:

   - mandatory pre-installation in combination with the Google Play application store of a suite of other applications, products, services of Google;

   - mandatory pre-installation on Mobile Devices and/or setting on Mobile Devices in combination with the Google Play application store of Google Search as the default search engine;

   - mandatory placement of other Google applications subject to pre-installation in combination with the Google Play app store strictly in certain places on the Mobile Device’s display;

   - adherence to restriction to pre-install applications, products, services developed by other business entities secured, *inter alia*, by provision of remuneration or other monetary stimulation by Google, which led or may lead to restriction of competition and violation of Article 10(1) of the Federal Law dated July 26, 2006 No. 135-ФЗ “On Protection of Competition”.

2. To dismiss the case against Google LLC due to absence of violation of antimonopoly legislation in actions examined by the Commission.
3. To issue the prescription to Google on cease of abuse of dominant position and taking actions
to facilitate competition.

4. To dismiss the case No. 1-14-21/00-11-15 on violation by Google of Article 14(1) of Law on
Protection of Competition due to absence of violation of antimonopoly legislation in actions
examined by the Commission.

PRESCRIPTION

on case No. 1-14-21/00-11-15

September 18, 2015  Moscow

Commission of the FAS of Russia for review of the case No. 1-14-21/00-11-15 on violation of
antimonopoly legislation comprising of: <…> (the “Commission”),

pursuant to Article 23, Article 39(1), Article 41(4), Article 50 of the Federal Law No. 135-ФЗ
“On Protection of Competition” dated July 26, 2006 (the “Law on Protection of Competition”),
based on its decision dated September 18, 2015, on the case No. 1-14-21/00-11-15 for violation
by Google Inc. (1600 Amphitheatre Parkway, Mountain View, CA 94093 USA), Google Ireland
Limited (Gordon House, Barrow Street, Dublin 4, Ireland) of Article 10(1) of the Law on
Protection of Competition,

PREScribes:

1. Google Inc. and Google Ireland Limited to cease by November 18, 2015 violation of Article
10(1) of the Law on Protection of Competition in the form of provision of Google Play
application store to counterparties – manufacturers of mobile devices for pre-installation on
mobile devices operated by Android operating system (“OS Android”) designated for
introduction into circulation on the territory of the Russian Federation, under the following
conditions:

1.1. adherence to restriction to pre-install applications, products, services developed by other
business entities, including as may be ensured by provision of remuneration or other monetary
stimulation by Google to counterparties – manufacturers of mobile devices operated by Android OS;

1.2. mandatory pre-installation in combination with the Google Play application store of a suite of other applications, products, services of Google;

1.3. mandatory pre-installation in combination with the Google Play application store on mobile devices, and/or setting on mobile devices, of Google search as the default search engine;

1.4. mandatory placement of other apps of Google subject to pre-installation in combination with the Google Play application store strictly in certain places on the mobile device’s display.

2. Google Inc. and Google Ireland Limited shall desist from conditioning pre-installation of the Google Play application store provided to counterparties – manufacturers of mobile devices operated by Android operating system for mobile devices operated by Android operating system and designated for introduction into circulation on the territory of the Russian Federation, upon the following:

2.1 mandatory pre-installation of other applications, products, services of Google;

2.2. mandatory placement of other Google’s applications subject to pre-installation in combination with the Google Play application store on the main screen or one level beyond the main screen;

2.3. mandatory pre-installation in combination with the Google Play application store on mobile devices, and/or setting on mobile devices, of Google search as the default search engine;

2.4. adherence to the prohibition to pre-install applications, products, services developed by other business entities, including as may be ensured by provision of remuneration or other monetary stimulation by Google to counterparties – manufacturers of mobile devices operated by Android OS.

3. Google Inc. and Google Ireland Limited shall by November 18, 2015 take all actions necessary to introduce amendments into all the effective contracts/agreements containing requirements set out in paragraph 1 of this Prescription entered into by or on behalf of Google Inc. and Google Ireland Limited with counterparties – manufacturers of mobile devices operated by Android OS designated for introduction into circulation on the territory of the Russian Federation.

4. Google Inc. shall by November 18, 2015, inform users of mobile devices operated by Android OS distributed on the territory of the Russian Federation of the possibility to deactivate pre-installed applications of Google, change search engine in the Google Chrome browser, of the possibility to set other search widget and install other applications similar to those comprising
GMS package, as well as of the possibility to change arrangement of icons on the screen of a device, in a form of notification to be demonstrated on the screen of the mobile device.

5. Google Inc. and Google Ireland Limited shall within 10 days from the moment of execution of this Prescription inform FAS of Russia in writing of such execution and attach the respective evidence in due form.