

Summary

The notion of price discrimination in accordance with the Russian antimonopoly legislation may include **setting different prices** for the same goods, including monopolistically low and monopolistically high prices, **and setting discriminatory conditions**, including through granting discounts and other special favorable conditions. Such actions are **prohibited** for economic entities with a dominant position and the authorities, unless justified economically, technologically or otherwise.

Definition of the notions of monopolistically low and monopolistically high prices is provided in Articles 6 and 7 of the Federal Law of 26.07.2016 №135-FZ "On Protection of Competition" (the Law on Protection of Competition).

Sanctions imposed on violators of the antitrust legislation and namely its clauses on price discrimination may vary in size. Decisions are taken (either by the antimonopoly authority or by court) depending on whether the violator's actions resulted or could result in preventing, restricting or eliminating competition. If the answer to this question is positive, the sanctions envisaged by law are more serious and can include a fine on persons in the amount of 20,000-50,000 rubles or a disqualification for up to three years; a fine on legal entities in the amount of 1-15% (in some cases provided by law 0.3-3%) of their revenue.

While taking decisions in cases on price discrimination, the FAS Russia applies the "**rule of reason**" **approach** contained in the Law on Protection of Competition, which requires in each case to carry out market analyses, determine the motives of price discrimination behaviour, and weigh its positive and negative effects. For instance, exemptions envisaged by this Law in relation to economic entities holding a dominant position are applicable if such entities actions on price discrimination can not eliminate competition, and also if they result or can result in the perfection of production, sale of goods or stimulation of technical, economic progress or increasing competitive capacity of the Russian goods in the world market; in consumers' benefits that are proportionate to the benefits of the economic entities obtained as a result of their actions on price discrimination.

The **companies and authorities accused recently** by the FAS Russia of price discrimination are the Federal Tariff Service (now abolished), the JSC "International airport Perm", the "Zelenokumsk Elevator" company. The FAS Russia's recommendations for economic entities, in order to avoid risks of price discrimination prosecution when the FAS Russia's suspicions arise in relation to the company's actions,

include a creation and publication of relevant documents (trade policies, pricing policies etc.) establishing the working principles applying to contractors, commercial conditions relating in particular to the volume of supply, product range, pricing, payment terms, discounts etc.

The FAS Russia's experience in prosecuting price discrimination, namely with fixing monopolistically high prices and setting discriminatory conditions, also includes numerous **cases involving the largest Russian oil companies** (2008-2011).

It should be noted at the end that the recent amendments to the Russian antimonopoly legislation have introduced provisions that **soften the system of sanctions imposed in cases of price discrimination**. In particular, the competition authority is not entitled to bring a case without first issuing a warning to the violator in cases of economically, technologically or otherwise unjustified establishment of different prices by dominant economic entities; creation of discriminatory conditions by dominant economic entities; restriction of competition by authorities (including through the creation of discriminatory conditions and establishment of different prices for the same product).

Introduction

There is no notion of price discrimination in the Russian antimonopoly legislation. The concepts set in the Federal Law of 26.07.2016 №135-FZ "On Protection of Competition" (hereinafter - the Law on Protection of Competition), which may fall under the term "price discrimination" are as follows:

- setting different prices for the same goods (including monopolistically low and monopolistically high prices);
- setting discriminatory conditions (including through granting discounts and other special favorable conditions).

These actions are prohibited in the Russian Federation for economic entities, whose position is recognized as dominant¹, because, according to the Russian law and court practice, such actions lead to preventing, restricting or eliminating competition or to infringing other persons' interests. However, an economic entity - a defendant always retains his possibility of "overcoming" this presumption, to prove that its actions do not pose a threat to competition.

Negative effects of the above-listed actions may relate to both business entities and third parties (meaning consumers). We suggest examining now in more detail the Russian antimonopoly legislation and the FAS Russia's practice in considering cases of price discrimination.

1. Setting different prices for the same goods

In accordance with the Russian antimonopoly legislation, establishment of different prices for the same goods that is not justified economically, technologically or otherwise is prohibited both for economic entities holding a dominant position and the authorities (in accordance with Part 1 Article 10, Part 4 Article 11, Part 3 Article 11.1 and the second paragraph of Article 16 of the Law on Protection of Competition).

Establishment of a violation of the prohibition of setting different prices requires the presence of a set of circumstances.

¹ An economic entity's position can be recognized as dominant if this economic entity's market share is not less than 35%. For the information on other cases of determining a dominant position in the Russian Federation see the Law on Protection of Competition.

- 1) Different prices are set for the same product (no matter who the product's customers were, including entities belonging to the seller's group of companies);
- 2) Time period of setting different prices coincides;
- 3) Prices are set on the same product market;
- 4) There is no technical, economic, other justification for setting different prices. A possible justification may include such issues as:

- different volumes and order of deliveries of the purchased goods;
- difference in costs related to a product's delivery;
- difference in a product's quality characteristics (including net cost, as well as the particularities of the production method/technology);
- payment conditions (prepayment/deferred payment);
- other conditions.

“Other justification” may include a number of specific criteria, which are not universal and are considered specifically in each case. Such criteria may include the commercial cooperation's term with a particular counterparty; presence or absence of indebtedness before suppliers; need of attracting new customers; etc.

In 2015, the FAS Russia admitted violations in the actions of the Federal Tariff Service of Russia that included the approval of amendments to the Price List "Tariffs for Transportation of Goods and for Infrastructure Services Performed by the Russian Railways". This Price List established lower railroad tariffs for a number of railway carriage models - the so-called "innovative" carriages - not on the basis of the universality principle (which means dependence on technical features), but on an individual basis.

As a result of usage of the Price List, a decline in demand for freight wagons not covered by the described tariff scheme was observed; competition on the market of innovative wagons and the related markets (such as those of freight carriages and railway infrastructure services) was restricted.

The Russian antimonopoly legislation also prohibits to economic entities holding a dominant position to fix and maintain monopolistically high and monopolistically low prices on commodities - including in respect of individual customers or groups of consumers (in accordance with Part 1 Article 10 of the Law on Protection of Competition. Definition of these price notions is provided in Article 6 and 7 of the same law).

In 2013, the JSC "International airport Perm" established and maintained monopolistically high prices for renting non-residential premises in the building of the airport "Bolshoye Savino". Namely, the company unreasonably increased the price for renters who carried out the same activity as the JSC "International airport Perm", which consisted in the organisation of ticket offices' work).

According to one of the participants of the market of tickets sale, whose application served as a ground for bringing the case, the cost of rent suddenly increased from 470 rub./sq.m. to 25,000 rub./sq.m. For price discrimination, as well as for fixing monopolistically high prices the FAS Russia imposed a fine on the JSC "International airport Perm" in the amount of 300,000 rubles².

2. Setting discriminatory conditions

Creating discriminatory conditions by economic entities that hold a dominant position provokes establishment of unequal position for some economic entities. It can also introduce a threat to competition and, ultimately, to the consumer welfare, thus discrimination is prohibited by the Russian antimonopoly legislation (in accordance with Part 1 Article 10 and Part 1 Article 15 of the Law on the Protection of Competition).

While considering such cases, the competition authority determines whether different conditions of cooperation are set in respect of business entities, which puts them at a disadvantage, and if so the authority establishes whether an adequate justification exists for this. The criteria applied here are the same as for the assessment of reasonableness of prices setting (economic, technological and other criteria).

² The currency rate as of October 11, 2016 is 1 USD = 62.3884 Russian rubles

The FAS Russia assesses the behavior of companies on provision of discriminatory conditions to its contractors, distributors or customers.

In 2008-2011 took place the three waves of antitrust investigations against the Russian oil companies.

During the first wave in 2008 the FAS Russia admitted that in 4th quarter of 2007 and 1st half of 2008 the largest vertically integrated Russian oil companies (the JSC Gazprom Neft, JSC TNC-BP Holding, JSC Lukoil) had violated Part 1 Article 10 of the Law on Protection of Competition, in particular the companies established monopolistically high prices on oil products, created discriminatory conditions for customers (e.g., the Gazprom company refused access to its pipes to the companies it competed with), fixed different prices on oil products, which was not justified economically, technologically or otherwise. All the decisions and prescriptions of the FAS Russia were appealed by the oil companies at arbitration courts. The courts (including the Presidium of the Supreme Arbitration Court) supported the legality and reasonableness of the FAS Russia's orders. As a result of the first wave, fines in the amount exceeding 6 billion rubles were imposed.

The second wave of antitrust investigations in 2009 involved the same companies together with another Russian oil company Rosneft; the accusations concerned withdrawal of goods out of circulation and creating discriminatory conditions (e.g., denial of access of other mining companies to Gazprom's pipes). The decisions again were appealed by the companies and supported by the Supreme Arbitration Court, the total fines amounted to more than 15 billion rubles.

In 2011, the third wave's cases involved Gazprom Neft, Lukoil and Rosneft companies for fixing monopolistically high prices as well as creating discriminatory conditions (namely by Gazprom Neft, which discriminated independent petrol stations in fuel supplies). The companies had to pay fines in the amount of almost 3,3 billion rubles in total.

According to the FAS Russia, in order to reduce competition risks, the working principles applying to contractors, commercial conditions relating in particular to the

volume of supply, product range, pricing, payment terms, discounts, bonuses and premium conditions may be described in the company's relevant documents (trade policy, pricing policy, etc.) in case if it occupies a dominant position. Elaboration and publication of a company's transparent pricing policy applying in a similar way to all the buyers, if it contains specific economic, technological or other criteria directly affecting the price will reduce the risk of prosecution in case of claims made by the Federal Antimonopoly Service of Russia.

However, a simple presence of such documents does not always guarantee the companies' release from liability, which is explained by the problems of insufficient clearness and specificity of such documents or unjust categorization of customers, as well as absence of actual execution of such documents in practice.

In 2011, the Stavropol territorial office of the FAS Russia considered a case on the grounds of violation of the Law on Protection of Competition on the abuse of a dominant position by "Zelenokumsk Elevator". This company holds a dominant position on the storage of grain within the geographic boundaries of the Stavropol region. According to the case materials, the entity set different prices for its services for different buyers.

The marketing policy of the Company fixed that the prices of the goods can be increased or decreased in some cases depending on the features of the technological processes applied additionally to certain lots. Individual customers can be granted individual discounts up to 20%. When providing individual discounts, the following factors were taken into account:

- Long-term cooperation with the client;*
- Strategic importance of a customer for the business entity;*
- Especially large amount of grain products for storing.*

After analyzing the conditions for application of individual discounts, the competition authority concluded that such conditions did not meet the criteria of economic and technological justification due to absence of clear methods of their application, and of criteria for defining "long-term positive cooperation with the client"; the mechanism of objective assessment of customers' strategic importance was not presented; etc. Lack of clearly defined criteria allowed the company to interpret and use

these concepts while concluding contracts and taking decisions on granting individual discounts at the company's owners discretion, which led to economically, technologically and otherwise unjustified establishment of different prices for the same for services for suppliers, and thus limited competition.

The company "Zelenokumsk Elevator" was admitted guilty by the FAS Russia.

3. Sanctions imposed for actions falling under the notion of price discrimination

Establishment of different prices for the same good and creation of discriminatory conditions are both included into the list of prohibitions applied to economic entities with a dominant position, and shall be punished in accordance with the Code of Administrative Offences of the Russian Federation (hereinafter – the CoAO).

The CoAO sets a less serious responsibility for abuse of dominant position of economic entities if such abuse leads or may lead to the infringement of the interests of others, when the result of such actions **does not and can not result in** preventing, restricting or eliminating competition (a fine imposed on officials is 15,000-20,000 rubles³, for legal entities 300,000-1,000,000). Abuse of a dominant position by economic entities, if the result of such an abuse **results or can result in** preventing, restricting or eliminating competition is punished with a fine on officials in the amount of 20,000-50,000 rubles or with a disqualification for up to three years; for legal entities a fine can be imposed in the amount of 1-15% (in some cases provided by law 0.3-3%) of their revenue.

In case if different prices are set as a result of decisions of authorities or agreements between authorities that are prohibited by law, the violators should be punished with a fine in the amount of 20,000-50,000 rubles or a disqualification for up to three years (imposed on officials); in cases where discrimination became the result of conclusion of agreements or concerted practices by economic entities, a fine may be imposed on officials in the amount of 20,000-50,000 rubles, or they may be disqualified for up to three years; the fine imposed on legal entities constitutes 1-15% (in some cases provided by law 0.3-3%) of the company's revenue.

³ The currency rate as of October 11, 2016 is 1 USD = 62.3884 Russian rubles

4. Decision-making in cases of price discrimination

It should be noted that this category of cases is always considered by the FAS Russia with the use of the "rule of reason" approach, which requires in each case:

- carrying out an analysis of the commodity market;
- determining the motives of the subject's behavior of using price discrimination;
- weighing positive and negative effects of such a behavior.

The Law on Protection of Competition and namely its Article 13 lists precise exemptions when the described above practices may be permissible. For instance, exemptions envisaged by this Law in relation to economic entities holding a dominant position are applicable if such entities actions (lack of action), agreements and concerted practices, transactions, other actions do not create for particular persons opportunity to eliminate competition in the relevant goods market, do not impose restrictions superfluous for achievement of the goal of these actions (lack of action), agreements and concerted practices, transactions, other actions on the participants or third persons and also if they result or can result in:

- 1) perfection of production, sale of goods or stimulation of technical, economic progress or rising competitive capacity of the Russian goods in the world market;
- 2) consumers obtaining benefits (advantages) which are proportionate to the benefits (advantages) that the economic entities obtain as a result of their actions (lack of action), agreements and concerted practices, transactions, other actions.

In addition, in 2012 to the Russian antimonopoly legislation was added a category of competition law violations, where the competition authority is not entitled to bring a case without first issuing a warning to the violator. Introduction and specific value of this instrument is explained by the risk that excessively tough forms of state economic regulation may cause flowering of a "grey" economy.

The most recent amendments to the Law on Protection of Competition (signed on October 5, 2015 in form of the so-called "fourth antimonopoly package" by the President of the Russian Federation) significantly expanded the use of the warning mechanism. Currently it is used in relation to:

1) actions (omissions) that lead or may lead to preventing, restricting or eliminating competition;

2) economically, technologically or otherwise unjustified establishment of different prices by dominant economic entities;

3) creation of discriminatory conditions by dominant economic entities;

4) unfair competition;

5) restriction of competition by authorities (including through the creation of discriminatory conditions and establishment of different prices for the same product).

Thus, currently the use of price discrimination by economic entities holding a dominant position, by the authorities as well as by companies entering into agreements between themselves or carrying out concerted actions is controlled by the Russian antimonopoly legislation, which envisages for such cases the possibility of using sanctions, including the new tool of the Russian competition law that is a warning.