

To heads of organisations
(in accordance with the list)

DECISION

on the case No. 1-11-59/00-22-16

Moscow

The decision's resolution part was announced on March 14, 2017

The full decision is made on March 27, 2017

The Commission of the Federal Antimonopoly Service on investigation of the case No. 1-11-59/00-22-16 on violation of antimonopoly legislation composed of:

Chairman of the Commission:

A.Y. Tsarikovskiy – Stats-Secretaty – Deputy Head of the FAS Russia;

Members of the Commission:

A.V. Molchanov – Head of Legal Department of the FAS Russia;

A.P. Tenishev – Head of Anti-Cartel Department of the FAS Russia;

D.V. Artyushenko – Deputy Head of Anti-Cartel Department of the FAS Russia;

N.V. Litvinova – Consultant of the First Division of Anti-Cartel Department of the FAS Russia;



A.S. Zemlyanaya – Chief Specialist Expert of Division for International Cooperation of the Department for International Economic Cooperation of the FAS Russia (hereinafter – the FAS Russia's Commission, the Commission),

having considered the case No. 1-11-59/00-22-16 on signs of violation of Part 5 Article 11 of the Federal Law dated July 26, 2006 No. 135-FZ “On Protection of Competition” (hereinafter – the Law on Protection of Competition) by Apple Rus Ltd. (107031, Moscow, Petrovka str., 5, TIN: 7707767220), Apple Holding B.V. (Leidseplein 29, Amsterdam, 1017PS, Netherlands; Company code: 08058671), Apple Sales Ireland (Hollyhill Industrial Estate, Hollyhill, Cork, Republic of Ireland; Registration number: 86705), Apple Operations International (Hollyhill Industrial Estate, Hollyhill, Cork, Republic of Ireland; Registration number: 76941), Apple Inc. (1 Infinite Loop, Cupertino, CA 95014, USA; Employer Identification Number: 94-2404110) (hereinafter also referred to as defendants),

in presence of N.V. Goreslavskaya (acting by power of attorney of August 22, 2016, unnumbered), A.V. Subbot (acting by power of attorney of August 22, 2016, unnumbered) – representatives of Apple Rus Ltd.; A.V. Egorushkin (acting by power of attorney of August 24, 2016, unnumbered, by power of attorney of August 29, 2016, unnumbered), E.S. Khokhlov (acting by power of attorney of August 24, 2016, unnumbered, by power of attorney of August 29, 2016, unnumbered) – representatives of Apple Holding B.V., Apple Sales Ireland, Apple Operations International, Apple Inc.; N.M. Dmitruk (acting by power of attorney of June 24, 2015 No. 00399/15-Д04) – a representative of PJSC VimpelCom; V.A. Partusov (acting by power of attorney of December 12, 2016 No. 0880/16), S.A. Sorokin (acting by power of attorney of August 29, 2016 No. 0708/16), S.L. Tolstobrov (acting by power of attorney of August 29, 2016 No. 0707/16) – representatives of JSC Russian Telephone Company (hereinafter referred to as JSC RTK); Y.A. Gorbenkova (acting by power of attorney of October 6, 2015 No. 5/607-15, by power of attorney of June 20, 2016 No. 12-Д0В-00418/16), M.A. Yusupova (acting by power of attorney of October 6, 2015 No. 5/601-15, by power of attorney of July 1, 2016 No. 12-Д0В-

00459/16) – representatives of PJSC MegaFon, JSC MegaFon Retail, V.N. Dianova (by power of attorney of August 25, 2016 No. 266/16), M.B. Zalazaeva (acting by power of attorney No. 276/16) – representatives of reStore Ltd., N.N. Voznesensky (acting by power of attorney of March 2, 2017 No. 181/17) – a representative of Media-Markt-Saturn Ltd.; K.O. Korshunov (acting by power of attorney of October 24, 2016 No. 23848_00/IOP), A.E. Sarapuk (acting by power of attorney December 5, 2016 No. 24074_00/IOP) – representatives of Eldorado Ltd.; V.S. Popov (acting by power of attorney of January 1, 2017 No. CJИ-0408) – a representative of JSC “Svyaznoy Logistika”; R.R. Salikhov (acting by power of attorney of December 30, 2016 No. 350/2017/EP) – a representative of Evroset-Retail Ltd.; D.A. Gavrilov (acting by power of attorney of August 31, 2016, unnumbered), A.A. Numerova (acting by power of attorney of August 31, 2016, unnumbered) – representatives of M.video Management Ltd.,

ESTABLISHED:

On October 23, 2015 the FAS Russia received a statement of the citizen P.Y. Nechaev (FAS Russia's ref. of October 26, 2015 No. 119263-ЭИ/15; hereinafter – the Statement)¹ with the information on fixing the same retail prices for the whole range of Apple iPhone 6s and iPhone 6s Plus smartphones, which started to be officially sold since October 9, 2015. According to the Statement, the same prices were fixed by economic entities with the following commercial names:

- MTS;
- M.video;
- Beeline;
- Eldorado;
- Evroset;
- OZON.ru;

¹ V. 1, part 2, pp. 1-14.

- Svyaznoy;
- MegaFon;
- Yulmart;
- re:Store;
- Media Markt;
- Citylink;
- HOLODILNIK.RU;
- DNS;
- ION (Know-How);
- Technosila.

With the purpose of verifying the facts named in the Statement, during the period from November 5, 2015 to July 22, 2016 the FAS Russia sent requests of information to Apple Rus Ltd.² - the only company registered in the Russian Federation and belonging to the international group Apple, to economic entities who specialise in wholesale trade of Apple iPhone smartphones as well as to economic entities who specialise in retail trade of these smartphones and use the commercial names listed in the Statement.

By the letters of November 5, 2015 No. CII/61650/15, of November 25, 2015 No. ЦА/66637/15, of December 8, 2015 No. KA/70231/15 the FAS Russia requested economic entities that retail Apple iPhone smartphones the information on price-setting for Apple iPhone 6s and Apple iPhone 6s Plus smartphones (price of purchase, consideration of price of transportation to different regions while setting prices; other factors taken into account for determining prices for smartphones; conditions of suppliers for reselling smartphones (on price, sales volume etc.) as well as copies of supply contracts concluded for the purpose of acquiring Apple iPhone 6s and Apple iPhone 6s Plus for further sale, and the information on unions (associations, alliances etc.) in which these economic entities

² Apple Rus Ltd. is a subsidiary of Apple Holding B.V. (the Netherlands), belonging to the international group of companies Apple headed by Apple Inc. (the US).

participate.

In accordance with the FAS Russia's request of December 14, 2015 No. ЦА/71459/15 economic entities that retail Apple iPhone smartphones were obliged to provide the information on retail prices for Apple iPhone 6s and iPhone 6s Plus smartphones.

By the letters of December 14, 2015 No. ЦА/71461/15, of February 3, 2016 No. KA/5958/16 the FAS Russia requested the economic entities that specialise in wholesale trade in Apple iPhone smartphones the information on contracts concluded for the purposes of purchasing and selling Apple iPhone smartphones. copies of these agreements as well as the information on prices for purchase and wholesale trade in Apple iPhone 6s and iPhone 6s Plus smartphones.

By the letter of December 15, 2015 No. KA/71906/15 the FAS Russia requested Apple Rus Ltd. the information on official distributors of Apple iPhone 6s and iPhone 6s Plus smartphones within the territory of the Russian Federation, on supply and other contracts concluded by Apple Rus Ltd. with the resellers of Apple iPhone 6s and iPhone 6s Plus smartphones, copies of these contracts and the information on the legal entity that administers the Russian version of the Apple website.

In accordance with the FAS Russia's request of February 3, 2016 No. KA/5981/16 Mobiland Ltd. was obliged to provide the information on contracts concluded for the purpose of purchase of Apple iPhone smartphones, copies of these contracts as well as the information on prices of purchase of Apple iPhone 6s and iPhone 6s Plus smartphones.

According to the FAS Russia's request of February 3, 2016 No. KA/5934/16 Apple Rus Ltd. was obliged to provide the information on the entity selling the Apple products via the website <http://www.apple.com/ru>; on retailing of Apple iPhone 6s and iPhone 6s Plus smartphones by Apple Rus Ltd or another entity on behalf of Apple Rus Ltd; on the entity providing hosting for the website <http://www.apple.com/ru>; on retail prices for Apple iPhone 6s and iPhone 6s Plus smartphones; on retail prices for Apple iPhone 6s and iPhone 6s Plus smartphones; on contracts concluded by Apple Rus Ltd. with PJSC

VimpelCom and PJSC MegaFon; on volumes of retail trade in Apple iPhone 6s and iPhone 6s Plus smartphones; on entities belonging to the same group with Apple Rus Ltd.

By the letter of February 5, 2016 No. KA/6514/16 the FAS Russia requested Apple Rus Ltd. the information on the entity or structural subdivision of the company that communicates via the e-mail address media.ru@apple.com as well as about determination of retail prices for Apple iPhone 6s and iPhone 6s Plus smartphones.

In accordance with the FAS Russia's requests of February 29, 2016 No. KA/12454/16, of March 4, 2016 No. KA/13875/16, of March 4, 2016 No. KA/13881/16 the economic entities retailing Apple iPhone smartphones were obliged to provide the information on receiving the text of Apple press release of September 28, 2015 from Apple Rus Ltd.; correspondence with Apple Rus Ltd. on the issues regarding determination of retail prices for Apple iPhone 6, iPhone 6 Plus, iPhone 6s, iPhone 6s Plus smartphones; copies of the letters sent from the e-mail address media.ru@apple.com.

By the letter of March 4, 2016 No. KA/13883/16 the FAS Russia requested the economic entities that retail Apple iPhone smartphones the information regarding retail prices on Apple iPhone 6 and iPhone 6 Plus smartphones.

By the letter of March 4, 2016 No. KA/13899/16 the FAS Russia requested Apple Rus Ltd. the information on determination of prices for Apple iPhone smartphones; a copy of the contract based on which Apple Rus Ltd. purchases Apple iPhone smartphones; the information on selling Apple iPhone smartphones via the Apple Online Store in the Russian Federation; on selling the mentioned smartphones by other companies belonging to the international group of companies Apple; on affiliation and usage of electronic mail with the domain name apple.com.

According to the FAS Russia's request of April 5, 2016 No. IJA/22070/16 economic entities retailing Apple iPhone smartphones were obliged to provide copies of incoming letters sent from e-mail addresses with the domain name apple.com.

In accordance with the FAS Russia's request of June 17, 2016 No. MO/41429/16 Apple Rus Ltd. was obliged to provide the information on differences present in contract

and other relations between Apple Rus Ltd. from the one side and mobile operators and other resellers from the other side that define the status of Apple's partners on the territory of the Russian Federation; clarifications regarding contract relations of Apple Rus Ltd. with the partners in the Russian Federation.

By the letters of July 22, 2016 No. AK/50194/16, of July 22, 2016 No. AK/50213/16 the FAS Russia requested the economic entities retailing Apple iPhone smartphones clarifications regarding non-decrease of prices for these smartphones in 2015; the information on meetings, briefings, negotiations or correspondence regarding the decrease of prices for Apple iPhone smartphones; on the prices used for purchase and retail trade in all the Apple iPhone models as well as on the share Apple iPhone smartphones have in resellers' retail trade and on the market in general.

By the letter of July 22, 2016 No. AK/50220/16 the FAS Russia requested the economic entities that specialise in wholesale trade in Apple iPhone smartphones the information on contracts concluded with the purpose of purchasing and reselling Apple iPhone smartphones, copies of these contracts as well as the information on prices used for purchasing and selling all the models of Apple iPhone smartphones.

In accordance with the results of analysing the information received in answers to the above-mentioned requests of information, the FAS Russia established the presence of signs of coordination of economic activity of the economic entities specialising in retail trade of Apple iPhone smartphones.

Based on the second paragraph of Part 2 Article 29 of the Law on Protection of Competition, a case was initiated by the FAS Russia's order of August 8, 2016 No. 1113/16 in relation to the group consisting of Apple Rus Ltd., Apple Holding B.V., Apple Sales Ireland, Apple Operations International, Apple Inc. on signs of violation of Part 5 Article 11 of the Law on Protection of Competition.

Based on Article 25 of the Law on Protection of Competition the documents and information necessary for considering the case were required from the persons participating in the case as well as other organisations.

The Ruling of the FAS Russia on setting the case No. 1-11-59/00-22-16 on violation of antimonopoly legislation for consideration of August 17, 2016 (ref. of August 17, 2016 No. AI/56577/16) attracted the following organisations using the relevant commercial names listed in parentheses as interested parties: PJSC MegaFon, JSC MegaFon Retail (MegaFon)³, PJSC VimpelCom (Beeline), JSC RTK (MTS), JSC Svyaznoy Logistika (Svyaznoy), M.video Management Ltd. (M.video), reStore Ltd. (re:Store), ServiceTrade Ltd. (Technosila), BusinessPRO Ltd.⁴, CJCS Yulmart (Yulmart), Edil-Import Ltd. (HOLODILNIK.RU), Internet Resheniya Ltd. (OZON.ru), Evroset-Retail Ltd. (Evroset), Media-Markt-Saturn Ltd. (Media Markt), Mobiland Ltd. (ION (Know-How)), MobilSovet Ltd.⁵, Eldorado Ltd. (Eldorado), Stinner Ltd (Citylink)⁶ (hereinafter also referred to as Interested parties); the Defendants were requested constituent documents, identification number certificates for accounting to registering, tax and other authorities, decision on election (appointment) of a chief executive officer.

By the letters of October 5, 2016 No. AI/68397/16 and of October 5, 2016 No. AI/68399/16 the FAS Russia requested the Interested parties the list of subjects of the Russian Federation on the territory of which they retail Apple iPhone smartphones; the information on differences on retail prices for Apple iPhone smartphones depending on subjects of the Russian Federation; the information on prices for purchase and resale trade in all the models of Apple iPhone smartphones.

In accordance with the request of October 6, 2016 No. AK/68743/16 Apple Rus Ltd. was obliged to provide the information on purchase of Apple iPhone smartphones from

3 PJSC MegaFon buys Apple iPhone smartphones that are then transferred to JSC MegaFon Retail and are retailed by this company based on the commission contract with PJSC MegaFon.

4 BusinessPRO Ltd. buys Apple iPhone smartphones that are then transferred to ServiceTrade Ltd. and are retailed by this company based on the commission contract with BusinessPRO Ltd. of April 26, 2010 No. 801-12/1.

5 MobilSovet Ltd. buys Apple iPhone smartphones that are then transferred to Mobiland Ltd. and are retailed by this company based on the commission contract with MobilSovet Ltd. of November 1, 2004 No. 1.

6 Starting from September 2, 2016 the person participating in the case No. 1-11-59/00-22-16 is the successor of Stinner Ltd., i.e. Kronar Ltd., due to the elimination of the former by re-organisation in the form of joining Kronar Ltd.

Apple Distribution International; on purchase of Apple iPhone smartphones from Apple Rus Ltd. by Dikhaus Ltd. and Haskel Ltd.; on the supply and other contracts concluded by Apple Rus Ltd. with the purpose of wholesale trade in Apple iPhone smartphones; on the prices used for purchasing and selling all the models of Apple iPhone smartphones.

By the letter of October 6, 2016 No. AK/68755/16 the FAS Russia requested Apple Inc. and Apple Distribution International to provide the information on the company that initially possesses the right of ownership on manufactured of Apple iPhone smartphones; on the company from which Apple Distribution International receives Apple iPhone smartphones; copies of contracts and other documents constituting the legal base for transfer of Apple iPhone smartphones to Apple Distribution International; the information on purchase of Apple iPhone smartphones from Apple Distribution International by Apple Rus Ltd.

According to the FAS Russia's request of October 7, 2016 No. AK/69310/16 GFK-Rus International Institute of Marketing and Social Studies Ltd. was obliged to provide the information on the shares of Apple iPhone smartphones in retail sales of smartphones on the Russian market since 2014.

In accordance with the FAS Russia's request of October 17, 2016 No. AI/71064/16 Apple Rus Ltd. was obliged to provide the information on the quantity of purchased Apple iPhone smartphones purchased by Apple Rus Ltd. and imported to the territory of the Russian Federation; on the quantity of Apple iPhone smartphones sold by Apple Rus Ltd. retail and wholesale.

By the letter of October 27, 2016 No. AK/73857/16 the FAS Russia requested Apple Rus Ltd. to provide the information on the subjects of the Russian Federation and settlements where Apple iPhone smartphones purchased at retail at the Apple Online Store were delivered.

By the FAS Russia's Ruling of November 7, 2016 No. AI/76454/16 it was decided to extend the term of consideration of the case No. 1-11-59/00-22-16 until May 17, 2017.

In accordance with the FAS Russia's request of November 10, 2016 No.

AI/77454/16 the Interested parties were obliged to provide the information on the prices used for retail trade in Apple iPhone 7 and iPhone 7 Plus smartphones; on the quantity of Apple iPhone 7 and iPhone 7 Plus smartphones ordered by resellers and delivered actually to them.

In accordance with the FAS Russia's request of November 21, 2016 No. AI/80114/16 Apple Rus Ltd. was obliged to provide the information on supply and other contracts concluded by Apple Rus Ltd. for the purpose of wholesale trade in Apple iPhone smartphones starting from the moment of Apple Rus Ltd.'s state registration; on the date of the first delivery of Apple iPhone smartphones to Apple Rus Ltd.; on the date of the first retailing of Apple iPhone smartphones via the Apple Online Store by Apple Rus Ltd. in the Russian Federation; on the contracts concluded by Apple Rus Ltd. with resellers of Apple iPhone smartphones and not relating directly to the purchase of these smartphones.

By the Ruling on postponing of consideration of the case No. 1-11-59/00-22-16 of December 8, 2016 (ref. of December 9, 2016 No. AI/85592/16) the FAS Russia *inter alia* requested Apple Rus Ltd. to provide the typical form of agreement with authorised dealers of Apple products; the information on differences in agreements with authorised resellers of Apple products.

In accordance with the FAS Russia's request of December 16, 2016 No. AK/87474/16 a number of resellers not participating in the case as interested parties were obliged to provide the information on agreements in accordance with which the resellers purchase Apple iPhone smartphones for their further selling on the territory of the Russian Federation; a list of subjects of the Russian Federation on the territory of which resellers retail Apple iPhone smartphones; on differences in retail prices for Apple iPhone smartphones depending on subjects of the Russian Federation; on prices used for purchasing and retail trade in Apple iPhone smartphones.

By the letter of December 26, 2016 No. AI/90280/16 the FAS Russia requested Apple Rus Ltd. to provide the information on a corporate act regulating the control of Apple Rus Ltd.'s compliance with the requirements of the Russian Federation legislation

in general and in particular the antimonopoly legislation; guidelines for Apple Rus Ltd.'s employees whose responsibilities include controlling over Apple Rus' Ltd.' compliance with the requirements set by the Russian Federation laws in general and the antimonopoly legislation in particular; the information on trainings of Apple Rus Ltd's employees on the topics relating to the compliance with the antimonopoly legislation of the Russian Federation.

In accordance with the FAS Russia's request of December 26, 2016 No. АИ/90281/16 the companies Apple Holding B.V., Apple Sales Ireland, Apple Operations International, Apple Inc. were obliged to provide the information on their corporate acts that establish procedures for subsidiaries's activities aimed at ensuring their compliance with the requirements of the antimonopoly legislation of the states where they conduct their business activities; on exercising control over the subsidiaries' (including Apple Rus Ltd.) compliance with the antimonopoly legislation of the states where the subsidiaries conduct their business activities.

By the letters of March 6, 2017 No. АИ/13625/17 and of March 6, 2017 No. АИ/13628/17 the FAS Russia requested from Media-Markt-Saturn Ltd. and Eldorado Ltd. the information on retail prices for Apple iPhone 5s and iPhone 6 smartphones.

The documents and information submitted to the FAS Russia in answers to the rulings and requests are joined to the materials of the case No. 1-11-59/00-22-16 on violation of antimonopoly legislation.

Besides, in accordance with the requirement of Part 5.1 Article 45 of the Law on Protection of Competition and the FAS Russia's Order of April 28, 2010 No. 220 "On adopting the Procedure for conducting analysis of the state of competition on a commodity market" (hereinafter – the Procedure for conducting analysis of the state of competition on a commodity market) during consideration of the case No. 1-11-59/00-22-16 the FAS Russia carried out an analysis of the state of competition on the market of Apple iPhone smartphones (models iPhone 5s, iPhone 5c, iPhone 6, iPhone 6 Plus, iPhone 6s, iPhone 6s Plus) retailed with the use of retail facilities within the limits of necessary for taking a

decision on presence or absence of violation of the antimonopoly legislation.

A brief report on the results of the analysis of the state of competition on the market of Apple iPhone smartphones (models iPhone 5s, iPhone 5c, iPhone 6, iPhone 6 Plus, iPhone 6s, iPhone 6s Plus) retailed with the use of retail facilities of January 13, 2017 (as edited on March 13, 2017) (hereinafter – the brief report on the results of the analysis of the state of competition of January 13, 2017 (as edited on March 13, 2017)) is joined to the materials of the considered case⁷.

In the given decision as well as the conclusion on circumstances of the case and the brief report on the results of the analysis of the state of competition of January 13, 2017 (as edited on March 13, 2017) the following terms are used with the relevant definitions:

– a smartphone means a subscriber device of mobile connection the functionality of which is considerably extended due to a developed operation system that is open for installing and using the software (applications) both of the company who produced the smartphone and of other developers;

– an authorised reseller of Apple iPhone smartphones means an economic entity specialising in sales of Apple iPhone smartphones to final consumers and with whom Apple Rus Ltd. has concluded a relevant contract;

– a reseller means an economic entity specialising in sales of Apple iPhone smartphones to final consumers and with whom Apple Rus Ltd. has not concluded a contract;

– an authorised distributor of Apple iPhone smartphones (except from Apple Rus Ltd.) means an economic entity specialising in wholesale trade of Apple iPhone smartphones and with whom Apple Rus Ltd. has concluded a distribution agreement;

– a distributor (a sub-distributor) means an economic entity specialising in wholesale trade of Apple iPhone smartphones and with whom Apple Rus Ltd. has not concluded a distribution agreement;

– retail facilities means a building or a part of a building that is specially

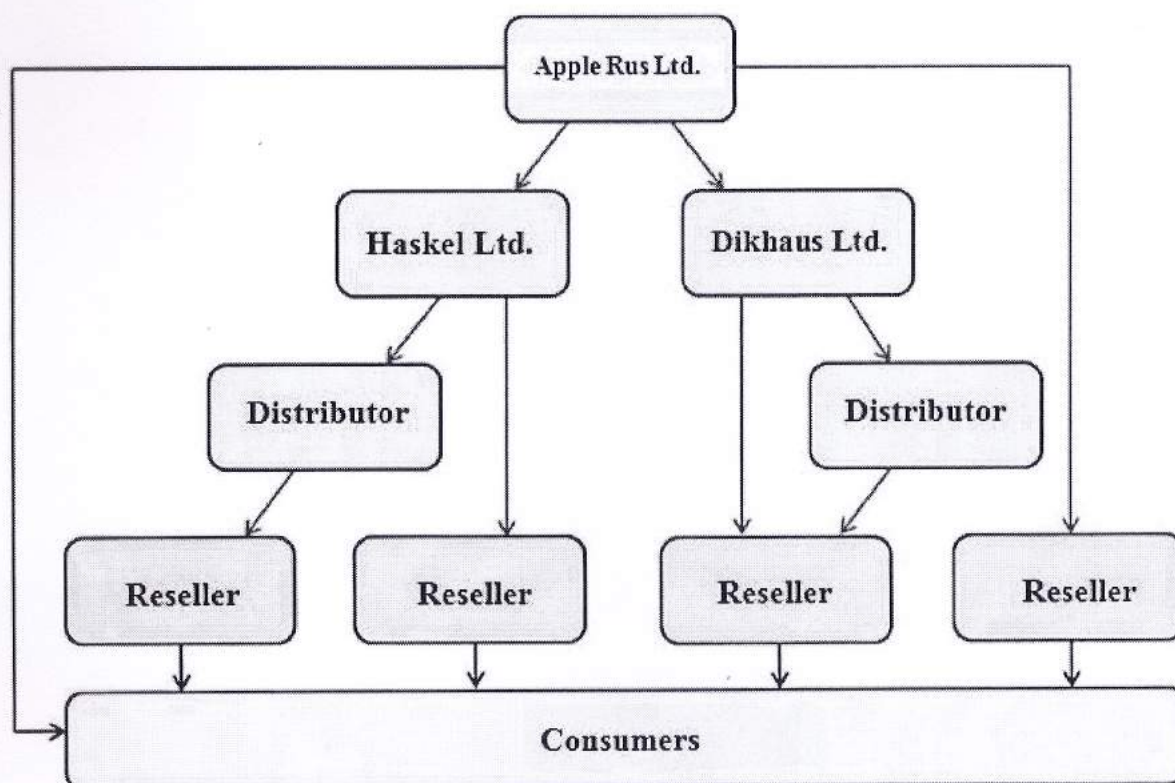
⁷ V. 1 part 4 pp. 19-35.

equipped and intended to be used for placing, demonstrating goods, serving customers and carrying our financial transactions with customers while selling goods.

Factual and other circumstances established upon the results of the analysis of the materials of the case No. 1-11-59/00-22-16 on violation of antimonopoly legislation.

In the course of consideration of the case No. 1-11-59/00-22-16 the FAS Russia's Commission established that Apple Rus Ltd. is the only authorised importer of Apple iPhone smartphones on the territory of the Russian Federation registered in the Customs register of intellectual property. After importing Apple Rus Ltd. sells these smartphones both wholesale – to the authorised distributors and authorised resellers of Apple iPhone smartphones, and retail.

Authorised distributors of Apple iPhone smartphones buying Apple iPhone smartphones directly from Apple Rus Ltd. (Dikhaus Ltd., Haskel Ltd.) may then sell these smartphones to other distributors as well as to authorised resellers of Apple iPhone smartphones (see Picture 1).



Picture 1. Scheme of sales of Apple iPhone smartphones in the Russian Federation

Since Apple Rus Ltd. set a number of requirements to potential counterparties concerning *inter alia* the requirements on minimum volumes of acquisition of Apple products and investments in promotion of Apple products, compliance with which is necessary for concluding a contract with Apple Rus Ltd. that envisages direct supply of products, the majority of distributors and authorised and other resellers purchase smartphones sold by Dikhaus Ltd. and Haskel Ltd. Also some resellers purchase Apple iPhone smartphones sold by “indirect” distributors – distributors that at the second position in the chain of sales of smartphones after Dikhaus Ltd. and Haskel Ltd.

Both authorised and non-authorised resellers retail Apple iPhone smartphones by different means: with the use of retail facilities, without using retail facilities (online) or by both means of trade simultaneously.

Apart from numerous resellers, Apple Rus Ltd also specialises in retail trade of Apple iPhone smartphones – with the use of the Internet website that can be reached at the link <http://www.apple.com/ru/> (hereinafter – the Apple Online Store)⁸. Besides, Apple Rus Ltd. administrates the mentioned website in terms of its information content⁹.

Thus, retail trade in Apple iPhone smartphones is performed by Apple Rus Ltd and resellers, a part of whom purchases smartphones directly from Apple Rus Ltd. and the other from distributors. But Apple Rus Ltd. retails smartphones only through the Apple Online Store¹⁰ while the resellers retails Apple iPhone smartphones by different means: with the use of retail facilities, without using retail facilities (online) or by both means of trade simultaneously.

The means of trade by which Apple Rus Ltd. retails Apple iPhone smartphones (without using retail facilities – online) influences the definition of borders of the territory in which this company sales products. And, as established below in the given decision, the geographic borders in which Apple Rus retails Apple iPhone smartphones do not coincide with the geographic borders in which a number of resellers participating in the given case as interested parties retail, and, consequently, Apple Rus Ltd. and resellers act on different commodity markets.

Since not only Apple Rus Ltd. but also a majority of resellers put information on retail prices set for Apple iPhone smartphones on the websites belonging to them (in online stores), the market of smartphones considered in the given decision is characterized by a high level of price transparency. Similar practice of making information concerning the start of sales or prices for goods in retail facilities and online stores available to consumers by economic entities exists on other markets.

In accordance with the first paragraph Part 3.3 Article 41 of the Law on Protection of Competition the decision on the case of violation of the antimonopoly legislation should contain *inter alia* circumstances established in the course of the analysis of the state of

8 V. 2 part 2 p. 3.

9 V. 2 part 1 p. 437.

10 V. 2 part 2 p. 3.

competition carried out by the antimonopoly authority.

The analysis of the state of competition carried out by the FAS Russia with the purpose of full, objective and comprehensive consideration of the case No. 1-11-59/00-22-16 on violation of antimonopoly legislation covers *the time period* starting from October 25, 2013 (the date of start of sales of iPhone 5s and iPhone 5c smartphones) to April 4, 2016 (the date before the start of Apple iPhone SE smartphones' sales) due to the following reasons.

In accordance with paragraph 2.1 of the Procedure for conducting analysis of the state of competition on a commodity market a time period of a commodity market investigation is determined depending of the purpose of the investigation, particularities of the commodity market.

According to paragraph 2.2 of the Procedure for conducting analysis of the state of competition on a commodity market in case if an investigation is limited within investigation of the observed commodity market's features that had appeared before the investigation was started, then a retrospective analysis of the state of competition should be carried out.

Since 2013, sale of the following models of Apple iPhone smartphones started in the Russian Federation:

- 25.10.2013 – iPhone 5s and iPhone 5c smartphones;
- 26.09.2014 – iPhone 6 and iPhone 6 Plus smartphones;
- 09.10.2015 – iPhone 6s and iPhone 6s Plus smartphones;
- 05.04.2016 – iPhone SE smartphones;
- 23.09.2016 – iPhone 7 and iPhone 7 Plus smartphones.

Thus, models of Apple iPhone smartphones iPhone 5s and iPhone 5c present the first models whose sale started after the beginning of performing economic activity by Apple Rus Ltd.

The materials of the case No. 1-11-59/00-22-16 on violation of antimonopoly legislation demonstrate that Apple Rus Ltd. started performing economic activity in 2013.

For instance, the distribution agreement between Apple Rus Ltd. and Apple Distribution International according to which Apple Rus Ltd. is non-exclusive distributor of Apple products on the territory of the Russian Federation was concluded on December 21, 2012 and entered into force on January 1, 2013 (hereinafter – the distribution agreement of January 1, 2013)¹¹.

In 2013 Apple Rus Ltd. started importing Apple iPhone smartphones to the territory of the Russian Federation. In the same year the Apple Online Store started working in the Russian Federation through which Apple Rus Ltd. retails Apple iPhone smartphones¹².

Besides, the FAS Russia established that the first contracts whose subject is wholesale trade in Apple iPhone smartphones to distributors and resellers were concluded by Apple Rus Ltd. after September 2, 2013.

Apart from concluding the above-mentioned contracts, since September 2, 2013 Apple Rus Ltd. started concluding contracts with authorised resellers concerning their reselling of Apple products but not relating directly to the purchase of Apple iPhone smartphones¹³.

In addition, as it was established by the FAS Russia's decision on the case No. 1 11/188-11 on violation of antimonopoly legislation (ref. of May 12, 2012 No. AI/14567), before the start of economic activity of Apple Rus Ltd. another scheme of import and wholesale trade in Apple iPhone smartphones was in force on the territory of the Russian Federation. In 2010-2012 only PJSC MTS and PJSC VimpelCom had a right to import these smartphones to the Russian Federation in accordance with the contracts concluded with Apple Sales International by the mentioned entities. Then the smartphones imported by PJSC MTS and PJSC VimpelCom were retailed in these entities' chains as well as delivered wholesale to other resellers for their further reselling to consumers¹⁴.

11 V. 2 p. 2 pp. 8-69.

12 V. 2 part 3 pp. 151-152.

13 V. 2 part 3 pp. 142-149.

14 The FAS Russia's decision on the case No. 1 11/188-11 on violation of the antimonopoly legislation of May 12, 2012 (FAS Russia's ref. of May 12, 2012 No. AI/14567) // Official website of the Federal Antimonopoly Service; available at <http://solutions.fas.gov.ru/ca/upravlenie-po-borbe-s-kartelyami/1-11-188-11>.

Thus, coordination of economic activities of the Apple iPhone smartphones's resellers signs of which are present in the actions of Apple Rus Ltd. became possible since 2013.

It is also necessary to note that before 2013 the market of Apple iPhone smartphones was characterised by price competition: the retail prices set by resellers could differ and decrease at the start of sales of consecutive new models of Apple iPhone smartphones. For example, on December 14, 2012 resellers fixed the following prices on Apple iPhone 5 at the start of sales: 29,900 roubles for the 16GB model (Svyaznoy Logistika Ltd.), 34,900 (PJSC VimpelCom, reStore Ltd., Evroset-Retail Ltd. and other resellers); 34,900 roubles for the 32GB model (Svyaznoy Logistika Ltd.), 39,900-39,990 (PJSC VimpelCom, reStore Ltd., Evroset-Retail Ltd. and other resellers); 39,900 roubles for the 64GB model (Svyaznoy Logistika Ltd.), 44,900-44,990 roubles (PJSC VimpelCom, reStore Ltd., Evroset-Retail Ltd. and other resellers). After several hours after the start of sales the resellers started to decrease prices for new smartphones. For example, PJSC VimpelCom fixed prices for Apple iPhone 5 smartphones at the price level set by Svyaznoy Logistika Ltd. Evroset-Retail Ltd. decreased prices for the whole range of Apple iPhone 5 to 28,900 roubles for the 16GB model, to 33,900 roubles for the 32GB model and to 38,900 roubles for the 64GB model. Svyaznoy Logistika Ltd. later decreased prices to the level set by Evroset-Retail Ltd. This fact is fixed in the protocol on inspection of the Internet website (page, source) of February 13, 2017 No. 6-17¹⁵.

The examined period in the brief report on the results of the analysis of the state of competition of January 13, 2017 (as edited on March 13, 2017) ends on April 4, 2016, i.e. the date before the start of sales of Apple iPhone SE smartphones sales that entered into the Russian market on April 5, 2016, because the FAS Russia did not establish the presence of signs of unlawful coordination of economic activities of Apple iPhone smartphones resellers relating to such Apple smartphones' models as iPhone SE, iPhone 7 and iPhone 7 Plus, as it will be noted further on in the present decision.

15 V. 1 part 3 pp. 16-23.

In accordance with the paragraph 10.5 and sub-paragraph “b” of paragraph 10.3 of the Procedure for conducting analysis of the state of competition on a commodity market, the definition of product boundaries of the market is carried out based on the subject of economic activity of economic entities.

Based on the issues discussed above, **the product boundaries of the commodity market** for the purposes of this case are defined in the brief report on the results of the analysis of the state of competition of January 13, 2017 (as edited on March 13, 2017) as models of Apple smartphones iPhone 5s, iPhone 5c, iPhone 6, iPhone 6 Plus, iPhone 6s, and iPhone 6s Plus retailed with the use of retail facilities, i.e. all the models of Apple iPhone smartphones issued during the period from October 25, 2013 to April 4, 2016, in relation to the price-setting of which the FAS Russia established presence of signs of unlawful coordination of resellers' economic activities.

The FAS Russia while considering the given case on violation of the antimonopoly legislation also analysed the information relating to selling Apple iPhone smartphones' models whose sales started on the territory of the Russian Federation after April 4, 2016 (iPhone SE, iPhone 7 and iPhone 7 Plus), but the signs of unlawful coordination of economic activities of the Apple iPhone smartphones' resellers relating to these smartphones' models were not proved, and as a result these models of Apple iPhone smartphones were not included to the product boundaries of the commodity market and were not taken into account in the analysis of the state of competition.

In accordance with paragraph 10.5 and 10.3 of the Procedure for conducting analysis of the state of competition on a commodity market, geographic boundaries of the commodity market are determined with the consideration of the materials of the case of violation of the antimonopoly legislation, including taking into account the territory where the signs of coordination of economic activity of resellers of Apple iPhone smartphones are observed.

While carrying out the analysis of the state of competition on the market of models of Apple smartphones iPhone 5s, iPhone 5c, iPhone 6, iPhone 6 Plus, iPhone 6s and

iPhone 6s Plus retailed with the use of retail facilities the borders of the Russian Federation (the federal market) were taken as the **geographic borders of the commodity market** due to the following reasons.

Authorised resellers of the Apple iPhone smartphones whose economic activity was coordinated are registered and perform their economic activity on the territory of the Russian Federation (JSC MegaFon Retail, PJSC VimpelCom, JSC RTK, JSC Svyaznoy Logistika, M.video Management Ltd., reStore Ltd., ServiceTrade Ltd., Evroset-Retail Ltd., Media-Markt-Saturn Ltd., Eldorado Ltd.).

Besides, while defining geographic borders of a commodity market, the FAS Russia took into account the following circumstances.

First, Apple Rus Ltd. in whose actions signs of coordination of the resellers' economic activities were revealed is the only entity importing officially Apple iPhone smartphones and providing first sales services on the territory of the Russian Federation. The Apple Rus Ltd.'s activities cover all the territory of the Russian Federation.

In accordance with paragraph 2.2. of the Order of Apple Rus Ltd. as in force in 201402916, *“the subject of activity of the entity is performing the activity aimed at achieving purposes of the entity's activity both on the territory of the Russian Federation and outside it”*¹⁶.

Second, in accordance with paragraph b of section 3.2 of the distribution agreement of January 1, 2013 Apple Rus Ltd. is obliged to choose dealers, sub-distributors and other resellers, trade agents and servicing organisation for marketing, realisation, sale and maintenance of Apple products on the territory of the Russian Federation¹⁷.

Besides, the territory of the Russian Federation is defined as the territory on which the Apple iPhone smartphone and other products are retailed in accordance with contracts (agreements) concluded with resellers of smartphones by Apple Rus Ltd..

For instance, according to paragraph 4.1 of the agreements of Apple Rus Ltd. with

16 V. 2 part 2 pp. 74-128.

17 V. 2 part 2 pp. 8-69.

authorised resellers (agreement with BusinessPRO Ltd. of September 2, 2013¹⁸, agreement with M.video Management Ltd. of May 1, 2015¹⁹, agreement with reStore Ltd. of May 1, 2015²⁰ and others), as well as taking into consideration Section 1 of these agreements (“Definitions”) the listed resellers sell Apple products on the territory of the Russian Federation.

Similarly, the Russian Federation is determined as the territory on which resellers – mobile network operators sell Apple products²¹.

The copies of contracts concluded with distributors by resellers with the purpose of wholesale purchase of *inter alia* Apple iPhone smartphones that the FAS Russia has do not include the provisions that would in some way limit the territory of sale of these smartphones to consumers inside the borders of the Russian Federation (for example, the contract between Eldorado Ltd. and Dikhaus Ltd. of July 16, 2012 No. 16/07/12-ДХ; contract between Eldorado Ltd. and VERISEL-Trading Ltd. of February 3, 2014 No. 16/07/12-ДХ (FAS Russia's ref. of December 22, 2015 No. 151379/15)²²; contract between Evroset-Retail Ltd. and Dikhaus Ltd. of June 10, 2010 No. 10/05/10; contract between Evroset Ltd. and Mirst Ltd. of June 1, 2010 No. 01/06 (FAS Russia's ref. of November 30, 2016 No. 138865/15)²³ and other contracts).

Taking into consideration, the geographic boundaries of the considered market are the borders of the Russian Federation (the federal market).

Besides, in the brief report on the results of the analysis of the state of competition of January 13, 2017 (as edited on March 13, 2017) the fact of presence of competitive relations between resellers whose economic activity had been coordinated was established.

To prove, based on the information providing evidence on retail trade from October 25, 2013 to April 4, 2016 in models of Apple iPhone smartphones iPhone 5s, iPhone 5c,

18 V. 15 pp. 34-76.

19 V. 2 part 1 pp. 408-434.

20 V. 2 part 1 pp. 201-227.

21 V. 7 pp. 54-102; V. 8 part 1 pp. 92-148.

22 V. 13 part 1 pp. 1-202.

23 V. 18 pp. 1-10.

iPhone 6, iPhone 6 Plus, iPhone 6s and iPhone 6s Plus with the use of retail facilities on the territory of the Russian Federation, the mentioned report contains a conclusion that JSC Megafon Retail, PJSC VimpelCom, JSC RTK, JSC Svyaznoy Logistika, M.video Management Ltd., reStore Ltd., ServiceTrade Ltd., Evroset-Retail Ltd., Media-Markt-Saturn Ltd. and Eldorado Ltd. were competitors on the discussed market.

At the same time, Apple Rus Ltd. whose action contain signs of coordination of economic activities of Apple iPhone smartphones' resellers sold these smartphones via the Apple Online Store without using retail facilities on the territory which in different periods of time covered no more than 17 regions of the Russian Federation, which is confirmed in the letter from Apple Rus Ltd. of February 2, 2016, unnumbered (ref. FAS Russia of February 18, 2016 No. 21735/16), the letter from Apple Rus Ltd. of November 11, 2016 No. (ref. FAS Russia of November 14, 2016 No. 167399-ДСП/16).

At the same time, the other defendants of the case No. 1-11-59/00-22-16 did not and do not perform the activity related to sale of these smartphones on the territory of the Russian Federation (Apple Holding B.V., Apple Sales Ireland, Apple Operations International and Apple Inc.).

Based on the above, a conclusion can be made that: 1) product (including the was of exercising trade activity), and 2) geographic boundaries of markets on which Apple Rus Ltd. and resellers of Apple iPhone smartphones perform their activity do not coincide. Hence, Apple Rus Ltd. and resellers act on different markets.

Thus, Apple Rus Ltd. whose action contain signs of coordination of economic activities of Apple iPhone smartphones' resellers was not and is not a participant of the market of Apple iPhone smartphones (models of smartphones: iPhone 5s, iPhone 5c, iPhone 6, iPhone 6 Plus, iPhone 6s and iPhone 6s Plus) retailed with the use of retail facilities and consequently did not and does not compete with JSC Megafon Retail, PJSC VimpelCom, JSC RTK, JSC Svyaznoy Logistika, M.video Management Ltd., reStore Ltd., ServiceTrade Ltd., Evroset-Retail Ltd., Media-Markt-Saturn Ltd. and Eldorado Ltd.

However, despite the fact that the above-listed resellers were and are competitors on

the market of models of Apple smartphones iPhone 5s, iPhone 5c, iPhone 6, iPhone 6 Plus, iPhone 6s and iPhone 6s Plus retailed with the use of retail facilities, these resellers did not always act independently while setting retail prices on smartphones.

As the FAS Russia established, Apple Rus Ltd. as an entity administrating the Russian version of the Apple website including the part relating to the Apple Online Store in the Russian Federation in its information content's part, before the issue of consecutive new models places on this website press releases that contain the information on retail prices for new smartphones.

In particular, before the issue of models of Apple iPhone smartphones iPhone 5s and iPhone 5c which took place on October 25, 2013 a press release of October 9, 2013 was placed on the Russian version of the Apple website with a headline "*iPhone 5s and iPhone 5c will appear in Italy, Spain, Russia and more than 25 other countries on Friday, October 25*", in which the following was stated: "*iPhone 5s is available in gold, silver and "space gray" colours at a price of 29,990 roubles (25,415 roubles 25 kop. without VAT) for a 16GB model, at a price of 34,990 roubles (29,652 roubles 54 kop. without VAT) for a 32GB model and at a price of 39,990 roubles (33,889 roubles 83 kop. without VAT) for a 64GB model. iPhone 5c is available in light blue, green, pink, yellow and white colours at a price of 24,990 roubles (21,177 roubles 97 kop. without VAT) for a 16GB model and at a price of 29,990 roubles (25 415 roubles 25 kop. without VAT) for a 32GB model*". This fact is fixed in the protocol on inspection of the Internet website (page, source) of February 13, 2017 No. 5-17²⁴.

Before issue of models of Apple iPhone smartphones 6 and 6 plus, which took place on September 26, 2014, on the Russian version of the Apple website a press release of September 9, 2014 was added with the headline "*Apple presents iPhone 6 and iPhone 6 Plus – the most considerable iPhone's upgrade in history*", in which it was stated: "*iPhone 6 is available in gold, silver and "space gray" colours at a price of 31,990 roubles (27,110 roubles 17 kop. without VAT) for a 16GB model, at a price of 36,990 roubles*

24 V. 1 part 3 pp. 1-15.

(31,347 roubles 46 kop. without VAT) for a 64GB model. For the first time, a new 128GB model at a price of 41,990 roubles (35,584 roubles 75 kop. without VAT) will be available. iPhone 6 Plus is available in gold, silver and “space gray” colours and will be available in Russia at a price 36,990 roubles (31,347 roubles 46 kop. without VAT) for a 16GB model, at a price of 41,990 roubles (35,584 roubles 75 kop. without VAT) for a 64GB model and at a price of 46,990 roubles (39,822 roubles 03 kop. without VAT) for a new 128GB model. Both models will be available in the Apple Online Store, at a number of operators and authorised resellers of Apple”. This fact is fixed in the protocol on inspection of the Internet website (page, source) of February 13, 2017 No. 5-17²⁵.

On September 28, 2015 before the issue of Apple iPhone 6s and iPhone 6s Plus smartphones on the Russian version of the Apple website a press release is placed with the following content: “iPhone 6s and iPhone 6s Plus will be available in metallic body of gold, silver and “space gray” colours, as well as in the new “rose gold” colour. iPhone 6s will be available in Russia at a price of 56,990 roubles for a 16GB model, 65,990 roubles for a 64GB model and 74,990 roubles for a 128GB model. iPhone 6s Plus will be available in Russia at a price of 65,990 roubles for a 16GB model, 74,990 roubles for a 64GB model and 83,990 roubles for a 128GB model. The prices include VAT.” This fact was fixed in the protocol on inspection of the website (page, resource) on the Internet of December 7, 2015 No. 12-15²⁶.

The above-mentioned information demonstrates that before the issue of such Apple smartphones' models as iPhone 5s, iPhone 5c, iPhone 6, iPhone 6 Plus, iPhone 6s and iPhone 6s Plus Apple Rus Ltd. placed on the Russian version of the Apple website press releases with the information on prices for the new smartphone models. The prices were provided for each model, depending on the volume of memory.

Before the start of sale of Apple iPhone smartphone SE scheduled for April 5, 2016 a press release of March 21, 2016 with the following information was published on the Russian version of the Apple website: “iPhone SE will be available in metallic body in

25 V. 1 part 3 pp. 1-15.

26 V. 1 part 2 pp. 15-20.

“space gray”, silver, gold and “rose gold” colours. 16GB and 64GB models will be sold on the Apple.com website at a price from 37, 990 roubles”. This fact is fixed in the protocol on inspection of the Internet website (page, source) of February 13, 2017 No. 5-17²⁷.

On September 7, 2016, before the issue of the last models of Apple iPhone 7 and iPhone 7 Plus smartphones at the moment of preparation of the given decision, Apple Rus Ltd. published on the Russian version of the Apple website a press release stating the following: *“iPhone 7 and iPhone 7 Plus in “gold rose”, silver and gold colours, as well as in a new black colour with memories 32GB, 128GB and 256GB will be available at a price from 56,990 roubles on the Apple.com/ru website. Models in the body of new “black onyx” colour with a memory of 128GB and 256GB will be xclusively available on the Apple.com/ru website, at authorised resellers of Apple and at some mobile network operators (prices may differ)”.* This fact is fixed in the protocol on inspection of the Internet website (page, source) of February 13, 2017 No. 5-17²⁸.

Thus, press releases of Apple Rus Ltd. published in 2016 before the issue of such Apple smartphones' models as iPhone SE, iPhone 7 and iPhone 7 Plus did not include information on all the prices for new models of smartphones, depending on the volume of memory in the frame of retail sale in general, as it had been with press releases on earlier models of smartphones, but included the information only on the price of the least expensive model which could be acquired in the Apple Online Store. In the Commission's opinion, such a change of approach of Apple Rus Ltd. to publication of prices on new models of smartphones which has less impact on retail prices could be caused by the investigation of the FAS Russia initiated in the end of 2015.

According to the letters of Apple Rus Ltd. of February 18, 2016, unnumbered (FAS Russia's ref. of February 18, 2016 No. 21733/16)²⁹ and of March 24, 2016, unnumbered

27 V. 1 part 3 pp. 1-15.

28 V. 1 part 3 pp. 1-15.

29 V. 2 part 2 p. 1.

(FAS Russia's ref. of March 24, 2016 No. 39089/16)³⁰ the prices which were stated by the entity in the press releases were defined by Apple Inc. “*on a global scale*” and were intended to sale of Apple iPhone smartphones through the Apple Online Store in the Russian Federation.

Apple Inc. fixes a wholesale price for each item of the Apple iPhone product range. Wholesale price is the price at which a reseller, including distributors, buys Apple iPhone smartphones. While determining a wholesale price the following facts are being taken into account by Apple Inc.: the level of prices of previous models of Apple iPhone smartphones, costs of Apple Inc. and forecast return, prices on competitors' smartphones, as well as functions and features offered in a new Apple iPhone model. Apple Inc. follows the same principles and takes into consideration the same factors while setting wholesale prices on all the models and items of the Apple iPhone smartphones' range.

For the purpose of ensuring stability of consumer prices on Apple iPhone smartphones in the world the wholesale Apple price on iPhone outside the United States of America is determined exclusively by Apple Inc. and is based on wholesale prices for the United States of America. This principle also applies to the wholesale prices for Apple iPhone smartphones in the Russian Federation.

According to the letter from Apple Rus Ltd. of March 24, 2016 this company does not participate in any way in determining wholesale prices for the Russian market.

Wholesale prices for the United States of America are determined by the financial department of Apple Inc. This department is also responsible for local price adjustments referred to above in other countries, after which the prices are approved by the top management of Apple Inc.

Apple Inc. fixes retail prices on all its products sold via the Apple Online Store and through its Apple retail stores. In the Russian Federation Apple Rus Ltd. sells products directly to Russian consumers via the Apple Online Store. Apple Inc. fixes retail prices for its products in the Apple Online Store in the Russian Federation (and in all other countries

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where Apple online stores or Apple retail facilities exist). Such factors as VAT, other taxes and duties and a good wholesale price for for the Russian Federation are taken into account for determining retail prices. The price is defined by the financial department of Apple Inc. and is approved by the top management of Apple Inc. Apple Rus Ltd. is not responsible for determining prices for the products in the Apple Online Store in Russia.

Usually the prices determined by Apple Inc. are communicated to Apple Rus Ltd. via e-mail.

When announcing issue of new products, the Apple group of companies issues a press release in which a price for a good sold via the Apple Online Store or Apple retail stores is stated. As stated in the letter from Apple Rus Ltd., such a price list price is the price set by Apple and is not aimed at fixing prices of resale or retail for resellers of Apple products. Apple Inc. expects resellers to fix retail prices on Apple products independently.

Thus, retail prices for Apple iPhone smartphones provided in press releases published by Apple Rus Ltd. were determined by Apple Inc. and communicated to Apple Rus Ltd. and were aimed at sales via the Apple Online Store in the Russian Federation.

The FAS Russia's Commission notes that publication of recommended retail prices by an authorised distributor (provision of these prices by other means, including by sending to resellers via e-mail) for example, with the purpose of price positioning of products for retail, can not be admitted an unlawful coordination of economic activity, unless a mechanism allowing to ensure compliance with the recommended prices exists, and unless consequences envisaged by the Law on Protection of Competition took place. However, in the considered case, in the FAS Russia's opinion such a mechanism existed, which is proven by the electronic communication provided below, as well as by specific provisions of contracts of Apple Rus Ltd. with the resellers of Apple iPhone smartphones, and consequences envisaged by the first paragraph of Part 1 Article 11 of the Law on Protection of Competition occurred.

As the FAS Russia's Commission established, after the issue of each new model of Apple iPhone smartphones the majority of resellers acting (having acted) on the

considered market fixed the same retail prices for smartphones provided in the press releases published by Apple Rus Ltd. of October 9, 2013, of September 9, 2014 and of September 28, 2015.

The analysis of information on some retail prices on Apple iPhone smartphones carried out by the FAS Russia demonstrated the following.

At the beginning of sales of each new model of Apple iPhone smartphones the majority of resellers participating in the considered case during a limited period of time fixed and maintained the same retail prices for smartphones which coincided with prices from the press releases published by Apple Rus Ltd. while allowing insignificant differences that as a rule did not exceed 9 roubles.

To demonstrate, since the beginning of official sales of Apple iPhone 5s and iPhone 5c smartphones the following retail prices were fixed by nine authorised resellers competing in the considered commodity market and participating in the considered case:

- for iPhone 5s (16GB): 29,989 roubles, 29,990 roubles, 29,999 roubles;
- for iPhone 5s (32GB): 34,990 roubles, 34,999 roubles;
- for iPhone 5s (64GB): 39,990 roubles, 39,999 roubles;
- for iPhone 5c (16GB): 24,989 roubles, 24,990 roubles, 24,999 roubles;
- for iPhone 5c (32GB): 29,989 roubles, 29,990 roubles, 29,999 roubles.

The majority of authorised resellers maintained the given prices from two to three months.

Besides, the FAS Russia established that during the same period of time a decrease in prices by resellers to the same level took place. For instance, in September 2014 the prices for smartphones iPhone 5s with 16GB and iPhone 5s with 32GB were decreased by eight and seven out of nine authorised resellers to the level of 24,990 roubles, 24,999 roubles (iPhone 5s with 16GB) and 27,490 roubles, 27,499 roubles (iPhone 5s with 32GB) respectively.

At the moment of the issue of Apple iPhone 6 and iPhone 6 Plus smartphones nine

resellers participating in the considered case established the following retail prices:

- for iPhone 6 16GB: 31,990 roubles, 31,991 roubles;
- for iPhone 6 64GB: 36,990 roubles;
- for iPhone 6 128GB: 41,990 roubles;
- for iPhone 6 Plus 16GB: 36,990 roubles, 36,992 roubles;
- for iPhone 6 Plus 64GB: 41,990 roubles, 41,991 roubles;
- for iPhone 6 Plus 128GB: 46,990 roubles.

The resellers maintained the listed prices during two months – until the end of November 2014, when the prices were raised by the Apple Online Store. Then, approximately until mid-December the prices established for the Apple iPhone 6 and iPhone 6 Plus smartphones were the same for eight out of nine resellers and coincided with the prices of the Apple Online Store:

- for iPhone 6 16GB: 39,990 roubles, 39,998 roubles;
- for iPhone 6 64GB: 46,990 roubles, 46,998 roubles;
- for iPhone 6 128GB: 52,990 roubles, 52,999 roubles;
- for iPhone 6 Plus 16GB: 46,990 roubles, 46,998 roubles;
- for iPhone 6 Plus 64GB: 52,990 roubles;
- for iPhone 6 Plus 128GB: 58,990 roubles.

After the beginning of the official sales of the models of Apple smartphones iPhone 6s and iPhone 6s Plus nine authorised resellers participating in the considered case set the following retail prices:

- for iPhone 6s с памятью 16 ГБ: 56 989 руб., 56 990 руб., 56 998 руб., 56 999 руб.;
- for iPhone 6s 64GB: 65,989 roubles, 65,990 roubles, 65,999 roubles;
- for iPhone 6s 128GB: 74,989 roubles, 74,990 roubles, 74,999 roubles;
- for iPhone 6s Plus 16GB: 65,989 roubles, 65,990 roubles, 65,999 roubles;
- for iPhone 6s Plus 64GB: 74,989 roubles, 74,990 roubles, 74,999 roubles;
- for iPhone 6s Plus 128 ГБGB: 83,989 roubles, 83,990 roubles, 83,999 roubles.

The listed retail prices coincided with the prices provided in the Apple press release of September 28, 2015, and were the same at least during 1.5 – 2 months after the start of the official sales of smartphones iPhone 6s and iPhone 6s Plus for all the nine resellers.

At the beginning of the sales of Apple iPhone SE smartphones the majority of resellers fixed the following retail prices:

- for iPhone SE 16GB: 37,990 roubles, 37,999 roubles;
- for iPhone SE 64GB: 47,990 roubles, 47,999 roubles.

The listed retail prices were maintained by resellers during two-three months after the start of the official sales.

After the issue of the last models of Apple smartphones as of the moment of preparation of the given decision – iPhone 7 and iPhone 7 Plus – the nine authorised resellers participating in the case established the following retail prices coinciding with the prices of the Apple Online Store:

- for iPhone 7 32GB: 56,990 roubles, 56,999 roubles ;
- for iPhone 7 128GB: 65,990 roubles, 65,999 roubles;
- for iPhone 7 256GB: 74,990 roubles, 74,999 roubles;
- for iPhone 7 Plus 32GB: 67,990 roubles, 67,999 roubles;
- for iPhone 7 Plus 128GB: 76,990 roubles, 76,999 roubles;
- for iPhone 7 Plus 256GB: 85,990 roubles, 85,999 roubles.

All the listed above demonstrates that when each new models of Apple iPhone smartphones are issued on the Russian market, the majority of authorised resellers participating in the considered case established and maintained the same retail prices for smartphones which coincided with the prices from the press releases published by Apple Rus Ltd. (with the prices of the Apple Online Store) while allowing insignificant fluctuation that as a rule did not exceed 9 roubles.

The Commission also points out that an increased demand for new models of smartphones often exceeding the supply could influence the establishment of retail prices

by resellers at the start of sales.

At the same time, after approximately three months after the issue of each new model of Apple iPhone smartphones to the market, the degree of differentiation of retail prices set by the resellers on these smartphones increased.

As the FAS Russia's Commission established, the resellers' mechanisms of price-setting differ.

For instance, in accordance with the letter of one of the resellers (FAS Russia's ref. of December 23, 2015 No. 152143-ДСП/15)³¹ this economic entity takes into account the following factors when determining retail prices for smartphones:

- purchase prices;
- costs on advertisement;
- costs on storage, warehouse operations, logistics and other costs related to the supply of equipment and its delivery to the point of sale;
- the expected good's turnover taken into account the experience of selling previous models of Apple iPhone smartphones;
- current warehouse stocks of the range of equipment of this kind;
- administrative, technical and other indirect costs arising due to retail sale of equipment.

At the same time, the costs listed above are taken into account integrally and do not affect the price of a smartphone in a particular shop: the prices on identical models of the Apple equipment in resellers' retail chains are the same in all the regions of the Russian Federation.

According to the letter of another resellers (FAS Russia's ref. of December 10, 2015 No. 144769-ДСП/15)³², this company also takes into account the transportation to the regions in total, while establishing the same prices for smartphones in the chain in all the regions of the Russian Federation. Besides, the letter specifies that the maximum price for

31 V. 7 pp. 1-107.

32 V. 8 part 1 pp. 1-152.

Apple iPhone smartphones depends on the demand for these smartphones. The costs on buying and selling smartphones and rentability define its minimum price. A considerable influence on the price of a smartphone is exercised by its quality, the behaviour of competitors, as well as elasticity of demand.

One of the resellers added in his letter (FAS Russia's ref. of February 1, 2015 No. 139504/15)³³ that he uses to different approaches to establishing the price for products. The first approach implies using the system of surcharges (for smartphones a surcharge constitutes 5-15%). The second approach implies using the programs that calculate a recommended prices based on the results of analysis of the competitors' prices (an average market price). The costs of transportation of goods to different regions of the Russian Federation does not influence directly the smartphones' retail prices.

Another reseller told that when determining retail prices for smartphones, he does not take into account the costs of transportation to the regions of the Russian Federation (FAS Russia's ref. of January 22, 2016 No. 7436/16)³⁴. At this company, the following factors exert influence on prices: the consumers' demand for different models and prices for analogous models of smartphones offered by the competitors, including the prices of the Apple Online Store.

In accordance with the letter from ServiceTrade Ltd. of November 23, 2015, unnumbered (FAS Russia's ref. of November 30, 2015 No. 138274/15)³⁵ the price for iPhone 6s and iPhone 6s Plus smartphones is formed in accordance with the price list from Apple, while the costs of transportation to different regions are not taken into account.

According to the letter of one of the resellers (FAS Russia's ref. of November 30, 2015 No. 138526-ДСП/15)³⁶, the key condition influencing the prices for smartphones in his retail chain is the good's purchase price. The final price also includes a retail surcharge. Transportation costs to the shops, similarly to other companies, do not affect directly the

33 V. 12 part 1 pp. 1-3

34 V. 11 part 1 pp. 1-2.

35 V. 15 pp. 1-191.

36 V. 14 part 1 pp. 1-52.

prices for smartphones.

Thus, the factors taken into account by resellers while determining prices for smartphones differ, but despite the differences of price-setting mechanisms described above, the retail prices for Apple iPhone smartphones coincided for the majority of resellers since the beginning of official sales of all the considered models of smartphones.

Besides, the analysis of the answers of Apple Rus Ltd., distributors and resellers provided on the FAS Russia's requests demonstrated that the prices at which the resellers purchase smartphones from Apple Rus Ltd. and distributors differed³⁷. Thus, for instance, the purchase prices for the Apple iPhone 6s 16GB and iPhone 6s Plus 128GB smartphones after the start of sales varied depending on a seller from 49,866 roubles to 54,825 roubles and from 73,491 roubles to 79,790 roubles respectively.

Also the FAS Russia established that the employers of Apple Rus Ltd. sent price lists and the text of the press release of September 28, 2015 with retail prices for smartphones to some authorised resellers purchasing smartphones both from Apple Rus Ltd. and distributors from e-mail addresses with the domain name apple.com.

The FAS Russia established that starting from September 11, 2014 the Apple price list of September 9, 2014 was sent to some authorised resellers purchasing smartphones from Apple Rus Ltd. and distributors from the addresses with the domain name apple.com; it included the following retail prices for Apple iPhone 5s smartphones: 24,990 roubles for the 16GB model and 27,490 roubles for the 32GB model.

The retail prices from the Apple price list of September 9, 2014 provided above were included to the Apple press release of September 9, 2014 published before the issue of Apple iPhone 6 and iPhone 6 Plus smartphones: "iPhone 5s will be available in Russia at the price of 24,990 roubles (21,177.97 roubles without VAT) for the 16GB model and 27,490 roubles (23,296.61 roubles without VAT) for the 32GB model", which is fixed in the protocol on inspection of the Internet website (page, resource) of February 13, 2017

³⁷ In the given conclusion, the full information on purchase prices for resellers is not provided due to the fact that the majority of entities possessing the information established the regime of confidentiality in this information's regard.

No. 5-17³⁸.

The case's materials demonstrate that at the end of September 2014, i.e. after the publication by Apple Rus Ltd. of the above-mentioned press release of September 9, 2014 and sending the price list of September 9, 2014 the prices for 16GB and 32GB iPhone 5s smartphones decreased for eight and seven out of nine authorised resellers to 24,990 roubles, 24,999 roubles (16GB iPhone 5s) and 27,490 roubles, 27,499 roubles (32 GB iPhone 5s) respectively.

Also Apple Rus Ltd. from November 24, 2014 to November 26, 2014 sent the price list with the prices for all the Apple products to some authorised resellers purchasing smartphones from Apple Rus Ltd. and distributors. This price list contained the following retail prices for Apple iPhone 6 and iPhone 6s smartphones: 39,990 roubles for 16GB iPhone 6, 46,990 roubles for 64GB iPhone 6, 52,990 roubles for 128GB iPhone 6, 46,990 for 16GB iPhone 6 Plus, 52,990 roubles for 64GB iPhone 6 Plus, 58,990 roubles for 128GB iPhone 6 Plus.

As follows from the case's materials, during the period from November 25, 2014 to December 4, 2014, i.e. after sending the price list by Apple Rus Ltd., eight authorised resellers participating in the case fixed retail prices for iPhone 6 and iPhone 6 Plus smartphones corresponding to the recommended prices of the Apple price list (with differences not exceeding 9 roubles).

Besides, answers from some resellers to the FAS Russia's request of March 4, 2016 No. KA/13875/16 contained as attachment copies of a number of letters with the text of the Apple press release of September 28, 2015 with the prices for Apple iPhone 6s and iPhone 6s Plus smartphones sent on the same day from the e-mail addresses with the domain name apple.com to employees of these resellers (FAS Russia's ref. of March 30, 2016 no. 41622/16³⁹; of December 23, 2015 No. 152143-ДСП/15⁴⁰).

The attachment to the letter from ServiceTrade Ltd. of March 22, 2016 No. 2 (FAS

38 V. 1 part 3 pp. 1-15.

39 V. 11 part 1 pp. 10-32.

40 V. 7 pp. 1-107.

Russia's ref. of March 28, 2016 No. 40414/16)⁴¹ as well as attachments to letters from other resellers contain copies of the letters sent on October 1, 2015 from the e-mail addresses with the domain name apple.com to employees of these resellers with the Apple price list of September 22, 2015 relating to all the Apple products including new models of iPhone 6s and iPhone 6s Plus smartphones.

As it has been noted in the given decision, since the start of official sales of Apple iPhone 6s and iPhone 6s Plus smartphones ten authorised resellers participating in the case established retail prices for these smartphones corresponding to the prices from the Apple press release of September 28, 2015 that the price list of September 22, 2015 also contained.

According to the letter from Apple Rus Ltd. of March 24, 2016, unnumbered (FAS Russia's ref. of March 24, 2016 No. 39089/16)⁴², the e-mail addresses with the domain name apple.com belong to Apple Inc., and employees of all the companies included to the international group Apple use the e-mail addresses with the domain name apple.com.

Besides, the results of the analysis of the communication between the resellers and Apple Rus Ltd. and other companies of the Apple group allowed the FAS Russia to establish that certain employees of Apple Rus Ltd. exercised control over the prices set by the resellers for Apple iPhone smartphones (including after receiving "reports" on the prices of competitors determined by the partners of Apple Rus Ltd.), and in case of setting "inappropriate" prices they exerted influence on resellers with the purpose of changing those prices.

In particular, there is evidence that some resellers were subjects to such behaviour by some employees of Apple Rus Ltd.

The letter sent on April 18, 2014 from a corporate e-mail address of one of the resellers states the following: "*The violations of Apple RRP^s⁴³ as of April 18, 2014 are attached*". The answer to this letter sent on April 18, 2014 from an e-mail address with the

41 V. 15 p. 196-243.

42 V. 2 part 2 pp. 70-72.

43 RRP^s means recommended retail prices.

domain name apple.com states: *“Thanks for the prompt field report, we have started to actively monitor the violators”*.

The letter sent in October 2014 from an e-mail address with the domain name apple.com contains the following information: *“We monitor all the big partners, now we adjust [reseller's commercial name] 5c and [reseller's commercial name] 5s 16 in one region”*.

A letter sent on October 13, 2014 from a corporate e-mail address of one of the resellers contains: *“The monitoring of competitors' prices is attached. The partners “play” with prices again. At the last meeting you told that you would stop such “playing” at grassroots level, as now in your hands there is a very powerful “instrument” for that in the form of supplies of the new model. Are your words still in force?”*. The answer to this letter was sent on October 13, 2014 from an e-mail address with the domain name apple.com: *“We will check everything tomorrow”*.

The letter sent in May 2014 by an employee of one of the resellers to the e-mail addresses with the domain name apple.com contains a request to allow to decrease the prices for Apple iPhone smartphones in the online store due to the facts that this reseller's prices for equipment in the online store are lower than in the retail chain in accordance with the established sales policy. In addition, the letter confirms readiness to maintain the recommended retail prices of Apple Rus Ltd. in the retail chain' shops.

The correspondence between employees of one of the resellers conducted in April – June 2015 provides evidence on the situation where the prices for Apple products set in the retail chain of one of the resellers were lower than those set by other economic entities acting on the market. Due to this reason, negotiations were conducted between the representatives of Apple Rus Ltd. and the reseller's top management who has established the low prices, with the purpose of increasing the prices, however the resellers did not change the prices. During the mentioned period of time (April – June 2015) on the Apple Rus Ltd.'s request the distributors did not deliver Apple products to this resellers. In June representatives of Apple Rus Ltd. convinced the reseller's top management to increase

retail prices on Apple products. Also according to the correspondence Apple Rus Ltd. addressed other market participants demanding to set prices for Apple iPhone 5s and iPhone 6 smartphones not below the level established by the above-mentioned reseller after the increase of price by him.

The letter sent in September 2014 from the e-mail address with the domain name apple.com to the employees of one of the resellers states the following: *“Please tell what is such a decrease in price for iPhone 5s in Krasnodar is connected to? ALP⁴⁴ is 28,990. Please correct it»* (followed by the screenshot of a page of the reseller's website with the prices on the mentioned iPhone model).

The letter sent in September 2014 from an e-mail address with the domain name apple.com to an employee of one of the resellers contains the following information: *“iPhone 5S – we have already corrected, 4s – still in process. By the way at yours in Krasnodar on 5s – 26,000, will you correct?”*.

The letter sent on October 17, 2015 from a corporate e-mail address of one of the resellers includes the following information: *“Pay attention to the average market price on 6 16GB – it is considerably lower than RRP. Possibly it is a little bit lower due to loan sale, but not to such an extent – someone big sells them with a discount of 1000-2000 roubles”*. The answer to this letter sent on October 17, 2014 from an e-mail address with the domain name apple.com includes: *“Thank you for the signal on RRP”*.

The letter sent in October 2014 from an e-mail address with the domain name apple.com to an employee of one of the resellers states: *“I would like to ask, although I have written almost to all the shops already, but it would be great if you could influence the shops from your part as well. They maintain the prices somehow lower than it is desired for iPhone 4s 13,990, iPhone 5s (24,990). The shops: [list of location addresses of some reseller's retail facilities] (followed by screenshots with the prices on the mentioned iPhone models in the named shops)”*.

As the Commission established based on the information on prices provided by the

⁴⁴ ALP means Apple list prices (retail prices indicated in Apple Rus Ltd. price lists).

reseller – addressee of the letter above, the price for Apple iPhone 5s smartphones was indeed increased by the reseller from 23,999 roubles to 24,999 roubles at the retail shop mentioned in the above letter after its receipt.

The letter sent on July 22, 2015 to employees of one of the resellers from an e-mail with the domain name apple.com contains the following text: *“It's short, sharp shock (followed by a screenshot of this reseller's web-page with the information on a decreased price for 16GB Apple iPhone 6 smartphone: 43,690 roubles instead of 45,989 roubles)”*⁴⁵.

The letter sent on October 22, 2015 by an employee of one of the resellers to an e-mail address with the domain name apple.com states: *“A very urgent question: can we use in a visual layout “guaranty of the best price”?”*. The answer to this letter sent from an e-mail address with the domain name apple.com of October 22, 2015 contains the following: *“No, there shouldn't be such a stamp in the layout. The price for iPhone 6s is the same for everyone”*⁴⁶.

The FAS Russia's Commission established that all the correspondence provided above was made via the e-mail addressed attributed to the employees of Apple Rus Ltd.

Thus, judging from the provided correspondence between Apple Rus Ltd. and the resellers, Apple Rus Ltd. monitored (on its own or with the use of the “reports” from resellers on prices of their competitors) retail prices for Apple iPhone smartphones fixed by resellers in online stores and retail shops in different regions and average market prices, due to which the employees of Apple Rus Ltd. sent e-mails to resellers demanding to change prices.

The provided correspondence demonstrates on the one hand the resellers' intention to compete by reducing prices for Apple iPhone smartphones and on the other hand the limitation of possibility to compete with Apple Rus Ltd. In this regard, in case of absence of coordination of the resellers' economic activity by Apple Rus Ltd. the degree of differentiation set by the resellers for Apple iPhone smartphones could have been higher.

It is also worth noting that according to the Commission the possibility of Apple

45 V. 13 part 2 pp. 3-4 (electronic media storage).

46 V. 13 part 2 pp. 3-4 (electronic media storage).

Rus Ltd. to control setting and maintaining retail prices for the smartphones is caused by the presence of conditions that can be considered as unfavourable for resellers and can also force the resellers to comply with the recommended retail prices established by Apple Inc. for the Apple Online Store in contracts concluded between Apple Rus Ltd. and authorised resellers with regard to Apple iPhone smartphones. In particular, the contracts of Apple Rus Ltd. with both direct and indirect resellers contain the following condition:

17.3. *“This Contract can be breached by either of the Parties at any moment without any grounds (i.e., due to any reasons or without reasons) through provision of a relevant written notification to the other Party 60 days before”*⁴⁷.

At the same time, as the FAS Russia's Commission established, the contracts of Apple Rus Ltd. with the direct resellers – mobile network operators do not envisage the right to breach the contract on the mobile network operator's initiative:

18.3. *«Apple may breach the given Contract on any grounds or without reasons by providing the Mobile Network Operator with a written notification not less than 60 days before”*.

Also the contracts of Apple Rus Ltd. with the direct resellers contain the following conditions:

8.3. *«Any order made to Apple should be formally accepted by Apple, and Apple may refuse an order, completely or partially, on any grounds. <...> Apple is entitled to annul any accepted order before its delivery”*⁴⁸.

8.5. *«Apple may exercise partial delivering of Dealer's orders without any responsibility for failure to deliver orders in the full volume or for any delays of deliveries”*⁴⁹.

Thus, the contracts with Apple Rus Ltd. contain the conditions allowing to Apple Rus Ltd. or a reseller – not a mobile network operator – to breach the contract by a unilateral action on any grounds and without reasons through provision of a written

47 V. 2, part 3 p. 164.

48 V. 2 part 3 p. 177.

49 V. 2 part 3 p. 177.

notification to the partner. In addition, in accordance with direct contracts concluded by Apple Rus Ltd. this company is entitled to fully or partially refuse or annul a partner's order.

Despite the fact that authorised resellers – not mobile network operators – have a right to breach the contract with Apple Rus Ltd. at any moment without any grounds, according to the Commission, the listed contracts' provisions could be used by Apple Rus Ltd. while forcing the resellers to change prices.

Legal qualification.

The provided factual circumstances are as follows:

– in 2013, Apple Rus Ltd. started to perform economic activity (importing smartphones, wholesale, retail through the Apple Online Store, appointing authorised resellers of the smartphones), due to which the scheme of smartphones sale changed, and Apple Rus Ltd. focused on all the primary sales, which has allowed the company to coordinate the economic activity of resellers;

– before the issue of each new model of Apple iPhone smartphones the retail prices were determined by Apple Inc. for selling through the Apple Online Store in Russia and were communicated to Apple Rus Ltd. which retailed via this Store, after which Apple Rus Ltd. published press releases with the information on all the prices for new models of smartphones (except press releases on Apple iPhone SE, iPhone 7 and iPhone 7 Plus models);

– before the start of sales of each new model of Apple iPhone smartphones the majority of resellers established and maintained during a limited period of time the same retail prices which coincided with the prices from press releases published by Apple Rus Ltd. (with the prices from the Apple Online Store) while allowing insignificant difference that did not exceed 9 roubles as a rule;

– price lists and the text of a press release of September 28, 2015 with the retail prices for smartphones were sent to some resellers purchasing smartphones both from

Apple Rus Ltd. and from the distributors from the e-mail addresses with the domain name apple.com possessed by Apple Inc.;

– after sending the price lists with the retail prices for Apple iPhone smartphones by the employees of Apple Rus Ltd. there were cases of decrease and / or increase of prices by the resellers at the same period of time to the same level;

– the prices for Apple iPhone smartphones at which the resellers purchased (purchase) these smartphones from Apple Rus Ltd. and distributors differed (differ);

– the price-setting mechanisms of resellers differ, while determining the price different factors (costs of transportation to the regions, marketing costs, other costs relating to retail trade, forecast sale volumes etc.) are taken into consideration;

– in some cases Apple Rus Ltd. exercised control over the prices (including after receiving the “reports” on competitors' prices prepared by the partners of Apple Rus Ltd.) fixed by the resellers for Apple iPhone smartphones, and in case of setting an “inappropriate” price Apple Rus Ltd. exerted influence on resellers with the purpose of changing the prices;

– the conditions of both direct and indirect contracts of Apple Rus Ltd. concerning purchase and resale of Apple iPhone smartphones could be used with the purpose of forcing the resellers to comply with the recommended retail prices (the conditions on unilateral breach of contract, annulment of an order made by the partner).

At the same time, the FAS Russia's Commission does not possess sufficient evidence on unlawful coordination of economic activities of Apple iPhone smartphones' resellers concerning Apple iPhone SE, iPhone 7 and iPhone 7 Plus models as it was not proved that prices for the mentioned models had been maintained during the periods of time analogous to those in relation to which which the Commission reached a conclusion based on the examination of retail prices for other Apple iPhone smartphones' models ((iPhone 5s, iPhone 5c, iPhone 6, iPhone 6 Plus, iPhone 6s and iPhone 6s Plus).

In addition, as it had been previously noted, 2016 Apple Rus Ltd. changed its practice of publication of press releases on the issue of new models of Apple iPhone

smartphones regarding the provision of retail prices for these smartphones. Apple Rus Ltd.'s press releases published before the issue of Apple iPhone SE, iPhone 7 and iPhone 7 Plus did not include the information on prices for the new smartphones' models and related only to the Apple Online Store's prices in contrast to the press releases on previous smartphones' models.

Thus, the subject of coordination of the resellers' economic activities were all the Apple iPhone smartphones' models that entered into Russian markets during the period from October 25, 2013 to April 4, 2016: iPhone 5s, iPhone 5c, iPhone 6, iPhone 6 Plus, iPhone 6s and iPhone 6s Plus.

According to Part 5 Article 11 of the Law on Protection of Competition, physical persons, commercial organisation and non-commercial organisations are prohibited from exercising coordination of economic activity of economic entites, if such coordination leads to any of the consequences described in Parts 1 – 3 Article 11 of the Law on Protection of Competition that can not be considered as permissible in accordance with Articles 12 and 13 of the Law on Protection of Competition and not envisaged by federal laws.

In accordance with Part 18 Article 4 of the Law on Protection of Competition, the coordination of economic activity – coordinating actions of economic activity by the third party not belonging to the same group with none of such economic entities and not acting on a commodity market on which the coordination of actions of economic activity takes place. The actions of economic entities exercised in the framework of “vertical” agreements are not considered as coordination of economic activity.

In accordance with Guidance No. 2 of the FAS Russia's Presidium approved by the protocol of the FAS Russia's Presidium of February 17, 2016 No. 3, “vertical” agreements are implemented through civil legal contracts whose subject implies transfer of a good from one entity to another (contract of purchase, contract of delivery, dealer contracts, distribution contracts and other agreements). Civil legal contracts or agreements that do not imply transfer of a good from one entity to another can not be considered as “vertical”

agreements.

Actions of Apple Rus Ltd. can not be classified as actions performed in the framework of vertical agreements because distribution of price lists, press releases with the prices for Apple iPhone smartphones as well as the letters whose purpose was to change the resellers' prices were performed by Apple Rus employees not only in relation to retailers purchasing smartphones directly from that company but also in relation to the resellers purchasing smartphones from distributors.

The issues described above demonstrate that Apple Rus Ltd. from October 25, 2013 to January 1, 2017 coordinated the economic activities of the resellers of Apple iPhone smartphones (Apple iPhone 5s, iPhone 5c, iPhone 6, iPhone 6 Plus, iPhone 6s and iPhone 6s Plus models).

The Commission established that the coordination of economic activity of resellers by Apple Rus Ltd. included in total the following elements:

– sending price lists and press releases with the retail prices on Apple iPhone smartphones to the resellers purchasing smartphones both from Apple Rus Ltd. and distributors, from e-mail addresses with the domain name apple.com;

– in some cases the exercise of control by Apple Rus Ltd. over the prices (including after receiving the “reports” on competitors' prices established by the partners of Apple Rus Ltd.) established by the resellers for Apple iPhone smartphones through sending e-mails with the purpose of changing those prices;

– presence of different provisions that could be used for forcing the resellers to comply with the recommended retail prices in both direct and indirect contracts with Apple Rus Ltd. on purchase and sale of Apple iPhone smartphones (conditions on unilateral breach of a contract, annulment of a partner's order).

In the case considered by the Commission the exercise of coordination of economic activity of resellers of Apple iPhone smartphones has led to the establishment and maintenance of prices (the consequence envisaged by the first

paragraph of Part 1 Article 11 of the Law on Protection Competition) on the market of Apple iPhone smartphones (Apple iPhone 5s, iPhone 5c, iPhone 6, iPhone 6 Plus, iPhone 6s and iPhone 6s Plus models) retailed with the use of retail facilities.

The Commission also considers it necessary to point out that as the materials of the case demonstrate the Defendants are guided in their activities by the policy in relation to the antimonopoly legislation developed by Apple Inc. which describes the antimonopoly risks and rules of conduct of the employees of Apple as well as established the approach towards antimonopoly compliance⁵⁰.

However, according to the Commission, presence of the antimonopoly policy at Apple Rus Ltd. has not ensured the respect of the requirements of the antimonopoly legislation of the Russian Federation by this company.

Apple Rus Ltd. is responsible for its employees' actions. Thus, Apple Rus Ltd. coordinated the economic activities of resellers of Apple iPhone smartphones, as Apple Rus Ltd. has not undertaken all the measures to ensure the compliance of its employees with the rules and norms established by the Law on Protection of Competition, nevertheless the company was capable of it.

The FAS Russia does not possess enough evidence on the coordination of economic activity of resellers by the other defendants.

Defining prices for selling Apple iPhone smartphones in the Apple Online Store in the Russian Federation and possessing the e-mail addresses with the domain name apple.com by Apple Inc. does not provide evidence on the coordination of economic activity of resellers of Apple iPhone smartphones by Apple Inc. because the administration of the Russian version of the Apple website was (is) exercised by Apple Rus Ltd, and the distribution of price lists, press releases and letters with the purpose of changing the established prices by Apple iPhone smartphones' resellers was also performed by the employees of Apple Rus Ltd.

⁵⁰ V. part 3 p. 206-283; V. 3 pp. 310-324.

There is also not enough evidence proving the coordination of economic activity of the Russian resellers of Apple iPhone smartphones by Apple Holding B.V., Apple Sales Ireland, Apple Operations International.

Based on Article 48.1 of the Law on Protection of Competition the factual and other circumstances of the case provided above and evidence were listed in the conclusion on circumstances on the case, where the FAS Russia's Commission reached conclusions on:

- 1) necessity to classify the actions of Apple Rus Ltd. in accordance with Part 5 Article 11 of the Law on Protection of Competition;
- 2) absence of signs of violation of Part 5 Article 11 of the Law on Protection of Competition in the actions of Apple Holding B.V., Apple Sales Ireland, Apple Operations International, Apple Inc..

On March 14, 2017 Apple Rus Ltd. (FAS Russia's ref. of March 14, 2017 No. 36513-ДЦП/17; of March 14, 2017 No. 36515/17)⁵¹ provided explanations regarding the circumstances of the cases described in the conclusion mentioned above.

Apple Rus Ltd. provides its own assessment of the circumstances described in the conclusion, however these explanations do not refute the FAS Russia's conclusions on violation of Part 5 Article 11 of the Law on Protection of Competition by this company.

According to Apple Rus Ltd., the practice of placement of press releases on the economic entity's website with the prices for new products, distribution of price lists to resellers by Apple Rus Ltd. with the provision of *inter alia* retail prices for products as well as the possibility of Apple Rus Ltd. to unilaterally breach contracts or decline orders of products do not prove the anticompetitive coordination.

However, in the considered case the violation of Part 5 Article 11 of the Law on Protection of Competition was established by the FAS Russia's Commission based on the integrity of evidences.

Besides, the explanations provided by Apple Rus Ltd. contained the description of

51 V. 1 part 3 pp. 90-95; V. 2 part 3 pp. 284-341.

actions on strengthening and increasing the quality of the antimonopoly compliance measures undertaken by Apple Rus Ltd. due to the consideration of the given case on violation of the antimonopoly legislation.

As it follows from the explanations, Apple Rus Ltd. has decided:

- to adopt a more detailed policy of antimonopoly compliance as a local normative act of Apple Rus Ltd. that would be obligatory for all the Apple Rus Ltd.'s employees;
- to continue holding special trainings on antimonopoly compliance for the Apple Rus Ltd. on an annual basis, with the focus on the rules of communication with resellers;
- to elaborate guidelines on communications with resellers to be used on an every-day basis for the Apple Rus Ltd' employees, with the purpose of increasing importance of strengthened antimonopoly compliance measures;
- to create a new template of messages on prices in the Apple Online Store as a part of press release on issue of a new iPhone smartphone's model;
- to create a new template of messages for resellers containing a link exclusively on DAC⁵² prices (i.e. prices at which resellers buy products from Apple) without mentioning or referencing to ALP prices (i.e. retail prices).

In the Commission's opinion, measures on strengthening and increasing quality of the antimonopoly compliance measures listed above that are planned to be adopted by Apple Rus Ltd. might be efficient for preventing violations of the antimonopoly legislation of the Russian Federation by this entity in the future.

The FAS Russia also received clarifications on circumstances provided in the conclusion on circumstances of the case from Media-Mrkt-Saturn Ltd.⁵³, reStore Ltd.⁵⁴ and Eldorado Ltd.⁵⁵ participating in the case as interested parties.

The clarifications provided by Media-Markt-Saturn Ltd. and reStore Ltd. do not refute the Commission's conclusions on violations of Part 5 Article 11 of the Law on

⁵² DAC means distributor acquisition cost (wholesale prices indicated in Apple Rus Ltd.'s price lists).

⁵³ V. 1 part 3 pp. 83-35.

⁵⁴ V. 1 part 3 pp. 86-89.

⁵⁵ V. 1 part 3 pp. 98-106.

Protection of Competition by Apple Rus Ltd. The mentioned entities support the Commission's findings listed in the conclusion of circumstances of the case and related to the absence of competitive relations between Apple Rus Ltd. and resellers on the considered market; to the factors influencing the establishment of retail prices for Apple iPhone smartphones and other conclusions.

Eldorado Ltd. in its clarifications states that in this entity's opinion the materials of the case lack evidence on negative effects necessary for the classification of Apple Rus Ltd.'s actions in accordance with Part 5 Article 11 of the Law on Protection of Competition; Apple Rus Ltd. did not have “an instrument of influence of a coordinated subject”; the coincidence of retail prices of Apple iPhone smartphones' resellers is the natural process.

The FAS Russia's Commission after having considered the clarifications from Eldorado Ltd. assumes that statements on the absence of the fact of unlawful coordination of the economic activities of Apple iPhone smartphones' resellers by Apple Rus Ltd. can not be proved as it follows from the integrity of evidences provided in the given decision.

Grounds for issuing a prescription to Apple Rus Ltd. on elimination of the violation of the antimonopoly legislation related to the fact of unlawful coordination of the economic activities of Apple iPhone smartphones' resellers are absent due to the termination of such a coordination.

Guided by Article 23, Part 1 Article 39, Parts 1-3 Article 41, Part 1 Article 49 of the Law on Protection of Competition, the FAS Russia's Commission

DECIDED:

1. To admit that the limited liability company Apple Rus (5 Petrovka str., Moscow 107031, INN: 7707767220) has violated Part 5 Article 11 of the Federal Law of July 26, 2006 No. 135-FZ “On Protection of Competition” which took the form of a coordination of economic activities of the Apple iPhone smartphones' resellers, which has led to the

establishment and maintenance of prices for Apple iPhone smartphones (iPhone 5s, iPhone 5c, iPhone 6, iPhone 6 Plus, iPhone 6s and iPhone 6s Plus models).

2. To terminate the consideration of the case in relation to Apple Holding B.V. (Leidseplein 29, Amsterdam, 1017PS, Netherlands; Company code: 08058671), Apple Sales Ireland (Hollyhill Industrial Estate, Hollyhill, Cork, Republic of Ireland; Registration number: 86705), Apple Operations International (Hollyhill Industrial Estate, Hollyhill, Cork, Republic of Ireland; Registration number: 76941), Apple Inc. (1 Infinite Loop, Cupertino, CA 95014, USA; Employer Identification Number: 94-2404110) based on the first paragraph of Part 1 Article 48 of the Law on Protection of Competition due to the absence of the antimonopoly legislation's violation in the actions of these entities.

3. Not to issue a prescription on termination of the violation of the antimonopoly legislation by Apple Rus Ltd. due to the termination of unlawful coordination of the economic activities of Apple iPhone smartphones' resellers.

Chairman of the Commission _____ A.Y. Tsarikovskiy

Members of the Commission: _____ A.V. Molchanov

_____ A.P. Tennishev

_____ D.V. Artyushenko

_____ N.V. Litvinova

_____ A.S. Zemlyanaya

The decision may be appealed at a court of arbitration within three months since the date of its issue.

Note. Article 19.5 of the Code of Administrative Offences of the Russian Federation establishes administrative liability for failure to comply with an antimonopoly body's lawful decision within the established term.

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