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ROUNDTABLE ON PROSECUTING CARTELS WITHOUT DIRECT EVIDENCE OF AGREEMENT

Contribution from the Russian Federation

-- Session II --

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ROUNDTABLE ON PROSECUTING CARTELS WITHOUT DIRECT EVIDENCE OF AGREEMENT

1. The Recent Russian Experience in Prosecuting Cartels without Direct Evidence of Agreement: Methodological Considerations and Practical Cases

1. While preparing its presentation for the Roundtable on prosecuting cartels without direct evidence of agreement the Federal Antimonopoly Service of the Russian Federation (FAS Russia) appreciated the approach contained in the Guidelines for Contributions, specifically its core question on circumstances enabling an antitrust authority to prove the existence of a cartel without direct evidence of agreement. The further explanation of the issue as provided in the Guidelines (whether a country in fact differentiates between hard core cartels and other types of anticompetitive horizontal activity; whether there exists an explicit or implicit definition of hard core cartel conduct; whether one element of that definition is the existence of an explicit agreement among competitors) also presents a good framework for a country specific analysis. Therefore, the FAS Russia' presentation of the issue will start from an analysis of the acting Russian Law "On Competition and Limitation of Monopolistic Activity in Commodities markets" from these positions as well as from review of the relevant parts of the draft Law "On Protection of Competition" currently being prepared and intended to upgrade the effective legislation.

2. In fact, the Russian antitrust legislation does differentiate between hard core cartels and other types of anticompetitive horizontal activity since they are defined separately in the sections 1 and 2 of Article 6 of the Law, though listed by comma: "contracts, other transactions, agreements ... or concerted practices, concluded between economic entities operating on the same commodity market" (Article 6, Section 1), "the conclusion of contracts or concerted practices between economic entities being active on the market of the same commodity (substitutes) that lead or may lead to the prevention, restraint or elimination of competition (Article 6, Section 2)." Thus, the Russian Law contains a definition of hard core cartel conduct, however, the existence of an explicit agreement among competitors is not considered as the only possible evidence of the cartel. In other words, if such evidence is found it would be sufficient for proving the cartel conduct, i.e. a *per se* violation according to the Russian legislation. However, this legislation also leaves a possibility to prove cartel conduct basing on other types of evidence by use of the notion of "concerted practices," i.e. cartel conduct that may not be necessarily based on the relevant documents or even revealed oral agreements between competitors. Thus, proving intentional, conscious, though implicit market sharing or price fixing can be sufficient for proving the cartel conduct, at least in theory. Regardless the presence of the direct evidence of the cartel agreement, the Russian legislation provides for the same sanctions, unless the court declines the economic evidence presented by FAS Russia as sufficient for proving cartel conduct. (The alleged cartel participants should challenge the relevant FAS Russia decision in the court in this case.)

3. The new version of the Law currently being prepared leaves this possibility, as well. Its preparation goes in parallel with the adoption of the amendments to the Russian Federation Code on Administrative Violations aimed to increase sanctions against cartels, i.e. to subject their participants to higher fines than these foreseen for other types of antitrust violations. It will be combined with the introduction of corporate and individual leniency program for cartel "whistle blowers." As such organisation of a cartel is civil and not criminal violation in Russia, though it can be considered as a criminal one in case the individuals involved combine it with actions leading to damage to property, coercion to participate in the cartel and similar activities considered as criminal ones. Failure to service an

administrative penalty (fines) may lead to arrest of corporate and/or individual property and other measures aimed to enforce the relevant FAS Russia or court decision.

4. Therefore, in its enforcement efforts the FAS Russia uses both “smoking gun” and economic evidence for prosecuting cartels. Though, the Russian courts may not be always in a position to consider the latter as sufficient as it happened about one year ago when the court refrained from recognising a cartel in the Russian steel industry basing on purely economic and behavioural evidence.

5. In some core Russian industries like oil, steel, chemicals production and others the supply side of the market can be characterised as tight oligopoly with high concentration ratios and possibility of control over prices and strategies of development of the market by a limited number of dominant companies. The concerted market behaviour of these companies is facilitated by extensive information exchange between the major actors in the course of numerous seminars, “experience exchange” workshops and other similar events. These meetings are rooted in the Soviet tradition of periodical seminars and meetings between representatives of enterprises of the same industry formerly governed by the same ministry, like ex-Soviet Ministry of Steelmaking, Ministry of Chemical Industry, Ministry of Fertiliser Production etc. Under the conditions of limited investments and slow technological change in these industries company managers especially these with Soviet experience of working in the industry are quite well aware of the competitors’ production facilities, spare capacities, competitive advantages and cost functions. Combined with detailed knowledge of the demand side of the market, it provides them with possibility of cartel behaviour even without explicit agreements, though the later are quite likely but yard to reveal.

6. The literature on cartels, including that produced by the OECD, urges that hard core cartels, because of their especially harmful effects, be prosecuted as aggressively as possible and punished by the most severe sanctions available. In our view, this goal is rather furthered than weakened by evidentiary rules that permit cartel prosecutions without evidence of explicit agreement. However, we cannot agree that proving the cartel behaviour basing on economic and behavioural evidence only is a “more lenient evidentiary standard” compared with generating direct evidence of explicit agreement between the cartel participants (see question 7 of the Guidelines for Contributors). Moreover, we believe that the ability of a national antitrust enforcement body to prove the cartel conduct basing on the economic and behavioural evidence and aptitude of courts to consider this type of evidence should be regarded as a sign of maturity of the country’s antitrust system since it is much more complicated than establishing cartel behaviour as a *per se* violation basing on documents, records and other types of the direct evidence.

7. In 2005 FAS Russia has successfully addressed several cartel cases basing on economic and behavioural evidence. Below some examples of these are presented.

8. On June 1, 2005 Krasnodar regional office of FAS Russia established a case against Lukoil-Yougnefteproduct, Rosneft’ – Kuban’nefteproduct and Rosneft’ – Tuapsenefteproduct prosecuting them for violation of Sections 1 and 2 of Article 6 of the Law “On Competition...” by means of fixing wholesale prices for Ai-92 and Ai-95 petrol (analogues of regular and premium types of petrol in the EU) in the territory of Krasnodar region. The case was initiated basing on the analysis of prices for these products for the first 5 months of 2005. The Krasnodar regional office issued a cease and desist order to these companies to cancel price fixing till July 11, 2005 and transfer the illegally received incomes to the Federal Budget. The order was not challenged in the court.

9. On February 8, 2005 the Rostov regional office of FAS Russia received a claim from the Ministry of Industry, Energy and Natural Resources of the Rostov Region and established a case against Rostov subsidiary of Lukoil-Nizhnevolzhsknefteproduct, Interneft’ and Megapolis Plus prosecuting them for a violation of Section 1 of Article 6 of the Law “On Competition...” These companies were accused of price fixing basing on the analysis of their costs and prices for Ai-92 petrol in Rostov-on-Don. While

facing different costs these companies established the same price level for petrol with a minor deviation of less than 0,2% that exceeded the average prices for petrol for the same period. The companies were proscribed to transfer the illegally received incomes to the Federal Budget. Lukoil-Nizhnevolzhsknefteproduct challenged the decision of Rostov regional office of FAS Russia in the local court of arbitration.

10. On May 11, 2005 Khanty-Mansiysk regional office of FAS Russia established the price fixing case against three airline companies: Aeroflot – Russian Airlines, Sibir’ and UTair basing on the claim “Nizhnevartovskoye Aviapredpriyatie” federal government company. The case was based on the analysis of prices and costs for flight Nizhnevartovsk – Moscow – Nizhnevartovsk performed by the companies under consideration. In November-December all three companies established their tariffs for this direction at the same level exceeding the tariff as of May 2005 almost by twice. Meanwhile, these companies face different costs while servicing Nizhnevartovsk – Moscow direction because they use different types of aircrafts and different Moscow airports that lead to different costs per hour of flight and airport service. Additional argument considered by Khanty-Mansiysk regional office of FAS Russia division was that these companies established different tariffs while servicing other directions. Moreover, in the session of the Regional office’s commission the representatives of the companies confirmed that their tariff setting depended on the tariff suggestion of the competitors. The commission decided that the tariff setting of the three companies was concerted and contradicted to Section 1 of Article 6 of the Law “On Competition...,” therefore. The Regional office issued the cease and desist order to the companies that challenged it in the court of arbitration.

11. Basing on the considerations and cases presented above we can suggest a general conclusion that in the absence of the direct evidence of the cartel conduct the properly provided economic and behavioral evidence should be considered as a sufficient proof of this most dangerous type of antitrust violation. Both antitrust agencies and courts should have sufficient skills for presenting and considering it. Moreover, the mere possibility of revealing the cartel conduct basing on economic evidence can preclude companies from it and have a significant prophylactic effect, therefore.