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ROUNDTABLE ON FIDELITY REBATES

-Note by Russian Federation-

15 - 17 June 2016

This document reproduces a written contribution from the Russian Federation submitted for Item 6 of the 125th OECD Competition committee on 15-17 June 2016.

More documents related to this discussion can be found at www.oecd.org/daf/competition/fidelity-rebates.htm

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--THE RUSSIAN FEDERATION--

1. Summary

1. In exercising control over compliance by economic entities with the antimonopoly legislation the FAS Russia has developed a specific approach to the influence of different systems of incentives on competition. It concerns the provision of discounts, bonuses, various rebates, granting by companies to their contractors, distributors, or buyers. As practice of the FAS Russia shows, schemes of application of discounts are widely used by companies with significant market power.

2. In exercising control over the compliance with antimonopoly legislation the FAS Russia pays attention to the fact that the economic entities occupying a dominant position on the market, haven't created conditions for its customers or counterparties, with which they would put in an unequal position to each other, that is not carried out actions aimed at creation of discriminatory conditions for the provision of discounts, including the fact that they didn't established for each customer individually different discount on the same product. Thus, the FAS Russia can recognize fidelity rebates of a dominant economic entity as anticompetitive only in the case if the provision of such rebates is not technologically or economically justified.

3. According to the FAS Russia's practice, in order to reduce antitrust risks the process of working with contractors, as well as commercial terms, on scope of supply, product range, price, payment terms, discounts, bonuses and premiums may be stated in the relevant document (trade policy, price policy, etc.) of an economic entity occupying a dominant position. Development and publication by a company of transparent pricing policy, that is unified for all buyers and includes specific economic, technological or other objective and direct criteria influencing on the price, will reduce the risk of holding liability in case of claims by the FAS Russia.

2. The provisions of the antimonopoly legislation of the Russian Federation on fidelity rebates.

4. There are a number of restrictions in the antimonopoly legislation of the Russian Federation for economic entities whose actions may restrict competition in the commodity market, including by establishing discounts.

5. Thus, in accordance with Articles 11 and 11.1 of the Federal Law from 26.07.2006 No. 135-FZ "On Protection of Competition" (as amended in 2015) (hereinafter — the Law on Protection of Competition) agreements between economic entities-competitors and coordinated actions of economic entities-competitors are forbidden if such agreements and coordinated actions lead to establishment or maintenance of the prices (rates), discounts, allowances (surcharges) and (or) markups.

6. Along with this, Article 10 of the Law on Protection of Competition prohibits acts of a dominant economic entity, results of which are or can be the prevention, restriction, elimination of competition and (or) infringement of interests of other persons (economic entities) or of indefinite range of consumers, including the creation of discriminatory conditions, and the creation of obstacles to enter on the commodity market or to exit from the commodity market for other economic entities.

7. In this context, discounting may fall under Point 6 of Part 1 of Article 10 of the Law on Protection of Competition, according with that the establishment of economically, technologically, and otherwise unjustified different prices (tariffs) for the same product by dominant entities is recognized as abuse. The implementation of such pricing policy may lead to the creation of discriminatory conditions in respect of customers that buy similar goods at a higher price, *ceteris paribus*.

8. In addition, Point 8 of Part 1 of Article 10 of the Law on Protection of Competition stipulates prevention of the creation of discriminatory conditions. Discriminatory conditions in this context refer to conditions of access to the commodity market, conditions of production, exchange, consumption, purchase, sale and other transfer of a commodity under which an economic entity or several economic entities are put in unequal position with other business entities. Thus, discriminatory conditions are meant to be the formation of unequal approach to the purchasers of identical in their nature, content and volume of product, despite the fact that there is not adequate justification for the establishment of such unequal terms.

9. In order to understand the effect from discounts' provisions and to measure the results of such discounts, one need to define the company's share in a particular product market in the particular geographic region and to assess the behavior of the company for the provision of such discounts to its partners, distributors or buyers.

10. Dominant economic entities use different reward systems for their customers: discounts, bonuses, premiums. As a rule, discounts are provided for increasing the volume of purchases, for the advance payment under the supply agreement, for expiring on the expiry date of the goods, for the launch of a new product on the commodity market. In this case, manufacturers or sellers, as a rule, independently determine the form, amount, timing of the incentive payments to its counterparties.

11. The most important in considering this category of cases is the reasonable distinction between common business practices and anti-competitive practices, leading to restriction of competition.

3. Law enforcement in the context of discounting

12. In exercising control over the compliance with antimonopoly legislation the FAS Russia pays attention to the fact that the economic entities occupying a dominant position on the market, haven't created conditions for its customers or counterparties, with which they would put in an unequal position to each other, that is not carried out actions aimed at creation of discriminatory conditions for the provision of discounts, including the fact that they didn't established for each customer individually different discount on the same product.

13. In this context, it is possible to identify 2 criteria that are significant in considering cases on the discounts by the FAS Russia:

- 1) dominant position of an economic entity within the particular geographic boundaries;
- 2) criteria that affect the pricing for certain customers, and their validity from the point of view of economic, technological or other aspects, objectively influencing the price of goods.

14. Thus, the FAS Russia can recognize fidelity rebates of a dominant economic entity as anticompetitive only in the case if the provision of such rebates is not technologically or economically justified.

15. According to the FAS Russia's practice, in order to reduce antitrust risks the process of working with contractors, as well as commercial terms, on scope of supply, product range, price, payment terms,

discounts, bonuses and premiums may be stated in the relevant document (trade policy, price policy, etc.) of an economic entity occupying a dominant position. Development and publication of transparent pricing policy, that is unified for all buyers and includes specific economic, technological or other objective and direct criteria influencing on the price, will reduce the risk of holding liability in case of claims by the FAS Russia.

16. However, even in the presence of transparent price policies, the company may face the following problems:

- 1) insufficient specification of the criteria used in determining prices for certain categories of customers;
- 2) absence of correlation between the established criteria and their actual impact on the cost or value of goods;
- 3) artificial classification of certain buyers to a particular category without economic or technological preconditions.

17. An example is a case investigated in 2011 by the Stavropol Regional office, for violation of Point 6 Part 1 Article 10 of the Law on Protection of Competition by LC “Zelenokumskiy Elevator”, which occupied a dominant position for the storage of grain within the geographical boundaries of the Stavropol territory. Based on this case, entity set different prices for their services for different buyers.

18. The marketing policy of the entity established that prices could be changed in certain cases depending on the engineering procedures applied in addition to a certain consignment of goods. Individual discounts up to 20% can be provided to certain clients. By provision of individual discounts it was considered:

- long-term cooperation with the client;
- strategic importance of the client for an economic entity;
- especially large amount of the grain products placed on storage.

19. After analyzing the conditions of application of individual discounts, Regional office concluded that such conditions don't comply with the criteria of economic and technological reasonableness due to the lack of clear methodology of their application; there were no specified clear criteria for the definition of "long-term positive cooperation with the client", which would allow to set the amount of time that is necessary to receive further discount; there was no disclosed mechanism for objective assessment of strategic importance of the client of the entity and the limits of deviation of discount (markup) from the prices stipulated by the tariff policy. The absence of clearly defined criteria allows the Director General to arbitrarily interpret these concepts at the conclusion of contracts and make decisions on granting individual discounts, using prices at his or her discretion, which leads to economically, technologically or otherwise unjustified establishing of different prices for the same services.

20. Thus, the FAS Russia recognised the company guilty in violating Russian antimonopoly legislation. This decision was upheld by appeal and cassation court instances.

21. Currently the FAS Russia carries out active work on advocacy of creation by the companies of transparent and open trade policies in which clear criteria of provision of discounts should be established.

22. In particular, the FAS Russia has developed Recommendations for the development and implementation of commercial policies of economic entities occupying a dominant position on the markets of medicines and markets of medical devices. In these Recommendations it's established that the FAS Russia allows reasonable differentiation by an economic entity of working conditions with the contractors, unless such conditions are economically justified, for example:

- - in case of a large amount of purchases of goods in real terms, the price per unit may be lower than the price of goods purchased in smaller consignments;
- - in case of the prepayment, price for the goods may be lower than the rate of commercial credit;
- - in case of the procurement of goods from the warehouse or non-seller goods, the price may be reduced.

23. Thus, the FAS Russia has examples of cases consideration on rebates for individual buyers. Provision of discounts isn't an antimonopoly offense under the Russian legislation. However, the FAS Russia notes that the discount may be pro-competitive and anti-competitive. The analysis of criteria and a context of provision of discounts is carried out in each certain case. As practice of the FAS Russia shows, in case if a company has open and clear trade, pricing or marketing policies, which set the mechanism of granting of discounts and bonuses, antitrust risks for a company are greatly reduced. Especially it concerns the large companies having a considerable market share because the trade policies which are carried out by them can have a significant impact on competition in a particular region or even throughout the country.

24. However, the FAS Russia recognizes that the fullest possible public disclosure of information about the marketing policy of the company has certain anticompetitive effects, including in terms of unified behavior of market participants. That is why this issue is considered individually in each specific case taking into account the general characteristics of the market, assess the market power of a seller and a buyer and other objective factors.