

# DYNAMIC PRICING: is any price discrimination legal?



**Dynamic pricing** is a type of price discrimination which occurs when different prices are charged to consumers for the same product depending on the category of the consumer.

At the present moment the price strategies, which make the price of a product dependant on the category the consumer belongs to, are becoming increasingly more popular in the sphere of online-business. For example, the airlines set different prices for the same tickets sold in the Internet depending on the time when the tickets are purchased, on the content of previous search queries by the buyer (tracked through Cookie), on the place where the Internet site was accessed from at the moment the ticket was purchased, as well as some other criteria.

The Dynamic Pricing method has been successfully employed in the Western countries for a long time. The information available in the public domain shows that on the Russian market this method is not so widely used yet and the companies are not interested in revealing their pricing policy to the full extent.

A good rule of thumb is that such concerns are not without reason.

In accordance with clause 1 article 10 of the Federal Competition Law (the «Law») the actions (omission to act) of a business entity occupying a dominant position which result or can result in barring, restricting or eliminating competition and (or) infringe upon the interests of other persons shall be prohibited. The article further provides a list of actions which have the above consequences, including:

- 6) fixing different prices (tariffs) of the same commodity which is not substantiated economically, technologically or in some other way, if not otherwise established by the federal laws;
- 8) creation of discriminating conditions.

It follows from the cited provisions of the Law and the court practice regarding this issue that the sellers using the Dynamic Pricing method violate the antitrust law subject to the following:

- the seller occupies a *dominant position* on the relevant market (article 3 of the Law);

- fixing *different prices (tariffs)* of the same commodity, or creation of *discriminating conditions* (which are not directly connected with the price) when the same commodities are being sold (article 10 of the Law);
- no economical and (or) technological substantiation of the fixing of different prices (tariffs), conditions for the same commodities (clause 6 part 1 article 10 of the Law).

### Some conditions based on the court practice

#### A53-17273/2010

- The courts were not convinced by the argument of the airline that it could not be considered an entity occupying a dominant position as the administrative agency did not prove the difficulty of access to the relevant commodity market for new competitors.
- The courts refuted the argument that the established procedure for modification of prices implies imposition of different tariffs for the tickets purchased by the passengers at different times for the same flight, that is on allegedly different conditions.

#### A71-13345/2009

- The courts have established that the fee included into the ticket price is an unreasonable increase in value of carriage which is determined in accordance with the set tariffs, whereby the argument of the carrier that the passengers were able to buy a ticket at the railway stations and centres owned by the applicant without being charged any box office fee, was considered by the courts to be weak.

#### A21-6910/2007

- The courts were not convinced by the airlines's argument that the computer-aided system restricts the number of tickets sold for each flight at differ-

ent tariffs in order to avoid unprofitability of the flight.

- The possibility for a consumer to purchase tickets with the departure from another airport does not present evidence of the lack of abuse as the option available for the consumer entails significant additional costs.

#### A53-11451/2011

- The courts agreed with the argument of airlines that the tickets had different period of validity, which means that they were different products.

We note that there is no consistent approach in the court practice to the definition of economic and technological feasibility of the prices for similar products, that is why the courts establish the fact that such differentiation in prices was reasonable on the basis of specific circumstances of the case under consideration, and the scope of evidence presented by the seller is not restricted.

## Liability

The violation of the specified provisions of the Law entails imposition of the relevant sanctions pursuant to articles 14.31 (clause 1), 14.31.1 of the Administrative Offences Code of the Russian Federation:

- imposition of an administrative fine on officials in the amount of fifteen thousand to twenty thousand roubles, on legal entities in the amount of three hundred thousand to one million roubles (if the market share of the company is equal or exceeds 35%);
- imposition of an administrative fine on officials in the amount of fifteen thousand to twenty thousand roubles, on legal entities in the amount of three hundred thousand to one million roubles (if the market share of the company is less than 35%).

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