

Russia issues clarifications on purchasing alliances, but questions remain

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On 20 July 2021, the Russian Federal Anti-monopoly Service (FAS) issued [clarifications](#)* on the application of anti-monopoly legislation to purchasing alliances (the “Clarifications”).

The legal status of purchasing alliances is still insufficiently regulated in Russian law. Therefore, numerous questions arise in practice regarding their compliance with the provisions of [Federal Law No. 135-FZ dated 26 July 2006 “On the Protection of Competition”](#)* (the “Competition Law”).

Approach to the definition of a “purchasing alliance” and whether these alliances can be established

Russian legislation does not currently define a purchasing alliance. The Clarifications also do not contain a definition, but the FAS clarified that a purchasing alliance should be understood as a joint procurement by several commercial entities (a “Purchasing Alliance”).

In addition, the Clarifications do not specify what is meant by joint procurement and what criteria should be used to distinguish a permissible Purchasing Alliance from an infringing cartel. Earlier, the FAS, together with the expert community, discussed the possibility of establishing maximum market shares for a Purchasing Alliance and its members, which, if complied with, would make their alliance’s activities permissible. For example, it was [proposed](#)* that the maximum market share of such an alliance should not exceed 20% and that each entity in such an alliance should have a market share of 8%. However, this criterion was not included in the Clarifications.

The Clarifications also use the term “sectoral association”. However, it seems that this term is broader than a Purchasing Alliance. Thus, the purpose of forming a Purchasing Alliance is obviously limited to optimising the procurement activities of its members and should not touch upon other industry issues.

Regarding the ability of Purchasing Alliances to operate, the FAS stated that Purchasing Alliances can be established provided that Competition Law requirements are met.

The Clarifications also expressly provide that the provisions on the permissibility of agreements stipulated by Articles 12 and 13 of the Competition Law apply to Purchasing Alliances.

The Clarifications, however, do not provide more detailed provisions on the conditions for the operation and recognition of Purchasing Alliances as permissible vis-à-vis competition law.

According to the Clarifications, a Purchasing Alliance may be organised by creating a new legal entity or by entering into a joint venture agreement without creating a separate legal entity.

Application of anti-monopoly prohibitions and approval of Purchasing Alliances

According to the FAS, a Purchasing Alliance as a joint procurement arrangement is recognised as an agreement in competition law regardless of the form this arrangement takes (e.g. oral or written, in the form of an agreement, minutes or an association decision). The Clarifications state that such an agreement is subject to the Competition Law’s anti-monopoly prohibitions.

However, the Clarifications do not explain how these prohibitions will apply to those aspects of a Purchasing Alliance’s activities potentially subject to anti-monopoly prohibitions (e.g. the price of such purchases and the range of products to be purchased jointly, and the conditions under which large commercial entities may group together for joint purchases).

At the same time, the Clarifications state that anti-monopoly prohibitions of agreements restricting competition do not apply to a Purchasing Alliance that has been established in agreement with the FAS in the manner prescribed by the Competition Law:

- as the conclusion of a joint venture agreement between competitors pursuant to Article 27(1)(8) of the Competition Law. (This approval is required when the assets or revenue of the parties to the agreement exceed the established [thresholds](#)); or

- with voluntary consent of the parties to a Purchasing Alliance pursuant to Article 35 of the Competition Law. This provision obviously refers to situations where the above thresholds are not exceeded and the parties to the agreement do not have to submit this agreement to the FAS for approval.

Comments

As stated on the agency's website, the Clarifications were prepared pursuant to an instruction from the Russian government to regulate the activities of "trade and purchasing alliances" in food retail markets. However, it cannot be inferred that the Clarifications exclusively relate to the activities of Purchasing Alliances in food markets.

Although the Clarifications reflect the official position of the anti-monopoly authority, the document was issued in the form of a letter, which is a non-regulatory act of an advisory nature.

In view of the above, although the Clarifications provide a framework for the establishment and operation of Purchasing Alliances, the line remains thin between an alliance that is permissible from an anti-monopoly perspective and an agreement between competitors infringing anti-monopoly legislation.

To avoid risks, participants in Purchasing Alliances are advised to seek the approval of the anti-monopoly authority.

For further information, please email the authors or your usual contact at CMS Russia.

** In Russian*

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