

Guidelines of the FAS Russia No. MIII/60379/21 of July 20, 2021

"On procurement unions"

In accordance with the Paragraph 5 of the Part 2 or the Article 23 of the Federal Law of July 26, 2006 No. 135-FZ "On Protection of Competition" (hereinafter – the Law on Protection of Competition), the FAS Russia is authorized to provide guidelines regarding the application of antimonopoly legislation.

In connection with the questions received by the FAS Russia concerning the application of antimonopoly legislation upon reaching agreements between economic entities on joint procurement, the FAS Russia is clarifying the following:

1. Question: "concerning possibility of establishing a "procurement union" in the framework of the current antimonopoly legislation by means of, inter alia, creating a new legal entity that will contribute to the optimization of procurement for participants that independently act under their own brands in the retail market, as well as the creation of a "procurement union" by concluding an agreement on joint activities".

Antimonopoly legislation does not contain the term "procurement union". As follows from the wording of the question, the term "procurement union" refers to possibility of joint purchasing by several economic entities.

The FAS Russia clarifies that joint purchasing by several economic entities is possible by means of, inter alia, creating a new legal entity or by concluding an agreement corresponding to the antimonopoly legislation requirements.

Thus, as provided by the Paragraph 18 of the Article 4 of the Law on Protection of Competition, an agreement is a written commitment contained in a document or several documents, as well as an oral commitment.

Furthermore, the Paragraph 18 of the Article 4 of the Law on Protection of Competition provides that an agreement between economic entities is any agreement between economic entities in relation to market behavior, including those made in writing (for instance, contracts, decisions of associations of economic entities, protocols) and those that become apparent from certain conduct without having made in writing. The existence of an agreement does not depend on its conclusion in a form required by the civil law rules, including the requirements for the form and the content of transactions (Paragraph 23 of the Resolution of the Plenum of the Supreme Court of the Russian Federation of March 4, 2021 No. 2 "On certain issues in relation to the application of antimonopoly law by the courts" (hereinafter – Resolution of the Plenum of the Supreme Court of the Russian Federation No. 2).

In this light, an agreement between economic entities regarding joint procurement shall be considered as an agreement.

When concluding an agreement, economic entities shall be guided by antimonopoly legislation, in particular by the Articles 11, 12, and 13 of the Law on Protection of Competition. In case of a merger or agreement on joint activities (joint venture agreement), they shall additionally be guided by the Article 27 of the Law on Protection of Competition (upon reaching the appropriate criteria of economic concentration).

Part 1 of the Article 11 prohibits cartels and defines them as agreements between the competing economic entities, namely economic entities that sell goods on the same market or between economic entities that purchase goods on the same market, that lead or may lead to the:

- 1) fixing or maintaining prices (tariffs), discounts, surcharges and/or markups;
- 2) increase, decrease, or maintenance of prices in a bid;
- 3) product market sharing that can be based on the division of the territory, the volume of sale or purchase of goods, the range of goods sold, or the composition of sellers or buyers (customers);
- 4) reduction or the termination of the production of goods;
- 5) refusal to enter into contractual relationships with certain sellers or buyers (customers).

Such agreements between economic entities that may result in the consequences listed under the Part 2 of the Article 11 are prohibited by the antimonopoly legislation of the Russian Federation. The restrictions provided under Parts 1-5 of the Article 11 are presumed unlawful by the virtue of law.

At the same time, the cooperation of economic entities for a common benefit, including the one that presupposes the pooling of their efforts, mutual agreement and joint implementation of actions (inaction) on the product market (for example, the conclusion of simple partnership contracts for conducting joint activities; attraction by one economic entity of another as a subcontractor under a civil law contract; solving general market problems by economic entities within the framework of professional associations) is not prohibited by antimonopoly legislation (Paragraph 20 of the Resolution of the Plenum of the Supreme Court of the Russian Federation No. 2).

Antimonopoly legislation prohibits "vertical" agreements that restrict competition. These are the agreements between economic entities, where one party is purchasing a product and another one is selling the product, with an effect of competition

distortion (Part 19 of the Article 4, Part 2-4 of the Article 11) (Paragraph 26 of the Resolution of the Plenum of the Supreme Court of the Russian Federation No. 2).

According to the Part 2 of the Article 11 of the Law on Protection of Competition, "vertical" agreements between economic entities are prohibited (except "vertical" agreements permitted under the Article 12 of the Law on Protection of Competition), if:

- 1) such agreements lead or may lead to resale price maintenance unless the seller sets for the buyer the maximum resale price of a good;
- 2) such agreements provide for the buyer's obligation not to sell a good to the economic entity competing with the seller.

This prohibition does not apply to the agreements on the organization by the buyer of the sale of goods under the trademark or other means of individualization of the seller or manufacturer.

Part 4 of the Article 11 of the Law on Protection of Competition prohibits other agreements between economic entities (except "vertical" agreements permitted under the Article 12 of the Law on Protection of Competition), when such agreements lead or may lead to the distortion of competition. Such agreements include:

- 1) agreements on the imposition on the counterparty of the terms of the contract that are unfavorable for them or not related to the subject of the contract (unreasonable requirements for the transfer of financial resources or other property, including property rights, as well as the agreement subject to the provisions regarding the goods in which the counterparty is not interested, and other requirements);
- 2) agreements on economically, technologically, and otherwise unjustified setting by an economic entity of different prices (tariffs) for the same product;
- 3) agreements on the creation of obstacles for other economic entities to enter the product market or exit the product market;
- 4) agreements on the establishment of conditions for membership (participation) in professional and other associations.

Part 5 of the Article 11 of the Law on Protection of Competition states that individuals, commercial organizations, and non-commercial organizations are prohibited from coordinating the economic activities of economic entities if such coordination leads to any of the consequences specified in Parts 1-3 of this Article, which cannot be recognized as permissible in accordance with the Articles 12 and 13 of the Law on Protection of Competition or which are not provided for by other Federal Laws.

Agreements between the organizations participating in an industry association, including agreements on the prices of goods and sales volumes, may lead to a violation of the Part 1 of the Article 11 of the Law on Protection of Competition. In addition, coordination by an industry association of the actions of its participants, if such coordination leads to one of the consequences specified in Parts 1-5 of the Article 11 of the Law on Protection of Competition, may also lead to a violation of the Part 5 of the Article 11 of the Law on Protection of Competition.

Part 1 of the Article 12 of the Law on Protection of Competition provides that written "vertical" agreements (except "vertical" agreements between financial institutions) are allowed if these agreements are commercial concession agreements.

Part 2 of the Article 12 of the Law on Protection of Competition allows "vertical" agreements between economic entities (except "vertical" agreements between financial institutions) when the market share of each economic entity on the product market, which are parties to a vertical agreement does not exceed 20%.

Part 3 of the Article 12 of the Law on Protection of Competition states that agreements provided for by the Part 4 of the Article 11 of this Federal Law are allowed between economic entities the dominant position of which cannot be recognized in accordance with Parts 2.1-2.2 of the Article 5 of this Federal Law if the total revenue of such economic entities from the sale of goods for the last calendar year does not exceed 400 000 000 rubles.

As provided under the Part 1 of the Article 13 of the Law on Protection of Competition, actions (inactions) of economic entities provided for in the Part 1 of the Article 10 of this Federal Law (with the exception of actions (inactions) specified in Paragraphs 1 (except for cases of establishing or maintaining the price of a product resulting from innovative activity), 2, 3, 5, 6, 7 and 10 of the Part 1 of the Article 10 of this Federal Law), agreements and concerted practices provided for under the Article 11(2)-(4), the Article 11.1 of this Federal Law, transactions and other actions provided for by the Articles 27-29 of this Federal Law, as well as agreements on joint activities concluded between competing economic entities may be recognized as permissible if such actions (inactions), agreements and concerted practices, transactions, and other actions do not create an opportunity to eliminate competition on the relevant product market and are not imposing restrictions on market participants or third parties that do not correspond to the achievement of the goals of such actions (inactions), agreements and concerted practices, transactions, and other actions, and also if their result is or may be:

- 1) the improvement of the production and sale of goods or stimulating technical and economic progress or increasing the competitiveness of goods produced in Russia on the global product market;

- 2) the receipt by the buyers of advantages (benefits) commensurate with the advantages (benefits) received by economic entities as a result of actions (inactions), agreements and concerted practices, transactions.

Herewith, as prescribed by the Part 2 of the Article 13 of the Law on Protection of Competition, the Government of the Russian Federation may determine the instances where the agreements between economic entities are permitted (general exceptions) in relation to the agreements, provided only under Parts 2-4 of the Article 11 of the Law on Protection of Competition.

According to the Part 7 of the Article 11, the prohibition of anticompetitive agreements does not apply to agreements between economic entities in the same group of persons, if one of such economic entities has established control over another economic entity, or if such economic entities are under the control of one person.

According to the Part 8 of the Article 11 of the Law on Protection of Competition, the notion of control refers to the possibility of a natural or legal person to govern directly or indirectly (through a legal person or several legal persons) decisions taken by another legal person by means of one or more of the following actions.

- 1) disposal of more than 50% of the total number of votes attributable to voting shares (stakes) that make up the authorized (pooled) capital of a legal person;
- 2) performing the functions of the executive body of a legal person.

Part 8 of the Article 11 of the Law on Protection of Competition sets a closed list of criteria for assessing whether economic entities are related to a controlled group of persons. Where these criteria are fulfilled, competing economic entities are allowed to conclude an agreement.

Therefore, a controlled group is defined as a group of persons, where one natural or legal person enjoys a possibility to govern decisions taken by another legal person by means of disposing more than 50% of the total number of votes attributable to voting shares (stakes) that make up the authorized (pooled) capital of a legal person.

This is set out in the Guidelines of the FAS Russia No. 16, approved by the Minutes of the Presidium of the FAS Russia of March 13, 2019 No. 2, and the Resolution of the Plenum of the Supreme Court of the Russian Federation No. 2.

Thus, the prohibitions established by the Article 11 of the Law on Protection of Competition do not apply to economic entities in a controlled group of persons in accordance with Parts 7-8 of the Article 11 of the Law on Protection of Competition.

By virtue of the Paragraph 4 of the Part 1 of the Article 27 of the Law on Protection of Competition, with the prior consent of the competition authority, a commercial organization is created if its authorized capital is paid with shares (stakes) and/or

with property, which are the main production assets and/or intangible assets of another commercial organization (with the exception of a financial institution), on the basis of, among other things, a transfer act or a separation balance sheet, and in relation to these shares (stakes) and/or property, the establishing commercial organization acquires rights provided for under the Article 28 of the Law on Protection of Competition, and at the same time the total value of assets according to the last balance sheet of the founders of the establishing commercial organization (their groups of persons) and persons (their groups of persons), the shares (stakes) and/or property of which are contributed to the authorized capital of the establishing commercial organization exceeds 7 000 000 000 rubles, or if the total revenue of the founders of the establishing commercial organisation (their groups of persons) and persons (their groups of persons), shares (stakes) and/or property made as a contribution to the authorized capital of an establishing commercial organization, from the sale of goods for the last calendar year exceeds 10 000 000 000 rubles.

The requirements of the Article 11 of the Law on Protection of Competition also do not apply to the agreements on joint activities concluded with the prior consent of competition authority, obtained in accordance with the procedure established by the Chapter 7 of the Law on Protection of Competition (Part 10 of the Article 11 of the Law on Protection of Competition).

On the basis of the Paragraph 8 of the Part 1 of the Article 27 of the Law on Protection of Competition, an agreement on activities in the territory of the Russian Federation is concluded between competing economic entities with the prior consent of competition authority, if the total value of their assets (assets of their groups of persons) exceeds 7 000 000 000 rubles according to the latest balances, or the total receipts of such economic entities (their groups of persons) from the sale of goods for the calendar year preceding the year of the conclusion of the agreement exceed 10 000 000 000 rubles.

The procedure for obtaining the preliminary consent of the competition authority to perform the actions specified in the Paragraphs 4, 8 of the Article 27 of the Law on Protection of Competition is provided by the Article 32 of the Law on Protection of Competition n.

By virtue of the Part 1 of the Article 35 of the Law on Protection of Competition, economic entities intending to reach an agreement that can be recognized as admissible in accordance with the Law on Protection of Competition, have the right to apply to the competition authority for verifying the compliance of the draft agreement in writing with the requirements of competition law.

The procedure for the submission of an application for verifying the compliance of the draft agreement, which might be considered admissible in accordance with the Law on Protection of Competition, is established by the Article 35 of the Law on

Protection of Competition, as well as the procedure of the consideration of the application by the competition authority.

In light of the foregoing considerations, the current antimonopoly legislation provides for the possibility of creating a new legal person, which will contribute to the optimization of procurement for its participants, as well as the possibility of concluding an agreement on joint activities, subject to the aforementioned requirements of the Law on Protection of Competition.

2. Question: "concerning the possibility of creating a new legal entity to act under its brand in the retail market, while maintaining commercial operational independence within the general rules framework".

According to the Part 8 of the Article 2 of the Federal Law of December 28, 2009 No. 381-FZ "On the basics of state regulation of trading activities in the Russian Federation" (hereinafter – the Law on Trade), a trading network is determined on the basis of one of two criteria taken individually or in aggregate: legal ownership of the aggregate two or more shopping facilities of an economic entity or several economic entities belonging to the same group of persons in accordance with the Law on Protection of Competition, or the use of the aggregate of two or more shopping facilities under a single commercial designation or other means of individualization.

Therefore, a trading network is recognized, among other things, as a set of two or more retail objects that are used under a single commercial designation or other means of individualization, belonging to different economic entities.

Consequently, the current legislation allows independent economic entities to come together into one trading network through the use of commercial objects under a single commercial designation or other means of individualization.

Accordingly, the creation of a new legal entity to act under its brand in the retail market is permitted under the current legislation.

The requirements established by the Articles 9, 13, 14 of the Law on Trade apply to independent economic entities that carry out retail trade of food products through the use of trade objects under a single commercial designation or other means of individualization.

3. Question: "concerning the possibility of creating a new legal person which will combine the requirements for legal persons union, provided under Sections 1 and 2 of the given Guidelines".

As provided under Sections 1 and 2 of the given Guidelines, the current antimonopoly legislation does not contain any prohibitions on the creation of a new legal person, which will contribute to optimization of procurement for its

participants, as well as the possibility of creating a new legal person under the brand, the participants of which will act in the retail market subject to the aforementioned requirements of antimonopoly legislation.

Antimonopoly legislation does not contain any prohibitions on the presence in the same group of persons of economic entities engaged in retail trade of food products and suppliers (manufacturers) of food products.