

18 January 2016

To our clients and friends

Amendments to Antimonopoly Legislation in Connection with the Adoption of the Entrepreneurial Code

The RK Entrepreneurial Code¹ (hereinafter, the Code), which incorporates, *inter alia*, the norms of the Competition Law², was adopted on 29 October 2015 and put into effect starting 1 January 2016. Certain antimonopoly regulations were changed and supplemented with the new norms. From now on, the antimonopoly regulation is established not by the Law, but by the Code, i.e. by a normative legal act of superior legal force. The adopted amendments affected legal regulation of a number of issues, the most important of which are considered below.

1. Changes in the Content of the Concept of "Cartel" and New Regulation of Cartel Agreements

According to the Competition Law, cartel included both anticompetitive agreements and anticompetitive coordinated actions of the market entities, which are the competitors or potential competitors in a single commodity market.

From now on, only horizontal agreements between the market entities are recognized as cartel, provided that such agreements result or may result in one of the below consequences:

- determination or support of prices (tariffs), discounts, increments (extra payments) and/or mark-ups;
- increase, decrease or support of prices at tenders, distortion of the results of tenders, auctions and competitions, including by way of division by lots;
- division of a commodity market on an area basis, volume of sale or purchase of goods, assortment of goods being sold or composition of sellers or buyers (customers);
- reduction or stop of the production of goods;
- refusal to enter into agreements with certain sellers or buyers (customers).

Cartel also previously included horizontal agreements derogating from the legitimate rights of consumers – this factor is now excluded.

Unlike the Competition Law previously in effect, the Code recognizes as cartels the horizontal agreements, which result or may result in the increase, decrease or support of prices at tenders, distortion of the results of tenders, actions and competitions, including by way of division by lots, even if performed within one group of persons.

Cartel agreements which do not impose constraints on the market entities, which are not necessary for the purposes of such agreements, and which do not create a possibility for the elimination of competition on a respective commodity market, are not recognized as legal now,

¹ Entrepreneurial Code No. 375-V of the Republic of Kazakhstan dated 29 October 2015.

² Law No. 122-IV of the Republic of Kazakhstan "On Competition" dated 25 December 2008 (hereinafter, the Competition Law).



in case it is proved that such agreements have or may have certain result. Such result includes as follows:

- contribution to the improvement of production (sale) of goods or stimulation of technological (economic) progress, or increase in the competitive capacity of goods produced by the participants of the world commodity market; or
- receipt by consumers of proportionate part of advantages (benefits) gained by respective persons as a result of performance of such actions.

In our view, the said legislative amendments are of great importance, especially with a view to the current discussions of the necessity to establish more stringent liability for cartel as compared with any other violations of the antimonopoly legislation.

2. Amendments with Respect to Features Qualifying Market Entities' Anticompetitive Actions as "Coordinated Actions"

Adoption of the Code did not change the list of the market entities' anticompetitive actions; however, such actions may now be recognized as anticompetitive only if intended to restrict competition (possible impairment of consumers' legitimate rights no longer serves as a feature of such actions). Qualification criteria allowing to recognize actions as the "coordinated market entities' actions" were changed.

Specifically, in order for the actions to be recognized as coordinated, the aggregate share of the involved market entities on a respective commodity market is to be 35% and more (previously it was 15%). At the same time, in order to recognize the market entities' anticompetitive actions as coordinated now it is not necessary for them to be performed within three-month period.

3. "Group of Persons" Pursuant to the Code

The Code includes a broader definition of the "group of persons" as compared with the Competition Law. The Code expands the list of features based on which market entities may be referred to one group of persons (Article 165 of the Code).

4. New Approach to Determining the Market Entity's Dominant Position

According to the Competition Law, the market entity's position is recognized as dominant, if its share on a respective commodity market is 35% and more.

According to the Code, 35% share held by a market entity is not a sufficient ground to recognize its position as dominant. For this purpose, it is necessary to establish in the aggregate the following circumstances in respect of such market entity:

- possibility for the market entity to unilaterally determine the goods price level and exercise a dominant influence on general conditions for the sale of goods on the commodity market;
- presence of economic, technological, administrative or any other restrictions with respect to access to the commodity market;
- duration of existence of the possibility for the market entity to exercise a dominant influence on general conditions for the goods circulation on the commodity market.

The presence of 50% share with one market entity on a respective commodity market is the absolute condition to recognize it as a dominant entity.

Position of several market entities cannot be recognized as dominant only subject to the fact that they own 50% share (for three entities) or 70% share (for four entities) on a respective commodity market.

In order to recognize the entities owning the said shares as dominant it is necessary to establish in the aggregate the following circumstances:

- relative amount of shares of the market entities does not change or is subject to insignificant changes within a long period of time (within at least one year or, if such period is less than one year, within the period of existence of a respective commodity market);
- goods being sold or acquired by the market entities cannot be substituted by any other goods when being consumed (including if consumed for the production purposes);
- information on the price and/or conditions for the sale of such goods on a respective commodity market is available to an indefinite range of persons.

5. Step-by-Step Withdrawal from the Formation and Maintenance of the Register

The Code provides for the step-by-step withdrawal from the formation and maintenance of the register of market entities occupying a dominant or monopolistic position (hereinafter, the Register). Starting 1 January 2016, the Register will exist only for the market entities occupying dominant positions on the regulated markets. This is to say that no Register will exist for the market entities occupying dominant positions on the free markets.

The Code provides for complete withdrawal from the formation and maintenance of the Register starting 1 January 2017.

6. Introduction of the Procedure for Preliminary Collective Consideration of Draft Opinions on Cases Involving Violations of Antimonopoly Legislation – "Grievance Committee"

In order to increase the level of objectiveness and transparency of adopted resolutions the Code provides for a possibility of preliminary (prior to issuing resolution by the antimonopoly agency) consideration of draft opinions subject to the results of investigation of violations of antimonopoly legislation by a specifically established collective body – grievance committee. Such consideration may take place subject to application from the object of investigation to be submitted not later than 7 days until conclusion of investigation.

It follows from the Code that the composition of the grievance committee is to include not only the employees of the antimonopoly agency, but also independent experts, including from the side of the object of investigation. It is contemplated that the composition of the grievance committee will include, *inter alia*, the representatives of the National Chamber of Entrepreneurs.

The grievance committee will consider draft opinions on investigations as to completeness and quality of stated evidences of the facts of violating the RK antimonopoly legislation. The persons participating in investigation will be invited to the meeting of the grievance committee.

According to the results of considering a draft opinion, the grievance committee is to present its comments and recommendations, which may be taken into consideration by officials.

Should you have any questions, we would be happy to answer them.

Best regards,
AEQUITAS Law Firm