Antimonopoly Regulation in Kazakhstan

Almaty 2017
Dear Colleagues and Friends,

Over the past several years, the importance of antitrust regulation in Kazakhstan has largely increased. This is both due to the development of market relations inside Kazakhstan, and to the creation of the Eurasian Economic Union, integration processes and Kazakhstan’s accession to the WTO. The legislation on competition protection and counteraction to monopolistic activities has been seriously amended and continues to develop and improve.

The year 2016 witnessed enactment of the Entrepreneurial Code of the Republic of Kazakhstan, which abolished the previously effective Competition Law and a number of subordinate regulatory acts. The Code contains a section "Economic Competition" and is the basic act governing relations in this area.

AEQUITAS has prepared a review entitled "Antimonopoly Regulation in Kazakhstan" comprising information on key regulations in the area of competition protection and support, competence of authorized agencies, and liability for violations, as well as analysis of recent judicial practice and outline of expected legislative novels.

We hope the review will come in handy as a systematized guidebook on antitrust regulation in Kazakhstan. The review, always up-to-date and reflecting the current legislation, is available on Competition & Antitrust page of AEQUITAS’s official website.

AEQUITAS Team
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1. KEY REGULATORY ACTS; ANTIMONOPOLY AGENCIES

1.1. Legal Framework

The principal regulatory act in the field of competition protection in the Republic of Kazakhstan (RK) is the RK Entrepreneurial Code No. 375-V of 29 October 2015 (Entrepreneurial Code or the Code), which came into effect from 1 January 2016, rendering inoperative, among other regulatory acts, the previously effective Competition Law (No. 112-IV of 25 December 2008).

Certain relations associated with the protection of competition and restriction of monopolistic activities are also governed by the following acts:

**Codes**
- RK Civil Code (General Part) of 27 December 1994;
- RK Administrative Code No. 235-V of 5 July 2014;

**Laws**

**Government Decrees**

**Acts of the Authorized Governmental Agency**

Some issues of antimonopoly agency's internal activities are governed by the orders of the Minister of National Economy, comprising as follows:

- Order No. 34 "On Approval of the Regulations on the Committee for the Regulation of Natural Monopolies and Protection of Competition of the Ministry of National Economy of the Republic of Kazakhstan" of 30 September 2014;
- Order No. 741 "On Approval of the Methodology for Analysis and Evaluation of the Condition of Competitive Environment on Commodity Markets" of 30 November 2015;
- Order No. 740 "On Approval of the Rules for Inclusion and Exclusion of Market Entities from the State Register of Market Entities Holding Dominant or Monopolistic Positions on Regulated Markets" of 30 November 2015.

**International Regulation**

- Agreement on the Procedure for the Protection of Confidential Information and Liability for its Disclosure in the Exercise of the Eurasian Economic Commission's Powers to Control Compliance with the Unified Competition Rules (Moscow, 12 November 2014) ratified by the RK Law No. 295-V of 18 March 2015;
- Agreement on the Coordinated Antimonopoly Policy Implementation (Moscow, 25 January 2000), approved by the RK Government Decree No. 1922 of 28 December 2000;
• Agreement between the RK Government, Government of the Kyrgyz Republic and Government of the Republic of Uzbekistan on Deepening Integration in the Field of Antimonopoly Policy (Bishkek, 14 March 1997).
• Agreement on Antimonopoly Policy Coordination (Moscow, 12 March 1993).
• Other international agreements and treaties governing the issues of cooperation in the field of competition.

1.2. Antimonopoly Agencies: Structure and Powers

The Committee for the Regulation of Natural Monopolies and Protection of Competition of the RK Ministry of National Economy (Committee) and its subordinate territorial departments comprise the central executive authority in the area of protection of competition, restriction of monopolistic activities and control over activities referred to the sphere of state monopoly.

The Committee's scope of competence, in addition to control over economic concentration and compliance with antimonopoly legislation, demonopolization of market entities restricting competition, and prevention, identification, investigation and curbing of antimonopoly legislation violations, includes the following fundamental powers:

• To implement the state policy in the area of protection of competition and restriction of monopolistic activities;
• To implement inter-sectoral coordination among governmental agencies and other organizations in the area of protection of competition and restriction of monopolistic activities;
• To implement international cooperation;
• To develop measures intended to improve antimonopoly legislation, as well as to develop and coordinate regulatory legal acts in the area of development of competition, restriction of monopolistic activities and functioning of commodity markets.

The Committee is headed by the Chairman, who is appointed and released from the office by the RK Government.

Certain natural monopolies are regulated by sectoral regulators (Ministry of Energy; Committee for Communications, Informatization and Information of the Ministry of Investment and Development).

1.3. Extraterritorial Effect

The Code also applies to the actions of market entities committed outside Kazakhstan, if such actions:

1) Affect, directly or indirectly, fixed and/or intangible assets located in the RK territory, or shares (participation interests), or property or non-property rights in respect of RK legal entities; or

2) Restrict competition in the RK.

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2. PREVENTION OF MONOPOLISTIC ACTIVITIES AND UNFAIR COMPETITION

2.1. General Overview

State regulation over prevention of monopolistic activities and unfair competition is implemented via: 1) establishing criteria for declaring market entities as monopolies or dominants; 2) drawing up a list of actions regarded as violations of antimonopoly legislation; and 3) referring certain commodity markets to socially significant markets and regulation of pricing thereon.

Kazakhstan is a party to the Antimonopoly Policy Coordination Treaty (Moscow, 25 January 2000) and a party to a number of international agreements purporting coordinated antimonopoly policies, which implies the bases and opportunities for the agreement participant states' joint actions to investigate antimonopoly legislation violations. In implementing the international cooperation, the Committee cooperates with antimonopoly agencies of CIS countries in the framework of the Interstate Council for Antimonopoly Policy, participates in the work of the Eurasian Economic Commission and interacts with the Organization for Economic Cooperation and Development.

2.2. Dominant Position; Monopolistic Position

The Code distinguishes between the concepts of market entity's "dominant position" and "monopolistic position." Depending on their area of activities, certain markets are referred to socially significant markets and all dominants and/or monopolists engaging in entrepreneurial activities on such markets must comply with the approved pricing procedure and submit periodic reporting (monthly, quarterly and half-yearly) to the Committee.

Dominant position. Recognized as dominant is a position of a market entity whose share on the relevant commodity market constitutes 50% or more, or 35% or more, provided that, in aggregate: 1) such entity has the possibility to unilaterally determine the level of a commodity price and to decisively affect the general conditions of the commodity sale on the commodity market; 2) exerts such influence for a long time, and 3) there exist economic, technological, administrative or other restrictions for other such market entities' access to the commodity market.

In addition, recognized as dominant is the position of each of entities within a group of entities, if: 1) the aggregate share of three or less market entities holding the largest shares constitutes 50% or more; or 2) the aggregate share of four or less market entities holding the largest shares constitutes 70% or more. At the same time, the following criteria apply to such entities in aggregate: 1) for a long period, the amount of such entities' shares remains unchanged or changes insignificantly; 2) the commodity being sold or purchased by the market entities cannot be replaced by another commodity in the course of consumption (including consumption for production purposes); and 3) the information on the price and/or conditions of such commodity sale on the relevant commodity market is available to an indefinite number of entities.

Separate criteria are established for finance organizations.

The dominant position is identified by the Committee (its sectoral subdivisions) based on the results of the study, analysis and evaluation of the status of competitive environment in the relevant commodity market. When qualifying market entities as dominant, taken into account are only quantitative, not qualitative characteristics of the market. If a market entity does not agree with its recognition as a dominant, it may submit to the Committee evidence to the contrary, following review of which the Committee is to make a relevant decision.

Monopolistic position. Recognized as monopolistic is a position of natural monopoly entities or market entities holding 100% share of domination on a certain commodity market.

Natural monopolies in Kazakhstan encompass, for instance, the following types of activities: 1) transportation of oil and oil products via main pipelines; 2) storage and transportation of gas via main and distribution gas pipelines; 3) transmission and distribution of electric and thermal
energy; 4) services of main railway networks, ports, airports, and air navigation; 5) lease out of cable duct systems; 6) water supply and disposal.

Referred to state monopoly are those types of activities, which, by virtue of law, can be performed only by appropriate state enterprises. Such types of activities, include, among others, the following: 1) defining the value of certain kinds of immovable property as objects of taxation; 2) registration of pledge of movable properties not subject to mandatory state registration; 3) activities in the field of protection of inventions, utility models and industrial samples; 4) activities in the field of protection of trademarks, service marks and appellations of origin; 5) expert examination of medications, medical products and medical equipment.

Socially significant markets. Socially significant markets include, but are not limited to, the following: sale of liquefied and commercial gas; retail sale of electric power; railway transportation services; and civil aviation services.

State price regulation. If so resolved by the Committee, allowed as a temporary measure is state regulation over pricing on certain markets. In such cases, the entire period of temporary pricing regulation cannot exceed 180 days in one calendar year.

Restriction of activities. Entities holding a dominant or monopolistic position on a market must comply with a number of restrictions, failing which is deemed an abuse of one's position. These include ban on actions or omissions which have lead or may lead to the limitation of access to a relevant commodity market, or to prevention, limitation or elimination of competition and/or which infringe on consumers' legitimate rights. Such actions/omissions include: 1) establishing and maintaining monopolistically high (low) or monopsonically low prices; 2) conditioning the supply of goods on the acceptance of limitations in purchasing goods manufactured or sold by competitors; 3) unjustified refusal from entering into a contract with, or selling goods to, certain buyers; 4) obstructing access to or exit from the commodity market to other market entities, and so on.

2.3. Anticompetitive Agreements and Anticompetitive Concerted Actions of Market Entities; Cartels

The Code bans, and in some instances invalidates, in full or in part, anticompetitive agreements and anticompetitive concerted actions of market entities. Recognized as anticompetitive agreements are oral or written agreements between market entities, which lead or may lead to the restriction of competition.

Anticompetitive agreements. The Code defines two types of anticompetitive agreements: 1) horizontal – agreements between competitors on a market, and 2) vertical – agreements between non-competing market entities one of which is acquiring goods (work, services) and the other is providing goods (work, services).

Cartel. A series of horizontal agreements is recognized as a cartel and is prohibited, if such agreements have lead or may lead to: 1) establishment or maintaining of prices (tariffs), discounts, surcharges (extra charges) and/or markups; 2) increasing, decreasing or maintaining prices in a tender or distortion of tender, auction or competitive bidding results, including through division into lots; 3) division of a commodity market according to territorial principle, volume of sale or purchase of goods, assortment of goods sold, or composition of the sellers or buyers; 4) reduction or termination of goods manufacture; 5) refusal of the parties to such agreements to enter into contracts with certain sellers or buyers (customers).

Vertical agreements. Vertical agreements are prohibited, if such agreements: 1) establish or may establish a goods resale price, except where the seller sets a maximum goods resale price for the buyer (customer); 2) provide for the buyer's (customer's) obligation not to sell the goods of a market entity, which is the seller's competitor; 3) provide for the seller's obligation not to sell the goods of a market entity, which is the buyer's (customer's) competitor.
Invalid anticompetitive agreements. Recognized as invalid, in full or in part, are both vertical and horizontal anticompetitive agreements achieved in any form, which have lead or may lead to competition restriction, including those relating to the following: 1) establishing or maintaining conditions discriminatory as compared to equivalent contracts with other market entities, including establishment of agreed conditions for the acquisition and/or sale of goods; 2) economically, technologically or otherwise unjustified establishment by market entities of different prices (tariffs) for one and the same goods; and so on.

Anticompetitive concerted actions. Concerted actions by market entities aimed at restriction of competition are prohibited. Such actions include as follows: 1) establishing and/or maintaining prices or other conditions for the purchase or sale of goods; 2) unjustified limitation of the production or sale of goods; 3) unjustified refusal to enter into agreements with certain sellers (suppliers) or buyers; 4) application of conditions discriminatory as compared to equivalent contracts with other entities.

The following indirect evidence is deemed sufficient to recognize actions as concerted: 1) the result of such actions meets the interests of each of the market entities; 2) actions of the market entities are known to each of them in advance; 3) actions of each of the said market entities are caused by the actions of other market entities participating in the concerted action; 4) the aggregate share of the so involved market entities on the relevant commodity market constitutes 35% or more.

Concerted actions are allowed between entities within the same group of persons, or in cases where such concerted actions result in the improvement of production or development of small-scale and medium-scale business.

Exceptions. The provisions restricting and/or banning anticompetitive agreements do not apply to certain contracts, which include: 1) agreements between market entities within the same group of persons, if one of such market entities controls another market entity, or if such market entities are controlled by one person; 2) public-private partnership agreements, including concession agreements and complex entrepreneurial license (franchising) agreements; 3) agreements of market entities whereunder the aggregate entities' share on the commodity market does not exceed 20%; 4) agreements on the exercise of exclusive rights to the results of intellectual activities and means of individualization of legal entities or means of individualization of products, work or services deemed equivalent thereto.

Also allowable are anticompetitive agreements, other than cartels, if such agreements: 1) do not restrict other market entities in their activities or restrict competition; and 2) contribute to the improvement of the production (sale) of goods, or promote technical (economic) progress, or enhance the competitiveness of goods manufactured by the parties on the global commodity market; or 3) if consumers receive a proportionate share of advantages (benefits).

Preliminary review of agreements. The Code introduces an option for the Committee to preliminarily review the draft potentially anticompetitive agreements as to their permissibility. The review is made based on an application by persons concerned within a period not to exceed thirty calendar days.

2.4. Unfair Competition

Many legislative acts ban unfair competition, primarily, the RK Constitution, as well as the Civil Code (General Part) and Entrepreneurial Code.

The Entrepreneurial Code contains key regulations defining the types of unfair competition. Recognized as unfair competition are any actions in competition aimed at attaining or provision of unlawful advantages.

The Code contains an exhaustive list of actions recognized as unfair competition, which include: misuse of the means of individualization of goods, work and services, as well as copyright items; defamation of a market entity; bribing of a seller's (supplier's) employee, etc.
2.5. Protection of Competition

The legislation provides for a number of measures intended to ensure protection of competition, which include: 1) measures for the Committee to prevent, monitor, control and investigate the committed violations and impose on market entities appropriate liability; and 2) measures to control and curb anticompetitive actions committed by governmental agencies or local executive authorities.

Such anticompetitive actions by governmental agencies or/and local executive authorities include, among others, unjustified obstruction of market entity’s activities; imposition of prohibitions or restrictions on the free movement of goods, other limitations on market entity’s rights to sell goods; actions aimed at increasing, reducing or maintaining prices; granting to certain market entities benefits or other advantages that put them in a privileged position as compared to competitors, or creating adverse or discriminatory conditions for activities as compared to competitors. However, such actions are allowable if taken to protect the constitutional and public order, human rights and freedoms, and public health and morals.

2.6. Antimonopoly Investigations

Grounds for investigation. The ground for instituting an antimonopoly investigation is information on a violation received by the Committee, which may be: 1) materials coming from governmental agencies; 2) application by an individual and/or legal entity; 3) elements of violation of competition legislation by the actions of a market entity, governmental agencies, or local executive authorities identified by the antimonopoly agency in the course of its activities; or 4) mass media reports.

Course of investigation. Commencement of investigation is documented by a relevant order, a copy of which is delivered to the applicant and the entity under investigation, except for the cases where the latter is a market entity whose actions suggest the elements of a cartel.

Persons concerned, witnesses and experts may also participate in the Committee’s investigation, in addition to the applicant and the entity under investigation. The period of investigation, starting from the date of the order, cannot exceed two months, subject to a two month extension.

Conciliation commission. In case the entity under investigation actively participates in the investigation and applies with the Committee within a period not to exceed seven business days prior to the completion of investigation, the draft opinion based on the results of the antimonopoly violations investigation is submitted to the Conciliation Commission. The Conciliation Commission comprises the Committee officials, representatives of the entity under investigation and experts. The Conciliation Commission renders its opinion, but cannot adopt a final decision on the investigation.

Result of investigation. Following the investigation, the Committee adopts one of the following options of decision in respect of the entity under investigation: 1) to institute an administrative case; 2) to issue an ordinance to eliminate the violation; 3) to transfer the materials to law enforcement authorities to institute a criminal case, or 4) to terminate the investigation in case there are no violations or no grounds to subject the entity to liability. The decision following the investigation may be appealed in court by persons concerned, including the entity under investigation.

Ordinances. The Committee’s ordinances may be appealed in court and may contain requirements for market entities to stop violations or eliminate their consequences; to restore the original position; to terminate or amend contracts contradicting the legislation; to enter into a contract with another market entity; or to refrain from breaching the Code provisions. The Committee controls the performance of issued ordinances and in case of non-performance it may go to court to force the market entity, governmental agency or local executive authority to perform the ordinance. The ordinance of a territorial subdivision of the Committee may be appealed by
the market entity with the Committee or in court within three months of the date it has been served on the market entity.

**Review of administrative cases.** Depending on the category of cases, administrative proceedings may be conducted either by the Committee, or by specialized administrative courts. The competence of the Committee encompasses review of violations associated with economic concentration, unfair competition, failure to perform the Committee's ordinances, or restriction of goods' access to trading networks. The right to review cases and impose administrative sanctions belongs to the head of the Committee and his/her deputies and the heads of territorial subdivisions and their deputies.

The acts issued following a case review may be appealed by persons concerned. For instance, a decision rendered by the specialized court may be appealed in a higher judicial instance; a ruling issued by a Committee official is to be appealed in the specialized court.

2.7. **Antimonopoly Compliance**

Pursuant to the Code, “antimonopoly compliance” is a system of measures to prevent violations of the competition legislation. Market entities may independently develop external and/or internal acts, which 1) govern the policy for the entity's fair competition on the relevant commodity market, and 2) define the methodologies and methods to organize the entity's work intended to minimize violations of the RK competition legislation.

The draft external act may be submitted to the Committee to establish its conformity to the model external antimonopoly compliance act. In this case, the external antimonopoly compliance act adopted in conformance with the model external act and reviewed by the Committee would be recognized as an act clarifying the RK competition legislation in respect of a particular market entity or in relation to a specific situation, which will be taken into account when conducting antimonopoly agency's investigations, if any, in respect of such market entity's activities.

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3. STATE CONTROL OVER ECONOMIC CONCENTRATION

3.1. Transactions Constituting Economic Concentration

The following types of transactions may be recognized, subject to certain conditions, as economic concentration that requires prior Committee's consent (paragraphs 1)–3) below) or notification to the Committee (paragraphs 4) and 5) below).

1) Re-organization of a market entity by way of merger or consolidation (acquisition);

2) Purchase by a person of voting shares (participatory interests, equity units (hereinafter, when reference is made to shares, it implies participatory interests or equity units)) of a market entity, whereby such person obtains a right to dispose of more than 50% of shares, if prior to such purchase such person disposed of no shares or of 50% or less shares in the said market entity;

3) Obtainment by a market entity into ownership, possession and use, including on account of paid in (transferred) charter capital, of fixed production assets and/or intangible assets of another market entity, if the book value of the property constituting the subject of transaction (related transactions) exceeds 10% of the book value of the fixed production assets and intangible assets of the market entity alienating or transferring the property;

4) Acquisition by a market entity of the rights (including under a trust management agreement, joint operating agreement, or agency agreement) enabling it to issue binding instructions to another market entity in the course of the latter’s carrying out entrepreneurial activities, or to perform the functions of its executive body;

5) Participation of the same individuals in the executive bodies, boards of directors, supervisory boards or other management bodies of two or more market entities, provided that the said individuals define in such entities the conditions of carrying out their entrepreneurial activities.

3.2. Consent / Notification Criteria

It is required to apply for the Committee's prior consent or to notify it of certain transactions, as mentioned above, in cases where: 1) the aggregate book value of assets of the market entities (group of persons) being reorganized or the acquirer (group of persons), and the market entity whose shares are being acquired, or their aggregate volume of goods sales for the last fiscal year exceeds, as of the date of application, 10,000,000 monthly calculation indices (MCI) (as at 1 February 2017, the said amount made approximately USD 69,815,000); or where one of the persons participating in the transaction is a market entity occupying a dominant or monopolistic position on the RK commodity markets. The aggregate volume of goods sales is defined as the amount of income (revenue) from the sale of goods for the last fiscal year less value added tax. Separate criteria are established for transactions performed by finance organizations.

3.3. "Group of Persons"

All Code provisions relating to market entities apply to a group of persons.

A group of persons means an aggregate of individuals and/or legal entities that meet one of the following conditions:

1) A market entity and a person (individual or legal entity) entitled to directly or indirectly dispose of more than 50% of the voting shares in the market entity’s charter capital, including on the basis of a written agreement with the holders of such voting shares;

2) A market entity and an individual or legal entity performing the functions of the market entity’s sole executive body;
3) A market entity and an individual or legal entity, which may, based on such market entity's foundation documents or a contract executed with such market entity, issue instructions binding on such market entity;

4) A market entity and an individual or legal entity, if such market entity's sole executive body has been appointed or elected based on such persons' proposal;

5) Legal entities in which more than 50% of the quantitative composition of collective executive body and/or board of directors (supervisory board, board of the fund) are the same individuals;

6) A market entity and an individual or legal entity, if more than 50% of the quantitative composition of such market entity's collective executive body or board of directors (supervisory board) have been elected based on such persons' proposal;

7) An individual and his/her spouse and close relatives;

8) Persons each of which, on one of the grounds mentioned in paragraphs above, falls within a group with one and the same person, and other persons falling within a group with each of such persons based on any of the said grounds;

9) A market entity, individuals and/or legal entities, which, on one of the said grounds, fall within a group of persons, if such persons may, by virtue of their joint participation in such market entity or according to powers received from other persons, dispose of more than 50% of such market entity's voting shares.

The above definition and criteria enable the authorized agency to most broadly interpret the concept of the “group of persons,” which allows for requirements to provide full information when preparing the application for consent to economic concentration.

3.4. Exempt Transactions

The requirement to first coordinate transactions with the Committee or notify the Committee thereof does not apply to:

1) Legal entity establishment;

2) Acquisition of shares in a market entity by finance organizations, if such acquisition is made for the purposes of their further resale, provided that such organization does not participate in voting on the market entity's management bodies; 3) Appointment of rehabilitation manager or receiver, or transitional administration;

4) The enumerated transactions performed within the same group of persons; 5) Transactions the consummation of which is expressly provided for by the Code, RK laws, edicts of the RK President and/or decrees of the RK Government.

3.5. Consent Obtainment Procedure / Notification Procedure Compliance; General Overview

Obtaining Committee's consent. Application for consent to economic concentration must precede the relevant transaction's consummation.

The obligation to apply for consent to economic concentration lies with the acquirers under transaction, and in case of market entity reorganization – with its founders. No state duty is payable.

The Code establishes a certain list of documents and information to be submitted together with the application, ranging from the basic information on the market entity being the subject of transaction and the draft corresponding contract to the information on shareholders and the relevant group of persons. Since the Code expressly provides for the Committee's right to request additional documents, in practice, the Committee requests the maximum scope of information on all entities within the acquirer's group of persons, up to the individual ultimate beneficiaries. In case it is impossible to provide full information, a forecast or estimate information is to be provided. Confidential information is submitted accordingly marked as classified.

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The general period for application consideration by the Committee is 40 calendar days. The Code also provides for the grounds to suspend consideration or to terminate consideration and return the application. The application consideration is a closed procedure.

The issue of involving third parties in the consideration of application for consent to economic concentration is decided by the antimonopoly agency, accordingly notifying the applicant.

Following the consideration, the Committee may resolve to prohibit or consent to the economic concentration. The agency’s consent may be conditioned on certain requirements and obligations to be performed by the economic concentration participants. Such conditions and obligations may relate, among other things, to restrictions on management, use or disposition of property. The economic concentration must be performed within one year of the consent obtainment; otherwise a new application must be filed.

The Code entitles the Committee to reconsider the adopted decision within 3 years of its date of adoption (general period of limitations), both in respect of consent to, or rejection of, the economic concentration. If as a result of reconsideration the Committee revokes the consent, the Committee claims in court invalidation and cancellation of the state registration and re-registration of the market entity and rights to immovable property previously completed in the framework of economic concentration.

Notification procedure. Transactions subject to Committee notification fall under simplified procedure. The acquirer, or the person resolving to perform the relevant action, must notify the Committee of such transactions within 45 days of the transaction consummation date. The notification must attach the same scope of information as in case of transactions requiring Committee’s prior consent.

The Committee may resolve to cancel the transaction in case it deems it restricting or eliminating competition on the corresponding market. The resolution to take note of the transaction and allow economic concentration, or to cancel the transaction, must be adopted by the Committee within 45 days of the date of notification. In case the Committee resolves to cancel the transaction, such resolution is to be performed within 30 days of receiving the Committee’s relevant ordinance. Should market entities disagree with the Committee’s resolution to cancel the transaction, the Committee may claim resolution enforcement in court.

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4. LIABILITY

4.1. Civil Liability

The Committee is empowered to claim in judicial bodies invalidation of transactions consummated without obtaining prior consent to economic concentration, if such transactions have led to the establishment or strengthening of a dominant or monopolistic position of a market entity or a group of persons and/or to restriction of competition. The Committee may also claim in court enforced division of a market entity or its spin-off from one or more legal entities, if such entity: 1) holds a dominant or monopolistic position, and 2) has twice over a year committed violations involving abuse of its position or anticompetitive actions or agreements.

Moreover, the Committee may claim in judicial bodies invalidation of the state registration and re-registration of legal entities and rights to immovable property, if such registration (re-registration) occurred in the framework of transactions failing to obtain consent to economic concentration.

4.2. Implications of Economic Concentration Committed Failing to Comply with the Consent / Notification Procedure

Economic concentration non-consented by the Committee, as well as failure to perform the requirements and obligations conditioning the consent to economic concentration, entail: 1) a risk of transaction invalidation upon Committee's claim (in cases where the transaction has led to the establishment or strengthening of a dominant or monopolistic position of a market entity or a group of persons and/or to restriction of competition); and 2) enforcement of an administrative fine in the amount of up to 1,600 MCI (which, as at 1 February 2017, made KZT 3,630,400).

Actions of certain authorized agencies are sometimes dependent on the Committee's resolution on economic concentration. For instance, in some established instances state registration and re-registration of market entities and rights to immovable property may be performed only based on the Committee's consent to economic concentration; otherwise such actions may be invalidated upon a Committee's claim.

4.3. Administrative Liability

The RK Administrative Code provides for the following types of sanctions for violations of administrative legislation: fines and confiscation of monopolistic income derived as a result of monopolistic activities. Depending on the committed violation, the amount of fines range from 3% to 10% of the income (revenues) derived as a result of monopolistic activities, or is imposable as a defined amount, from 100 to 2,000 MCI (which, as at 1 February 2017, made from KZT 226,900 to KZT 4,538,000).

Administrative liability may be imposed both on individuals and legal entities, and their employees. There are grounds for releasing persons from administrative liability upon expiration of the period of limitations, which is 1 year for individuals and five years for legal entities.

Issues of administrative enforcement. The Code has an extraterritorial effect and applies to relations arising outside the RK, while the RK Administrative Code applies to acts starting, continuing or ending in the territory of Kazakhstan. This conflict of laws prevents ample application of administrative sanctions, in particular, to acts involving execution of anticompetitive agreements or abuse of monopolistic or dominant position committed by foreign market entities outside the RK. Such foreign persons can be subjected to administrative sanctions only if there is an international agreement on legal assistance between Kazakhstan and the state of residence of the foreign persons committing the administrative violation.
4.4. **Criminal Liability**

The Criminal Code establishes liability of market entity officers for monopolistic activities, if such activities have caused major damages to an individual, organization or the state, or if such activities are associated with derivation of a large-scale income by the market entity. Such actions are punishable by a fine, or correctional labor, or restriction of liberty for a period of time depending on the qualifying elements of crime.

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5. RECENT INVESTIGATIONS AND LITIGATIONS

Litigations involving the Committee mostly relate to the investigation of violations associated with market entities’ abuse of their dominant or monopolistic position, commission of acts (actions, transactions) resulting in unfair competition, bringing to liability for failure to provide information to the Committee by entities holding dominant or monopolistic position, and invalidation of market entities inclusion in the State Register.

According to statistical data available on the Committee’s website (http://www.kremzk.gov.kz/), the first half of the year 2016 yielded 52 completed investigations (38 of which identified violations), resulting in the following decisions:

- To terminate due to lack of violations – 14 investigations;
- To issue ordinances – 9 investigations;
- To institute administrative cases – 10 investigations; and
- To institute administrative cases and issue ordinances – 19 investigations.

Completed investigations broken down by the types of anticompetitive violations look as follows:

- Anticompetitive agreements – 1;
- Anticompetitive concerted actions – 5;
- Abuse of dominant or monopolistic position – 8;
- Unfair competition – 11; and
- Anticompetitive actions or agreements of governmental agencies or local executive authorities – 13.

The largest market entities subjected to administrative liability in the year 2016 are: Shymkent Airport JSC, Transport Holding of Almaty City LLP, Pavlodar Airport JSC, Kazakhstan Branch of Karachaganak Petroleum Operating B.V. CJSC; ArcelorMittal Temirtau JSC, and others.

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6. KEY ANTIMONOPOLY LEGISLATION DEVELOPMENT / AMENDMENT TRENDS IN 2016-2017

6.1. General Trends

The basic guidelines of the RK antimonopoly policy development and antimonopoly legislation improvement are set out in the National Program "100 Concrete Steps to the Modern State for All" where the 53rd step focuses on changing the concept of Committee's work and aligning it with the standards of the Organization of Economic Cooperation and Development (OECD).

The RK Ministry of National Economy has developed a two-stage approach to change the concept of Committee's work. Implementation of the first stage resulted in the adoption of the Entrepreneurial Code. The second stage will focus on the development of recommendations to bring the national antimonopoly legislation in line with the international practice and OECD standards. Besides, adaptation of the OECD principles and standards will introduce a mechanism of competition impact assessment. This will allow identifying and cutting off those pending or currently effective regulatory provisions that unnecessarily restrict competition.

6.2. Novelties Expected in 2017

It is expected that the regulated areas of activities currently qualified as natural monopolies will be significantly narrowed.

Amendments are expected to be introduced into the RK Administrative Code to provide for responsibility of officials of local and central executive authorities for omissions committed where antimonopoly response was required.

The Committee is expected to develop a model external antimonopoly compliance act in the nearest future.

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AEQUITAS ANTIMONOPOLY PRACTICE

AEQUITAS antitrust practice dates more than 10 years back. The firm boasts dozens of successful approvals of M&A transactions significant to Kazakhstan’s economy.

Over the past several years, the importance of antitrust regulation in Kazakhstan has largely increased. This is both due to the development of market relations inside Kazakhstan, and to the creation of the Eurasian Economic Union, integration processes and Kazakhstan's accession to the WTO. The legislation on competition protection and counteraction to monopolistic activities has been seriously amended and continues to develop and improve. AEQUITAS lawyers are perfectly familiar with the legislation and the law-application and judicial practice and can address most complex aspects of the national and supra-national antitrust legislation application.

AEQUITAS has signed cooperation agreements with experts extensively experienced in the economic-and-analytical and applied scientific research in the field of competition policy. Due to such expert cooperation, AEQUITAS clients can enjoy not just the legal support services for their projects, but also economic analysis of commodity markets and determination of an entity's market share, as well as expert examination to identify the signs of monopolistically high or low prices or the geographical and commodity borders of the market.

Partner Natalya Braynina heading AEQUITAS antimonopoly practice is a member of the Council for Competition Protection of Atameken National Chamber of RK Entrepreneurs and a member of the Noncommercial Partnership "Supporting Competition in the CIS Countries" – an organization uniting the CIS leading legal advisors and in-house lawyers specializing in the antimonopoly area.

Requests for legal services or additional information on antimonopoly regulation may be addressed to aequitas@aequitas.kz or directly to Natalya Braynina at n.braynina@aequitas.kz.

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