

On Amendments to Antimonopoly Legislation of the Republic of Kazakhstan

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Introductory provisions

On 7 July 2006, a new Law on the Competition and Restriction of Monopolistic Activity (hereinafter – the Law) was adopted in Kazakhstan. The Law entered into force on 28 July 2006 which simultaneously made the earlier effective Law on the Competition and Restriction of Monopolistic Activity of 19 January 2001 defunct.

The adoption of the above-mentioned Law has already entailed amending some of the effective regulatory acts, including the Code of Administrative Violations, the Law on State Registration of Legal Entities and Registration of Branches and Representative Offices, the Law on Unfair Competition, the Law on Protection of Domestic Market in Import of Goods, the Law on State Regulation of, and Supervision over, Financial Market and Financial Institutions, and some other legislative acts,¹ and in the near future will inevitably be connected with the adoption by the antimonopoly agency of new subordinate legislative acts, which in more detail regulate certain issues of antimonopoly regulation.

This Information Memorandum provides a brief analysis of some basic requirements of the new Law, which in our view are of vital importance to entities of the market in Kazakhstan.

General evaluation of the Law

The new Law introduced a number of considerable amendments and additions into antimonopoly regulation, in general aimed at elaborating legislative rules in this sphere and improving their legal technique. Thus, the Law:

- ! is characterized by sound structuring of the provisions of the antimonopoly legislation;
- ! improves the concepts used;

! in more detail spells out the procedure for the coordination of transactions of market entities with the antimonopoly agency, and the performance of audits on matters of compliance with the antimonopoly legislation.

At the same time, even a cursory reading of the Law shows that some of its provisions to a certain extent are aimed at tightening the antimonopoly legislation requirements; however, owing to the fact that not all of the provisions are expressed clearly, in our view in practice the implementation of such rules would cause certain difficulties.

Concepts of the Law

Distinct from the earlier antimonopoly legislation, the new Law changed a list of concepts used; some of them are now more specific, others were expanded upon, while some were replaced by new concepts altogether.

Specifically, the Law uses such new concepts as:

- ! agreements (concerted action) – any contractual relations of the parties directed towards the restriction or elimination of competition or by obtaining advantages in entrepreneurial activity;
- ! inquiry – the application of the antimonopoly legislation by way of consideration of cases of its violation;
- ! goods (work, services) – property which is an object of civil turnover;
- ! fixed price – the price introduced by the antimonopoly agency in cases of violation of the Law.

Among the specified concepts one should note the definition of monopolistic activity, which pursuant to the Law includes, anti-competition agreements of market entities, abuse of the dominant (monopolistic) position and anti-competition actions of state bodies.

¹ Law No. 174-3 of the Republic of Kazakhstan, On the Introduction of Amendments and Additions to Certain Legislative Acts of the Republic of Kazakhstan on Matters of Control and Regulation of Activities of Entities of Natural Monopoly and Market Entities Holding Dominant Position on the Relevant Commodities Market, dated 7 July, 2006.

The concept of market entities also underwent certain changes. In addition to Kazakhstan's legal entities and individuals, the new Law expressly refers to foreign legal entities (their branches and representative offices) operating in Kazakhstan as market entities.

It is also noteworthy that the Law uses new terms, some of which are specifically not included in the concepts but their definition and contents are disclosed in the body of this regulatory act. A few examples include: economic concentration, a group of entities, anti-competition agreements, anti-competition actions of state bodies, market share of an entity and boundaries of commodity markets in addition to some others.

The next sections of this Information Memorandum deal in more detail with these legal institutions.

Anticompetition agreements of market entities

Under the Law, agreements reached in any form between market entities which result or may result in restriction of competition, are referred to as anti-competition agreements (earlier called "conspiracy").²

The Law prohibits the execution of the above-mentioned agreements, and if such agreements are executed they are deemed invalid.

The legislation effective prior to the adoption of the Law contained similar restrictions. Their effect, however, applied only to the market entities which have over 35% (aggregate) share of certain goods in the market. The new Law establishes restrictions with respect to the concerted action of all market entities.

The innovation of legislation in this sphere is that the Law established exceptional circumstances where the above-mentioned restrictions are inapplicable. Specifically, the restrictions do not apply to the following agreements:

- ! licensing agreements;
- ! agreements of blanket entrepreneurial licenses (franchise agreements);
- ! contracts related to technological transfer;
- ! contracts of cooperation in research and development work; and
- ! other contracts related to the assignment of rights to items of intellectual property.

Anti-competition actions of state bodies

As compared with the earlier effective rules of the antimonopoly legislation, the Law considerably expanded a list of actions of state bodies considered to be actions restricting competition.³

In this respect, the powers of the antimonopoly body include the right to issue obligatory orders to state bodies for implementing acts cancelled or changed by them, on the termination of violations, and also regarding the dissolution of contracts executed by state bodies that contradict the Law.

² Among the anti-competition agreements the Law names the following agreements related to:

- 1) establishment (maintenance) of agreed prices or other terms of the purchase or sale of goods;
- 2) distortion of the results of tenders as a result of the increase, decrease, or maintenance of prices or other agreements between the tender participants;
- 3) division of commodity markets by territorial principles, assortment of good, volume of their selling or purchase, by a group of sellers or buyers, or by other principles;
- 4) ungrounded restriction of production or selling of goods, including quota arrangements;
- 5) ungrounded refusal to enter into contracts with certain sellers or buyers;
- 6) restriction of access to commodity market or elimination from it of other market entities as sellers of certain goods or their buyers;
- 7) application of discriminating terms to equivalent contracts with other entities;
- 8) execution of contracts subject to undertaking by contractors of additional obligations which by their contents or according to the business practice do not concern the subject matter of these contracts (an unreasonable demand to transfer funds or other property, property rights and others).

³ Presently the following actions of the state bodies are recognized as anticompetitive:

- 1) Prohibiting or preventing the establishment of market entities in some sphere of activity, and also prohibiting the performance of certain types of activity; on the production, purchase or sale of certain types of goods, unless otherwise established by legislative acts of the Republic of Kazakhstan;
- 2) direct or indirect pressure on market entities to priority execution of contracts for primary supply of goods to certain group of consumers or prioritizing the purchase of goods from certain sellers;
- 3) any action aimed at the centralized distribution of goods, and also distribution of markets between market entities on the territorial principle, assortment of goods, volume of their sales and purchases or on the group of consumers or sellers, unless otherwise established by legislative acts of the Republic of Kazakhstan;
- 4) establishment of prohibition on the sales (import) of certain goods from one region of the Republic of Kazakhstan to another, unless otherwise established by legislative acts of the Republic of Kazakhstan;
- 5) granting certain market entities privileges or other advantages which put them to a privileged position compared to their competitors, which leads or may lead to competition restriction;
- 6) action as a consequence of which unfavorable or discriminatory terms of the activity, as compared with competitors, are created for certain market entities;
- 7) action which prohibits or restricts the independence of market entities not provided for by the laws of the Republic of Kazakhstan, including those concerning the purchase or sale of goods, price formation, formation of programs of activity and development and disposal of income (proceeds) from the sale of goods.

Dominant (monopolistic) position

On the whole, the Law retained the former definition of a dominant (monopolistic) position of a market entity, qualifying it through its share in the relevant commodity market of 35% or greater.

However, with respect to the dominant position of several market entities the Law established somewhat different criteria. The position of each of the several market entities is recognized as dominant if:

- ! an aggregate share of not more than three market entities, which hold the highest shares in the relevant commodity market, equals 50% or more (the previous law only related to the share of not more than two entities);
- ! an aggregate share of no more than four market entities which hold the highest shares in the relevant commodity market equal to 70% or more (earlier it related to the share of not more than three entities).

Additionally, the Law considerably reduced the lower threshold with respect to which the belonging of some entity (in a group of entities) to dominating market entities is determined. Presently, the position of a market entity whose share in the relevant commodity market does not exceed 15% may not be recognized as dominant (monopolistic) (prior to the adoption of the Law the lower threshold was 35%).

The Law also introduced the procedure for determination of a market entity's share in the relevant commodity market as the ratio of the volume of sales of goods by the market entity or fungible goods within the geographical boundaries of the market to the volume of the respective commodity market. In this respect, the geographical boundaries of the market are meant to be the territory on which the buyers purchase or may purchase goods

or fungible goods and do not have the possibility to purchase it outside the given territory due to economic, technological, administrative and other reasons.

As to the abuse of the dominant position, the Law also considerably expanded a list of actions considered invalid that the antimonopoly agency may qualify as restricting access to the relevant commodity market, or restricting or eliminating competition and/or infringing upon the lawful interests of consumers.⁴

Economic concentration

Within the framework of the state's control over compliance with the antimonopoly legislation, the Law, as did its predecessor, determines a number of transactions, now referred to as economic concentrations, whose performance is possible subject to obtaining prior consent of the antimonopoly agency.

However, in regards to such transactions, the participation of individuals in executive bodies and the boards of directors (supervisory board) of two or more market entities are included additionally. At the same time, the liquidation of a market entity holding a dominant (monopolistic) position is no longer under the control of the state in regards to the antimonopoly agency.

Furthermore, for of recognition a transaction on the purchase of voting shares (participation interests) in the charter capital of a market entity as an economic concentration, the amount of such shareholding of voting shares, instead of the earlier established 20% in the entity holding dominant (monopolistic) position, now should amount to 25% in any market entity.

At the same time, prior consent of the antimonopoly agency for the performance of the above-mentioned transactions, except for the establishment or reorganization of market entities holding a dominant (monopolistic) position is required in the following cases: the book value of the assets of the entities participating in the relevant transaction or an aggregate volume of goods being sold for the most recent fiscal year exceeds one and a half million times the monthly calculation indicator,⁵ or one of them is a market entity which holds dominant (monopolistic) position in the relevant commodity market; or the purchaser is a group of entities directly controlling the activities of the above-mentioned market entities. Please note that the Law does not expressly determine

⁴ Among the abuses of dominant position, the Law names the following:

- 1) establishment of monopolistic high (low) prices;
- 2) application of different prices or different conditions to equivalent agreements with entities without objectively justified reasons for that;
- 3) establishment of restrictions on the resale of goods purchased from under the territorial principle, group of buyers, terms of purchase, and also quantity and price;
- 4) preconditioning or imposition of a contract execution by the undertaking by a market entity of additional obligations which by their contents or according to business practice do not relate to the subject matter of this contract;
- 5) ungrounded refusal from the execution of a contract with some buyers in the existence of the possibility of production or selling of the relevant goods;
- 6) conditioning the supply of goods by the acceptance of restrictions in the purchase of goods, manufactured or sold by competitors;
- 7) unsubstantiated reduction of volumes of production or termination of production of goods on which demand exists or orders of consumers in the existence of the possibility of their production or supply;
- 8) violation of the procedure for price formation as established by regulatory legal acts.

⁵ Please note that earlier it was required that the book value of assets should not be less than one hundred thousand times the monthly calculation indicator. The amount of the monthly calculation indicator in 2006 equals to one hundred and thirty (T1,030) Tenge, which in dollar equivalent approximately equals eight US dollars and fifty cents (\$8.5).

the subject composition of "entities participating in the transaction". Earlier, in the implementation of this legislative requirement, the book value of assets of the entity, in which participation interest is acquired, the entity-acquirer was taken into account. We admit that now even wider interpretation of this concept may be possible.

In accordance with the above-mentioned requirement, in the calculation of the volumes of sales of goods (work, services) the use is made of the amount of income (proceeds) from the selling of goods (work, services) minus the amounts of value added tax and excise duty for the last fiscal year preceding the submission of an application for granting permission for economic concentration.

It should be noted that in accordance with the Law the following shall not be recognized as economic concentration:

- ! the purchase of shares (participation interests) of a market entity by financial institutions if this purchase is carried out for the purpose of furthering their stock-brokering, provided that the indicated institution does not participate in voting in the management bodies of the market entity; and
- ! the appointment of a rehabilitation or bankruptcy commissioner or provisional administrator (provisional administrator).

Procedure for consideration of applications on permission to economic concentration

On the whole, the Law has not amended the previous regulations concerning the procedure for the consideration of market entities' applications for permission to the performance of transactions recognized as economic concentration, with the exception of two circumstances.

Previously an application was submitted to the antimonopoly agency by an entity which was purchasing voting shares (participation interest), industrial assets or other property rights of market entities in Kazakhstan. Now, in accordance with the provisions of the Law, the participants of the transaction which intend to carry out economic concentration shall submit a collective application.

The Law also establishes a one-year effective period of permission (consent) of the antimonopoly agency for carrying out economic concentration.

State regulation of prices

The earlier effective antimonopoly legislation provided for the possibility of the introduction of state regulation of prices on goods (work, services) of market entities holding a dominant position in the relevant commodity market. Now, however, the Law excludes such possibility.

At the same time, as a separate form of state regulation and control, the possibility of introducing fixed price is stipulated. However, the fixed price is established in the case of abuse by market entities of a dominant position,⁶ provided there is a repeated violation within one year after the imposition of an administrative punishment.

New powers of the antimonopoly agency

In accordance with the Law, the antimonopoly agency is additionally entrusted with the power to conduct inquiries into the violation of antimonopoly legislation, and to consider cases of administrative violation regarding the anti-competition agreements of market entities, anti-competition actions of state bodies and the abuse of dominant (monopolistic) positions.

The results of the review performed by the antimonopoly agency shall be grounds for the inquiry.

Based on the results of the inquiry, the antimonopoly agency shall adopt a decision based on one of the following situations:

- ! the absence of grounds for the institution of administrative violation case;
- ! the institution of administrative violation case;
- ! forwarding the materials to the law-enforcement bodies for the institution of a criminal case; and
- ! the issue of prescription on the elimination of the Law violations.

The decision of the antimonopoly agency shall be brought to the notice of the applicant, state body, relevant market entity and other interested parties. A case of administrative violation shall be considered in accordance with the Code of Administrative Violations. □

⁶ The establishment of fixed price is allowed in the following cases:

- 1) in the establishment of monopolistic high (low) prices;
- 2) in the application of different prices to equivalent agreements;
- 3) in the execution of anticompetition agreements related to the establishment (maintenance) of agreed prices;
- 4) in the application of discriminating prices to equivalent contracts with other entities.