



IN THIS REVIEW:

Key regulatory acts. Antitrust agency

Prevention of monopolistic activities
and unfair competition

State control over "economic
concentration"

Liability

ANTITRUST REGULATION IN KAZAKHSTAN: BASICS ABOUT

Dear friends, colleagues and partners,

AEQUITAS has prepared the review entitled "Antitrust regulation in Kazakhstan" comprising information on the key regulatory legal acts, competence of authorized agencies and liability for violations.

When preparing the materials, we cared for the interests and needs of our clients and partners to comply with antitrust legislation in connection with their businesses in Kazakhstan. We do hope that the review containing the key regulations as of 1 July 2022 will be helpful in making sound decisions.

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The review cannot be regarded as legal advice or legal basis for specific decision-making.
Should you require legal assistance on antimonopoly regulation matters, we would be happy to help.

1. KEY REGULATORY ACTS. ANTITRUST AGENCY

1.1 LEGAL FRAMEWORK



IMPORTANT!

The principal regulatory act in the field of competition protection in the Republic of Kazakhstan (Kazakhstan) is the Kazakhstan Entrepreneurial [Code](#) No. 375-V of 29 October 2015, which came into effect from 1 January 2016 (Entrepreneurial Code, Code).

Adoption of the Entrepreneurial Code rendered 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:

Kazakhstan Codes	Number and date	Reference in Russian
■ Entrepreneurial Code	No. 375-V of 29 October 2015	Reference
■ Civil Code (General Part)	No. 268-XIII of 27 December 1994	Reference
■ Administrative Code	No. 235-V of 5 July 2014	Reference
■ Criminal Code	No. 226-V of 3 July 2014	Reference
Kazakhstan Laws		
■ "On Natural Monopolies" (as amended)	No. 204-VI of 27 December 2018	Reference
Edict of the Kazakhstan President		
■ "On Certain Issues of the Competition Protection and Development Agency of the Republic of Kazakhstan"	No. 428 of 5 October 2020	Reference
Decrees of the Kazakhstan Government		
■ "Issues of the Ministry of National Economy of the Republic of Kazakhstan"	No. 1011 of 24 September 2014	Reference
Acts of the Antitrust Agency		
■ "On Approval of the Methodology for Conducting Analysis of the Condition of Competition on the Commodity Markets"	No. 12 of 29 April 2022	Reference
■ "On Approval of the Methodology for Conducting Analysis of the Condition of Competition on the Commodity Markets"	No. 13 of 3 May 2022	Reference

Some issues of the internal activities of the authorized agency in the sphere of natural monopolies are governed by the **orders** of the Minister of National Economy, comprising as follows:

<ul style="list-style-type: none"> ■ "On Approval of the Regulations on the Committee for the Regulation of Natural Monopolies of the Ministry of National Economy of the Republic of Kazakhstan and Recognition of Certain Orders of the Minister of National Economy of the Republic of Kazakhstan as Null and Void" 	No. 190 of 29 July 2019	Reference
International regulation		
<ul style="list-style-type: none"> ■ 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 (as amended) <p>Ratified by the Kazakhstan Law</p>	12 November 2014, Moscow	Reference
	No. 295-V of 18 March 2015	
<ul style="list-style-type: none"> ■ Eurasian Economic Union Treaty, including annexes to the Treaty, namely Annex 19 "Protocol on Common Principles and Competition Rules" (as amended) <p>Ratified by the Kazakhstan Law</p>	29 May 2014, Astana	Reference
	No. 240-V of 14 October 2014	
<ul style="list-style-type: none"> ■ Agreement on the Coordinated Antitrust Policy Implementation (as amended) <p>Approved by the Kazakhstan Government Decree</p>	25 January 2000, Moscow	Reference
	No. 1922 of 28 December 2000	
<ul style="list-style-type: none"> ■ Agreement between the Kazakhstan Government and the Government of the People's Republic of China on Cooperation in the Field of Antitrust Policy and Combating Unfair Competition 	23 November 1999, Beijing	Reference
<ul style="list-style-type: none"> ■ Agreement between the Kazakhstan Government, Government of the Kyrgyz Republic and Government of the Republic of Uzbekistan on Deepening Integration in the Field of Antitrust Policy 	14 March 1997, Bishkek	Reference
<ul style="list-style-type: none"> ■ Agreement on Antitrust Policy Coordination 	12 March 1993, Moscow	Reference

Other international agreements and treaties governing the issues of cooperation in the field of competition.

1.2 ANTITRUST AGENCY: STRUCTURE AND POWERS



The Competition Protection and Development Agency of Kazakhstan (Agency) and its territorial subdivisions are the governmental agency, which is directly subordinated and accountable to the Kazakhstan President and carries out management in the sphere of competition protection and restriction of monopolistic activities, exercises control and

performs regulation of the activities referred to the sphere of the state monopoly, as well as the state control and licensing of activities in the sphere of commodity exchanges.

The Agency's scope of competence, in addition to consideration of applications for economic concentration and control over compliance with antitrust legislation, demonopolization of market entities restricting competition, and prevention, identification, investigation and curbing of antitrust 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 on the issues of competition protection and restriction of monopolistic activities;
- To develop measures intended to improve antitrust 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 Agency is headed by the Chairman who is appointed and released from the office by the Kazakhstan President.

Natural monopolies are regulated by the [Committee for the Regulation of Natural Monopolies](#), except for those regulated by sectoral regulators (Ministry of Energy, Committee for Communications, Informatization and Information of the Ministry of Industry and Infrastructural Development).

1.3 EXTRATERRITORIAL EFFECT



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

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

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2. PREVENTION OF MONOPOLISTIC ACTIVITIES AND UNFAIR COMPETITION

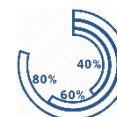
2.1 GENERAL OVERVIEW



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 antitrust legislation.

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

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 were previously referred to regulated markets and all dominants and/or monopolists engaging in entrepreneurial activities on such markets had to be included in the State Register. The State Register was abolished starting 1 January 2017.

However, abolishment of the State Register and related obligations of the market entities holding dominant or monopolistic positions on the regulated markets does mean the abolishment of the status of a monopolist or a dominant and other related obligations and liability imposed in case of violating such obligations.

■ Dominant position



Recognized as dominant is a position of a market entity whose share on the relevant commodity market is $\geq 50\%$ or $\geq 35\%$, provided that, in aggregate:

- 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;
- exerts such influence for a long time, and
- 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:

- aggregate share of three or less market entities holding the largest shares is \geq 50%;
- aggregate share of four or less market entities holding the largest shares is \geq 70% or more;
- for a long period, the amount of such entities' shares remains unchanged or changes insignificantly;
- 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
- 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 Agency (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.

■ **Monopolistic position**



Recognized as monopolistic is a position of natural monopoly, state 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) telecommunication services, universal postal services and 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 the following: electric power supply, centralized trading in electric power, gas, airport and railway services.

Prices are formed on the above markets according to the rules for price formation on the socially significant markets as approved by the Ministry of National Economy. Regulated markets include, but are not limited to, the following: processing of crude oil and natural and associated gas; sale of liquefied and commercial gas; retail sale of electric power; railway transportation services; civil aviation services; port handling activities; telecommunication services; and postal communication services.

The state monitors over the entities active on regulated markets and includes them in the State Register of Natural Monopoly Entities.

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:

- **Horizontal** – agreements between competitors on a market.



Cartel. A series of horizontal agreements is recognized as a cartel and is prohibited, if such agreements have lead or may lead to:

- establishment or maintaining of prices (tariffs), discounts, surcharges (extra charges) and/or markups;
- increasing, decreasing or maintaining prices in a tender or distortion of tender, auction or competitive bidding results, including through division into lots;
- 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;
- reduction or termination of goods manufacture;

- refusal of the parties to such agreements to enter into contracts with certain sellers or buyers (customers).
- **Vertical** – agreements between non-competing market entities, one of which acquires goods (work, service), and the other provides such goods (work, service).



Vertical agreements are prohibited, if such agreements:

- establish or may establish a goods resale price, except where the seller sets a maximum goods resale price for the buyer (customer);
- provide for the buyer's (customer's) obligation not to sell the goods of a market entity, which is the seller's competitor;
- provide for the seller's obligation not to sell the goods to a market entity, which is the buyer's (customer's) competitor.

Other anticompetitive agreements. Recognized as invalid, in full or in part, are any agreements, which 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 is $\geq 35\%$.

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 certain 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 Agency 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 30 calendar days.

2.4 UNFAIR COMPETITION



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

The Entrepreneurial Code contains key regulations defining the types of unfair competition. According to the previous version of the Code, strictly defined actions in competition aimed at attaining or provision of unlawful advantages were recognized as unfair competition.

However, starting from 7 March 2022, unfair competition means **any actions** of the market entities aimed at acquisition of advantages in business activities, which contradict the Kazakhstan legislation, normal business practice, criteria in the sphere of honesty, reasonableness and fairness, and which have caused or may cause damages to other competing market entities or have caused or may cause harm to their business reputation.

Accordingly, from now on, the Code contains the non-exhaustive list of actions recognized as unfair competition, which includes: 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 Agency 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 and/or 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 ORGANIZING AND CONDUCTING PROCUREMENT OF GOODS AND TENDERS



The Entrepreneurial Code bans coordination of activities of procurement suppliers and tender participants if such actions will or may lead to prevention, restriction or elimination of competition.

Organizers of goods procurement, except for procurement conducted in electronic form and subsoil user companies submitting information on conducted procurement to authorized governmental agencies, must submit annual procurement plan and information on conducted procurement to the antitrust agency.

2.7 NOTIFICATION OF ANTITRUST AGENCY



One of key directions of development of antitrust regulation in the age of globalization and harmonization of laws of the Eurasian Economic Union (EAEU) member states is the prevention and curbing of unfair competition.

Following this development direction, a new prevention instrument was added to the Entrepreneurial Code – notification of market entities that their actions contain the elements of unfair competition, abuse of a dominant position and so on.

IMPORTANT!

A notification issued according to the form established by the agency is sent not later than **10 business days** of the date the Antitrust Agency became aware of the presence of the said elements.

The Antitrust Agency initiates an investigation, unless the market entity terminates the actions specified in a notification within 30 business days.

If some extra time is required, the market entity may file a respective application to the antitrust agency within 3 business days period to expiration of the period given to fulfill the notification. Such application must list the measures to be taken to fulfill the notification and the objective reasons for extension of the period required to fulfill the notification.

The time given to fulfill the notification is no more than 30 calendar days.

In case the antitrust agency discovers the features of the same violation of the Kazakhstan legislation in the sphere of competition protection within one calendar year of the moment of issuing the notification, the antitrust agency will initiate an investigation without sending a relevant notification.

2.8 ANTITRUST INVESTIGATIONS



Grounds for investigation. The ground for initiating an antitrust investigation is information on a violation received by the Agency, 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 antitrust agency in the course of its activities; 4) mass media reports; or 5) market entity's failure to fulfill the antitrust agency's notification on presence of the features of a violation of the Kazakhstan legislation in the competition protection sphere within the established term.

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 Agency'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 files an application to the Agency within a period of at least 20 calendar days prior to completion of the investigation, the draft opinion based on the results of the antitrust violations investigation is submitted to the Conciliation Commission. The Conciliation Commission comprises the Agency 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 Agency adopts one of the following options of decision in respect of the entity under investigation: 1) to initiate an administrative case; 2) to issue an ordinance to eliminate the violation; 3) to transfer the materials to law enforcement authorities to initiate 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 Agency'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; necessity to cancel transactions by way of termination or invalidation when regulating economic concentration. The Agency 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 Agency may be appealed by the market entity with the Agency or in court within 3 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 Agency, or by specialized administrative courts. The competence of the Agency encompasses review of violations associated with economic concentration, unfair competition, failure to perform the Agency'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 Agency 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.

2.9 ANTITRUST COMPLIANCE

In 2018, antitrust compliance, which is a new instrument allowing to prevent from violations in the competition protection sphere, was introduced into the Code. For certain market entities, antitrust compliance is still a "new" and "unknown" concept.

In light of the fact that almost any market entity may become an entity under investigation for violations in the competition protection sphere, development and implementation of the relevant antitrust compliance is one of high-priority objectives, because such instrument will allow adjusting the activities and production processes of a market entity with a view to mandatory compliance with requirements or prohibitions established by the antitrust legislation, and will also help when making certain business decisions.

To implement antitrust compliance, market entities may issue external and internal antitrust compliance acts. An **external act** provides for the policies and fair competition rules of a market entity on a relevant commodity market, i.e. the way a company interacts with its customers or counterparties. An **internal act** is the methods, approaches allowing to assess the risks, procedure for organizing the company's work in the sphere of risk management with respect to violations of the Kazakhstan legislation in the competition protection sphere.

Since the compliance institute has not been so widely spread among the market entities, except for the market entities in the financial sphere, the Agency developed and approved

the model external antitrust compliance acts and approved the methodological recommendations on development of internal antitrust compliance acts.

It is worth mentioning that the Kazakhstan legislation in the competition protection sphere provides for the market entities' right to send a draft of an external antitrust compliance act to the Agency for approval. The external antitrust compliance act approved by the Agency is the act of clarifications of the Kazakhstan legislation in the competition protection sphere with respect to a specific market entity or as applied to a specific situation which will, in turn, allow reducing liability under certain circumstances in case of detecting the antitrust legislation violations.

Presence of an effective internal antitrust compliance act is also taken into consideration when reviewing the cases involving violations of the Kazakhstan antitrust legislation, which also contributes to reduction of liability under certain circumstances for violations in the competition protection sphere of Kazakhstan.

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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 Agency's consent (paragraphs 1)–3) below) or notification to the Agency (paragraphs 4) and 5) below):

- 1) Re-organization of a market entity by way of merger or consolidation (accession);
- 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 > 50% of shares, if prior to such purchase such person disposed of no shares or of $\leq 50\%$ of 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.

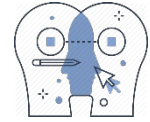
3.2 CONSENT / NOTIFICATION CRITERIA



It is required to apply for the Agency'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); or where one of the persons participating in the transaction is a market entity occupying a dominant or monopolistic position on the Kazakhstan

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 > 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 > 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 > 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 > 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 Agency or notify the Agency 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 in 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, Kazakhstan laws, edicts of the Kazakhstan President and/or decrees of the Kazakhstan Government.

3.5 CONSENT OBTAINMENT PROCEDURE / NOTIFICATION PROCEDURE COMPLIANCE. GENERAL OVERVIEW



Obtaining the Agency'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 founder(s). 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 Agency's right to request additional documents, in practice, the Agency 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.

IMPORTANT!

The general period for application consideration by the Agency 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 antitrust agency, accordingly notifying the applicant.

Following the consideration, the Agency 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 Agency 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 Agency revokes the consent, the Agency 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 Agency notification fall under simplified procedure. The acquirer, or the person resolving to perform the relevant action, must notify the Agency of such transactions within 45 days of the transaction consummation date. The notification must attach the same scope of information and documents as in case of transactions requiring the Agency's prior consent.

The Agency 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 Agency within 30 days of the date of notification. In case the Agency resolves to cancel the transaction, such resolution is to be performed within 30 days of receiving the Agency's relevant ordinance. Should market entities disagree with the Agency's resolution to cancel the transaction, the Agency may claim resolution enforcement in court.

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4. LIABILITY

4.1 CIVIL LIABILITY



The Agency 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 Agency may also claim in court enforced division of a market entity or spin-off of 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 Agency 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 Agency, as well as failure to perform the requirements and obligations conditioning the consent to economic concentration, entail: 1) a risk of transaction invalidation upon Agency'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.

Actions of certain authorized agencies are sometimes dependent on the Agency'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 Agency's consent to economic concentration; otherwise such actions may be invalidated upon the Agency's claim.

4.3 ADMINISTRATIVE LIABILITY



The Kazakhstan 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).

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 5 years for legal entities.

Issues of administrative enforcement. The Code has an extraterritorial effect and applies to relations arising outside Kazakhstan, while the Kazakhstan 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 Kazakhstan. 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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AEQUITAS Antitrust Practice is one of the firm's most active practice areas. A large scope of services involving Kazakhstan antitrust legislation matters relates to advising on, and legal support of, M&A transactions, including those effected in the course of IPOs of companies. 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 due to the creation of the EAEU, integration of antitrust legislation and certain areas of activities of EAEU member states' agencies. AEQUITAS regularly advises its clients on various issues of application of the national and supra-national antitrust legislation.

Partner **Nurlan Sholanov** heading AEQUITAS antitrust practice is a member of the Eurasian Competition Association, union of professional lawyers and economists specializing in the sphere of antitrust legislation.

On our side, we will always be ready to help in looking for and applying the best legal solutions.

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